# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Alagiah v Crouch as administrator of the estate of Ratnam Alagiah (deceased)* [2015] QSC 281 |
| PARTIES: | **SHANTHA DEVI ALAGIAH**<br>(applicant)<br>**v**<br>**TIMOTHY MICHAEL HENRY CROUCH as administrator of the estate of Ratnam Alagiah (Deceased)**<br>(respondent) |
| FILE NO/S: | SC No 3095 of 2015 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 October 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 October 2015 |
| JUDGE: | Ann Lyons J |
| ORDER: | **Application is refused.** |
| CATCHWORDS: | SUCCESSION – FAMILY PROVISION – ELIGIBLE APPLICANTS – DIVORCED SPOUSE – where the applicant and the deceased were married for 22 years until their divorce on 25 May 2012 – where the deceased died on 21 January 2013 – where the applicant had not remarried or entered into a registered relationship prior to the deceased's death – where the applicant was not receiving maintenance from the deceased – whether the applicant was a dependent former spouse of the deceased – whether the applicant was entitled to receive maintenance from the deceased<br><br>SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – PARTICULAR CASES – where the applicant and the deceased commenced negotiations throughout 2012 with respect to a property settlement – where the deceased died before property proceedings were filed or negotiations of a property settlement were concluded – where the applicant applies for an order pursuant to s 41(8) of the *Succession Act* 1981 (Qld) extending the time to make a claim for family provision from the deceased's estate — whether the applicant |

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| | is entitled to bring an application pursuant to s 41(8) of the *Succession Act* 1981 (Qld) |
| | *Family Law Act* 1975 (Cth), s 72, s 75, s 79<br>*Succession Act* 1981 (Qld), s 5AA, s 41 |
| | *Dobell v Van Damme* [1982] VR 425, followed<br>*Enoch v Public Trustee of Queensland* [2006] 1 Qd R 144; [2005] QSC 194, followed<br>*In the Marriage of Sims* (1981) 55 FLR 67, considered<br>*Krause v Sinclair* [1983] 1 VR 73, followed<br>*Re Lack* [1981] Qd R 112, followed<br>*Re Prakash* [1981] Qd R 189, followed<br>*Sarich v Erceg* [1984] WAR 11, followed |
| COUNSEL: | S M Gerber for the applicant<br>R Whiteford for the respondent |
| SOLICITORS: | Speakman Lawyers for the applicant<br>Crouch & Co Solicitors for the respondent |

**Background**

[1] Shantha Alagiah (the applicant) is currently 54 years of age. She was married to Dr Ratnam Alagiah, a university professor, for 22 years until their divorce on 25 May 2012. At the time of the divorce and throughout 2012, various attempts were made by the applicant's solicitors to reach a concluded agreement with Dr Alagiah in relation to a property settlement.

[2] Dr Alagiah died on 21 January 2013 at the age of 57 whilst on holiday in Canada. His death occurred before the negotiations were concluded or property proceedings were filed. He was a resident of South Australia at the time of his death. The applicant now applies under s 41(8) of the *Succession Act* 1981 (Qld) for an order extending the time to make a claim for family provision from the deceased's estate.

**The separation, divorce and property negotiations**

[3] The applicant and the deceased married on 16 February 1990 and separated on 29 May 2006.

[4] The affidavit of the applicant's solicitor, Asha Gowreah, sworn 29 September 2015 states that on 1 February 2012, the applicant, who was a resident in India, had sought advice via email from a family law specialist. On 23 February 2012, the applicant's solicitors forwarded an Application for Divorce to Dr Alagiah and advised that the application will be heard in the Family Court of Australia on 24 April 2012.

[5] On 7 March 2012, the applicant's solicitors wrote to Dr Alagiah listing the matrimonial assets, including superannuation assets and properties in New South Wales and Queensland, and advised that they had been instructed by the applicant to "commence negotiations with respect to property settlement."

