SUPREME COURT OF QUEENSLAND

CITATION:	*Kay & Anor v Kreis* [2018] QCA 128
PARTIES:	**YVONNE MARIE KAY** (first appellant) **ALBERT DEVIVO** (second appellant) **v** **GINA MARY KREIS (as executor of the Will of MARIO ALFRED DEVIVO)** (respondent)
FILE NO/S:	Appeal No 8171 of 2017 SC No 11988 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 151
DELIVERED ON:	19 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2018
JUDGES:	Fraser and Gotterson JJA and Boddice J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – GENERAL PRINCIPLES – PARTICULAR GROUNDS FOR EXTENSION OF TIME – where the appellants sought an extension of time within which to make an application for family provision – where s 41(8) of the *Succession Act* 1981 (Qld) provides that any application for family provision must be commenced within nine months of a testator's death, unless the Court exercises its discretion to extend time – where the appellants were refused an extension of time at first instance – where the appellants failed to bring the claim within that time –where the appellants had been provided legal advice of the limitation period applicable to the family provision claim – where the appellants made an application for extension of time almost 10 years after they became aware of their right for family provision – where some assets of the estate were located in Italy and others were located in Australia – where the appellants filed caveats to oppose the grant of probate – where the appellants received legal advice that such caveats were not a proper mechanism to seek family provision – where the primary judge refused to

grant an extension of time – whether the primary judge erred in the exercise of that discretion – where the primary judge considered factors of prejudice, unconscionable conduct, delay, and justice – where the weight to be given to those factors was a matter for the primary judge – where the primary judge determined delay was the primary issue – where no error was established by the appellants

Succession Act 1981 (Qld), s 41(8)

Hills v Chalk [2009] 1 Qd R 409; [2008] QCA 159, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Spencer v Burton [2016] 2 Qd R 215; [2015] QCA 104, cited

COUNSEL: No appearance for the first appellant
The second appellant appeared on his own behalf
J A Sheean for the respondent

SOLICITORS: No appearance for the first appellant
The second appellant appeared on his own behalf
Blake Topping Solicitors for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J:** On 17 November 2016, the appellants filed an application for Family Provision in respect of the estate of Mario Alfred Devivo ("the deceased"), who died on 4 December 2006.

[4] On 16 January 2017, the question of whether the applicants should be granted an extension of time was listed for hearing on 27 April 2017.

[5] On 14 July 2017, the application for an extension of time within which to commence a Family Provision Application was dismissed, with costs.

[6] The appellants appeal against that decision. At issue is whether the primary judge's discretion miscarried by reason of errors of fact and law.

Background

[7] The appellants are the children of the deceased. The respondent is their half-sister.

[8] By his Will, made on 9 April 2001, the deceased appointed the respondent as his executor and made her sole beneficiary of his estate. An addendum to the Will explained that decision on the basis of the respondent's needs, the conduct of the appellants' mother, the appellants' distant treatment of the respondent and previous assistance the deceased had given the appellants through employment in a family business.

[9] On 25 July 2001, the deceased suffered a severe stroke. He was left with significant disabilities. As a consequence, he was admitted to an aged care facility. On 11 May 2005, the then Guardianship and Administration Tribunal appointed the male

appellant administrator of the deceased's financial affairs. Prior to that appointment, the male appellant had held an appointment as the deceased's attorney, pursuant to an Enduring Power of Attorney, dated 18 November 1994.

[10] On 10 July 2004, the male appellant sold the deceased's house at Bardon. The proceeds of that sale were invested in a high interest account. On 2 December 2006, shortly before the death of the deceased, the male appellant transferred those funds to an Italian bank account. The reason given for that transfer was in order to secure an aged care facility placement in Italy for the deceased.

[11] At the date of the deceased's death, the deceased held monies in an Australian bank account, a solicitor's trust account and the funds in the Italian bank account. The deceased also owned a half share in an apartment in Italy and two motor vehicles.

Proceedings

[12] In February 2007, the respondent filed an application for a grant of Probate of the Deceased's Last Will. The male appellant filed a caveat opposing that grant. On 26 February 2007, the male appellant filed a notice in support of the caveat. It identified the claimed interest in the estate under "the Family Provision Act", by virtue of his position as son of the testator. The notice indicated the male appellant required the Will to be proven in solemn form, on the ground he was one of the testator's next of kin.