[6] The marriage was then dissolved by a decree of the Family Court of Australia which became absolute on 25 May 2012.

[7] Correspondence ensued between the solicitors for the applicant and Dr Alagiah in relation to the asset pool. In letters dated 4 May 2012 and 18 May 2012, the solicitors for the applicant requested cash advances from Dr Alagiah on behalf of the applicant and indicated that her financial situation was dire. The letter of 18 May 2012 also stated the following:

> "We wish to make it quite clear to you that our client is trying to resolve this matter in an amicable but fair way. However, if there is no positive response forthcoming from you, our client will have no option but to commence proceedings in the Family Court and this may be detrimental to your interests. It would certainly be detrimental to your interests. It would certainly be detrimental to both you and your client as far as costs are concerned."

[8] Negotiations then ensued between the solicitors for the applicant and Dr Alagiah in relation to the asset pool. It was clear that Dr Alagiah owned real property in Malaysia, South Australia, Queensland and New South Wales as well as superannuation entitlements. There were, however, significant mortgages over the properties.

[9] On 5 October 2012, the applicant's solicitors wrote to Dr Alagiah's solicitors indicating that they disagreed with an "asset by asset approach" and that they proposed to "comprise a property pool." The letter further stated:

> "Once we are in a position where the property pool is agreed between the parties, we propose that each party advise of what adjustment they believe to be just, fair and equitable pursuant to s75(2) of the Family Law Act. Following this, offers would be made by each side and the final settlement would be negotiated."

[10] Negotiations were then delayed in October/November 2012 due to a cyclone in Chennai where the applicant resided. On 7 December 2012, however, the applicant's solicitors sent a detailed letter setting out a net asset pool of at least $651,637 and confirmed that once the asset pool was finalised, offers would be made by both sides and a final settlement would be negotiated.

[11] The solicitors for Dr Alagiah (the deceased) advised the applicant's solicitors in February 2013 of their client's death and advised that they did not hold his last Will and Testament and were not aware if such a document existed.

**Current position of the applicant**

[12] The applicant and the deceased had no children. At the time of his death, the applicant was residing with her elderly mother in India, having returned to India to care for her after the separation in 2006. She resided with her until her mother's death on 12 April 2014. The applicant has not remarried. It is also clear that, whilst she was in dire financial need throughout 2012, she was not in fact being supported by the deceased prior to his death. In the applicant's affidavit sworn 21 September 2015, she stated that after the separation, her mother was her sole source of support.

[13] It would seem that whilst there are total assets of $837,828, there are known liabilities of $154,063. The respondent states that, after the estimated contingent liabilities are deducted, the net Australian assets, which could be subject to a family provision order, would be between $336,968 and $683,765 depending on amounts owing on mortgages over those properties. There are also assets of uncertain value in Malaysia.

[14] Accordingly, it is clear that, whilst the applicant and the deceased entered into negotiations in an attempt to finalise their outstanding property law matters by way of a family law property settlement, no agreement had been reached and no proceedings had in fact been commenced at the time of the deceased's death.

[15] The *Family Law Act* 1975 (Cth) does not contemplate the institution of property proceedings after the death of one or more of the parties. The Full Court of the Family Court held *In the Marriage of Sims*[1] that the *Family Law Act* 1975 (Cth) refers to proceedings between two living persons who are either parties to an existing marriage or who were parties to a marriage which has been dissolved. Whilst the 1983 amendments to the *Family Law Act* 1975 (Cth) now provide that pursuant to s 79(8) proceedings which have been instituted can continue against a deceased party, it is clear that in this case property proceedings cannot now be pursued in the Family Court because they were not commenced prior to the death of the deceased.

**This application**

[16] It would seem clear therefore that in the circumstances the applicant has limited options available to her which would allow her to obtain orders for a share of the matrimonial assets in circumstances where property proceedings were not instituted prior to Dr Alagiah's death. There is no doubt, however, that the deceased agreed that there should be a property settlement and he was in fact in the process of negotiating such a settlement through his solicitors.

[17] Pursuant to an application brought by the applicant, Letters of Administration on Intestacy were granted to the respondent on 11 July 2014.

[18] The time limit for instituting a family provision claim against the estate expired on 21 October 2013.

[19] The originating application in this proceeding was filed by the applicant on 26 March 2015.

[20] An extension of time for the filing of the application may, however, be granted pursuant to s 41(8) of the *Succession Act* 1981 (Qld).

**Should an extension of time be granted?**

[21] Section 41(8) of the *Succession Act* 1981 (Qld) provides:

> "(8) Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and

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1 (1981) 55 FLR 67.

> determine an application under this part although a grant has not been made."

[22] In *Enoch v Public Trustee of Queensland*,[2] Margaret Wilson J considered the discretion to grant an extension of time as follows:

> "The court has an unfettered discretion whether to extend the time for making such an application…the onus lies on the applicant to establish sufficient grounds for taking the case outside what is not merely a procedural time limit but a substantive one imposed by the Act. Four factors which can be relevant to the exercise of the discretion are –
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> (a) whether there is an adequate explanation for the delay;
> (b) whether there would be any prejudice to the beneficiaries;
> (c) whether there has been any unconscionable conduct by the applicant; and
> (d) the strength of the applicant's case."

[23] I now turn to the first consideration as to whether there has been an adequate explanation for the delay.

**Is there an adequate explanation for the delay?**

[24] Having considered the affidavits filed in this application, particularly the affidavit of the applicant sworn 21 September 2015, I am satisfied that the delay has been explained. It is clear that following the separation, the applicant resided in India and cared for her ill and elderly mother. When her mother died on 12 April 2014, she lost her only source of support and place of permanent accommodation in India. She is currently 54 years of age, does not have a permanent address and is required to move around frequently staying with friends. She is unemployed and her expenses exceed her income. She is unable to afford to return from India to Australia. I accept that it would appear that she is suffering from extreme financial hardship. It is also clear from the affidavit material that the applicant does not have reliable or timely access to telephone and internet services and, at times, electricity. Those circumstances make timely contact with her solicitors difficult.

[25] In her affidavit, the applicant also deposes as to her efforts to finalise the outstanding property settlement of the deceased's estate. The affidavit indicates that, shortly after the deceased's death, the applicant was advised through conversations with the Office of the National Spiritual Assembly of the Bahá'í Faith of Australia that the deceased had left a will in their custody. In May 2013, the applicant was advised by representatives of the Bahá'í Faith that a solicitor, Mr Ross Richards, was assisting the community in relation to the deceased's estate. In July 2013, the applicant was advised by the secretary of a Local Spiritual Assembly that the Local Spiritual Assembly had been appointed as executors of the estate.

[26] The applicant's affidavit sets out in detail the attempts made by the applicant's solicitors to contact the solicitor for the Local Spiritual Assembly and I accept numerous letters were written and a number of telephone inquiries were made by the applicant's solicitor from 12 June 2013. It is also clear that despite numerous requests made to Mr Richards to produce the alleged will, it was not produced until 25 June 2014, some 12 months after

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[2] [2006] 1 Qd R 144, 145.

the initial request had been made. Despite the applicant being advised by Mr Richards that he would attend to the administration of the estate, it is clear that between January 2013 and March 2014 no steps were taken by the Local Spiritual Assembly of the Bahá'í Faith or Mr Richards to administer the deceased's estate or appoint an administrator.

[27] A copy of the alleged will dated 19 August 2012 is exhibited to the affidavit of the respondent filed by leave on 1 October 2015. The deceased's signature has not been witnessed. In the document, the deceased requests the Local Spiritual Assembly of the Bahá'í Faith of Charles Sturt to be his executor and to divide his estate according to the tenets of the Bahá'í Faith. The respondent swears that, as at the date of the hearing of the application, no application has been made in Queensland or South Australia for that document to be admitted to probate.

[28] I am satisfied that the inaction by the Local Spiritual Assembly of the Bahá'í Faith and their advisers necessitated the applicant to make an application to this Court for the appointment of Timothy Michael Henry Crouch as administrator. That application was filed on 14 March 2014. On 13 June 2014, McMurdo J appointed the respondent as administrator and subsequently issued Letters of Administration on Intestacy on 11 July 2014.

[29] Since the appointment, the administrator has been attending to the realisation of the assets and liabilities of the estate. The evidence indicates that this has been a significant undertaking, as the deceased did not keep accurate or complete records of his financial affairs and those affairs are complex and confusing. I consider the inaction of the Local Spiritual Assembly and Mr Richards for almost 18 months following Dr Alagiah's death contributed significantly to the delay in the administration of the estate.

[30] The respondent argues, however, that the current application for an extension of time within which to bring an application for family provision pursuant to s 41(8) of the *Succession Act* 1981 (Qld) is futile, as the applicant is not a person who is entitled to bring such an application under the Act. The affidavit of the respondent states that it is believed that the deceased is survived by a brother, three sisters and eight nieces and nephews who reside in Malaysia, Mozambique or Australia.

[31] Section 41(1) of the *Succession Act* 1981 (Qld) is in the following terms:

> **"41 Estate of deceased person liable for maintenance**
>
> (1) If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate **provision is not made from the estate for the proper maintenance and support of the deceased person's spouse**, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant" (emphasis added).

**Is the application futile?**

[32] Counsel for the applicant argues that she has a strong claim for family provision pursuant to the *Succession Act* 1981 (Qld) and that family provision applications are designed to provide proper maintenance and support of the deceased person's spouse, child or

dependant where adequate provision has not been made for them and where the Court is satisfied that there is a continuing need for maintenance and support.

[33] Counsel for the applicant also argues that there is no prejudice to the various beneficiaries of the estate, as the estate has not been collected or administered and the applicant has not acted unconscionably. Counsel submits that the applicant has been attempting to resolve her claim, firstly, with her former husband by way of a family law property settlement and, secondly, since the time of her former husband's death by pursuing her present claim for provision from the estate. Counsel for the applicant further submits that, although the applicant and the deceased were divorced, she is still a spouse pursuant to s 5AA(2)(c)(ii) of the *Succession Act* 1981 (Qld) for the purposes of an application for provision under s 41.

[34] Section 5AA of the *Succession Act* 1981 (Qld) is in the following terms:

> "**5AA Who is a person's *spouse***
>
> (1) Generally, a person's ***spouse*** is the person's—
> (a) husband or wife; or
> (b) de facto partner, as defined in the *Acts Interpretation Act 1954* (the ***AIA***), section 32DA; or
> (c) registered partner, as defined in the AIA, schedule 1.
> (2) However, a person is a ***spouse*** of a deceased person only if, on the deceased's death—
> (a) the person was the deceased's husband or wife; or
> (b) the following applied to the person—
> (i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;
> (ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or
> (ba) the person was the deceased's registered partner; or
> (c) for part 4, the person was—
> (i) a person mentioned in paragraph (a), (b) or (ba); or
> (ii) the deceased's dependant former husband or wife or registered partner.
> (3) Subsection (2) applies—
> (a) despite the AIA, section 32DA(6) and schedule 1, definition *spouse*; and
> (b) whether the deceased died testate or intestate.
> (4) In this section—
> ***dependent former husband or wife or registered partner***, of a deceased person, means—
> (a) a person who—
> (i) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and
> (ii) had not remarried or entered into a registered relationship with another person before the deceased's death; and

(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased; or

(b) a person who—

(i) was in a registered relationship with the deceased that was terminated under the *Relationships Act 2011*, section 19; and

(ii) had not married or entered into another registered relationship before the deceased's death; and

(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased."

[35] It is clear that s 5AA(2)(c)(ii) provides that the definition of "spouse" in relation to family provision claims includes a deceased's dependent former husband or wife. A dependent former husband or wife is defined in s 5AA(4) of the *Succession Act* 1981 (Qld) and includes a former spouse that "was on the deceased's death receiving, or entitled to receive, maintenance from the deceased."

[36] Counsel for the applicant argues that different definitions should not be given to the term "maintenance" in different sections of the same Act and that if the Act intended to refer to "maintenance", as used in the *Family Law Act* 1975 (Cth), then it would have been easy to do so. Counsel argues that s 5AA(4)(a)(iii) of the *Succession Act* 1981 (Qld) should be interpreted as being an entitlement to maintenance pursuant to s 41 of the *Succession Act* 1981 (Qld) and the applicant is a person entitled to maintenance pursuant to s 41 because no provision was made for her. Counsel also argues that in any event the applicant was a person entitled to maintenance under s 72 of the *Family Law Act* 1975 (Cth).

[37] In this regard, s 72(1) of the *Family Law Act* 1975 (Cth) states:

"**72 Right of spouse to maintenance**

(1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason;

having regard to any relevant matter referred to in subsection 75(2)."

[38] Section 75(2) of the *Family Law Act* 1975 (Cth) renders a party to a marriage automatically liable to maintain the other party who is unable to support herself or himself. In this regard, Counsel argues that the correspondence from the applicant's solicitor to the deceased and his solicitors in the following terms indicates why the applicant was a person "entitled to receive maintenance":

(a) In the letter dated 7 March 2012 from Christine Vashon to the respondent, it was indicated that the applicant was "in dire financial straits" and an interim payment was sought from the respondent;

(b) In the letter dated 4 May 2012 from Christine Vashon to the respondent, it was indicated that the applicant's financial position was worsening considerably and another advance was requested by the applicant; and

(c) In the letter dated 18 May 2012 from Christine Vashon to the respondent, the applicant again requested financial assistance.

[39] There is no doubt that the applicant had a right to bring an application for maintenance in the Family Court prior to Dr Alagiah's death, however, no such application was brought. It is unfortunate and, on the face of it, unfair that the applicant has had no adequate property settlement despite making efforts to negotiate such a settlement throughout 2012. Is the interpretation of s 5AA(4) of the *Succession Act* 1981 (Qld) as argued by Counsel for the applicant correct? Section 41(1) of the *Succession Act* 1981 (Qld) clearly provides that if adequate provision is not made from the estate of the deceased for the "proper maintenance and support of the deceased person's spouse, child or dependant" then the Court may order such provision as the Court thinks fit.

[40] The determination of the issue, however, clearly turns on the definition of the word "spouse" in the *Succession Act* 1981 (Qld). Is the applicant a "spouse" as defined in s 5AA of the *Succession Act* 1981 (Qld)? According to s 5AA(2)(c)(ii), a "spouse" includes not only a husband or wife or de-facto partner or registered partner but also a "dependent former husband or wife", which is then defined in s 5AA(4) as a person who was divorced from the deceased, had not remarried or entered into a registered relationship before the deceased's death and "was on the deceased's death **receiving, or entitled to receive, maintenance from the deceased**" (emphasis added).

[41] It is clear that the applicant was not the deceased's wife at the time of his death, given the decree nisi which became absolute on 25 May 2012 some eight months before his death. Whilst it is clear that the applicant had not remarried or entered into another registered relationship before the deceased's death and she was clearly not receiving maintenance from him, was she a dependent former spouse as defined in s 5AA(4) because she was "entitled" to receive maintenance from the deceased?

[42] The meaning of the word "entitled" has been considered in a number of decisions including the earlier decisions of this Court in *Re Lack*[3] and *Re Prakash*.[4] In *Re Lack,* Dunn J held that the "entitlement" referred to by the *Succession Act* 1981 (Qld) was an enforceable entitlement either by contract or court order as follows:

> "The second applicant is a woman who was divorced by her husband and she had not remarried before the time of his death. She never sought nor received any maintenance from him. The question is whether she was, at the time of his death, within the meaning of the Act, entitled to

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3 [1981] Qd R 112.
4 [1981] Qd R 189.

receive maintenance from him. Counsel were unable to refer me to any decided case which provided a clear answer to the question.

Counsel for the second applicant referred me to s. 4(2) of the *Family Law Act* 1975, which provides that a reference in the Act 'to a party to a marriage includes a reference to a person who was a party to a marriage that has been dissolved...' He placed particular reliance upon s. 72, which relevantly provides as follows:

> 'A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately...by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75(2).'

Section 74 of the *Act* gives the Family Court a wide discretion to make maintenance orders. Section 75(2) lists matters to be taken into account when the Family Court exercises jurisdiction under s. 74.

The policy of the *Family Law Act* is that an application for such forms of relief as maintenance should be promptly made; s. 44(3) provides that such proceedings 'shall not be instituted after the expiration of 12 months after the date of making of the decree…except by leave of the court in which the proceedings are to be instituted.' I was referred to decided cases which show that such leave has on occasions been granted. It was submitted, and I agree with the submission, that the remarriage of the testator did not extinguish the right of the second applicant to take proceedings for a maintenance order.

The circumstances of the second applicant on the date of death of the testator were that she was 62 years of age, and not in employment, being in receipt of a pension from the authorities in New Zealand. The retiring age in that country is ordinarily 60. She lived with her daughter and son-in-law in a house in which she had a one-third share as tenant in common. She owned a one-third share of the contents of the house, and had money in two bank accounts (her savings were by no means large). In all the circumstances, it is not inconceivable that had she sought leave to apply for a maintenance order pursuant to the provisions of the *Family Law Act* the leave would have been forthcoming, and it may be that she would have obtained an order.

The effect of the submissions on her behalf was that the deceased was, on the date of his death, liable to maintain her, his liability being imposed by statute. Therefore, it was submitted, she was 'entitled to receive maintenance' within the meaning of s. 89 of the *Succession Act*. However, the liability of which s. 72 of the *Family Law Act* speaks is a conditional liability, the Family Court being entrusted with the responsibility of seeing whether relevant conditions are satisfied, in which case it may make an order. The 'entitlement' contemplated by s. 89 of the *Succession Act* is I think an enforceable entitlement, an

> entitlement derived either from a contract or a Court order. I therefore hold the opinion that I have no jurisdiction to give relief to the second applicant."[5]

[43] The same conclusion was reached by Master Lee QC (as his Honour then was) in *Re Prakash*[6] and subsequently in the Victorian decisions of *Dobell v Van Damme*[7]and *Krause v Sinclair*[8] and the Western Australian decision of *Sarich v Erceg.*[9] In *Dobell v Van Damme*, McGarvie J held that in order for the former wife to have been entitled to receive payments under similar legislation, she must have had, at the date of the deceased's death, "an actually crystallized right" to payments of maintenance, such as a right under an existing order or agreement.[10]

[44] In the circumstances, it is clear that whatever moral claims or other claims the applicant has against her former husband, she is not a dependent former spouse as defined in s 5AA(4) of the *Succession Act* 1981 (Qld) and she is not entitled to bring an application pursuant to s 41(8) of the *Succession Act* 1981 (Qld).

[45] I therefore consider that the application must be refused.

[46] I will hear from Counsel in relation to orders as to costs.

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5 *Re Lack* [1981] Qd R 112, 112-114.
6 [1981] Qd R 189.
7 [1982] VR 425.
8 [1983] 1 VR 73.
9 [1984] WAR 11.
10 [1982] VR 425.