[13] In response to that notice, the respondent's then solicitors advised the male appellant that if he wished to make an application for family provision he would need to commence separate proceedings under the *Succession Act* 1981 (Qld). They suggested the caveat be withdrawn to allow probate of the Will to be obtained, undertaking in that event not to distribute the estate until resolution of the claim for family provision. That letter notified the male appellant expressly of the necessity for any such application to be filed within nine months of the date of the testator's death.

[14] By this stage, the appellants had obtained legal advice to the effect that they would have difficulties in challenging testamentary capacity, but they could file family provision claims. They were given an estimate of legal costs of $81,000, if the matter went to trial and were warned of the risks of an adverse costs order. The male appellant had also spoken to an officer at the Italian Consulate who informed him that "foreign assets in the estate might not be transferable to Australia". There was an estimate of additional legal costs if they sought advice on that issue. The appellants were advised by the solicitors of the need to give notice within six months of death of an intention to commence a family provision application and of the nine months limitation period within which to commence such an application.

[15] The appellants did not retain the services of those solicitors and did not commence any application. The male appellant consulted another firm of solicitors in July 2007, and received a similar estimate in relation to legal fees. Those solicitors advised the respondent's solicitors of the male appellant's intention to make a family provision application. They asked whether it may be possible to negotiate a settlement, but advised that in the event of no resolution, the male appellant intended to apply to remove the respondent as executor of the estate on the grounds of alleged fraud. That allegation related to an assertion the respondent had undertaken unauthorised transactions of the deceased's bank account whilst administering his affairs following the stroke.

[16] On 3 April 2007, the female appellant wrote to the respondent's solicitors advising of her intention to challenge the Will. On 16 August 2007, the female appellant lodged a caveat, supported by a notice expressed in very similar terms to the male appellant's notice, asserting an interest under the "*Family Provision Act*". In response, the respondent's solicitors wrote to the female appellant advising of the need to make a separate application for provision under the *Succession Act*.

[17] In February 2008, the male appellant filed another caveat. Thereafter no further action was taken in relation to probate or any family provision application by either appellant. There was, however, continuing correspondence between the parties in relation to the location of assets and the entitlement of the respondent to retain funds she allegedly had removed from the testator's bank account.

[18] Subsequently, the respondent's solicitors advised the respondent had no funds to take court action and was not prepared to prepare tax returns for the estate without the provision of information from the male appellant. The male appellant received requests from the respondent that the caveats be removed. The respondent did not proceed to remove the caveats. As they remained in place, no further steps were taken to obtain probate or to realise the estate.

[19] Matters remained in abeyance until August 2016 when the male appellant and the respondent both received advice from an Italian official to the effect that the testator's estate consisted of the apartment in Italy and that it was necessary for his heirs to advise, within 10 years of the testator's death, whether they wished to accept the inheritance. The respondent retained an Italian lawyer to act on her behalf to prevent forfeiture of the Italian assets. The male appellant also retained an Italian lawyer who advised the Italian official there was a contest in relation to the testator's Will. An Italian court ordered the administrator to suspend any further proceedings in relation to the estate, pending resolution of the Australian proceeding.

[20] Subsequent to those events, the male appellant received legal advice to the effect that the caveat was not a proper mechanism to seek family provision. He was advised to file an originating application for family provision. In accordance with that advice, the appellants filed the application for an extension of time.

Primary decision

[21] At the hearing of the application, the respondent conceded, for the purposes of the application, that the appellants had an arguable case for family provision. The application was accordingly determined on the basis of whether, having regard to any prejudice, unconscionable conduct or delay, justice required the granting of the extension of time.

[22] In respect of prejudice, the primary judge accepted no prejudice arose by reason of distribution of the estate's assets because nothing had been done in the administration of the estate until very recently. There was however, general prejudice which arose from the lapse of time, with difficulties of fading recollection and loss of records. That prejudice was considered to be relevant, but not a decisive consideration in determining what justice required in the case. Similarly, the primary judge concluded the issue of unconscionability was not decisive in any determination of the case. The primary issue was delay.

[23] In respect of delay, the primary judge noted that the appellants said they were not in a financial position to commence a proceeding and they had taken reasonable steps by filing caveats in order to bring the dispute before the court. The primary judge did not accept those explanations represented a satisfactory explanation for the inordinate delay.

[24] The fee estimate received by the appellants was a worse-case scenario and the respondent's solicitors had indicated a willingness to negotiate provided the caveats were removed. Further, it is not correct that the appellants only became aware in 2016 of the need to file a different application. The respondent's solicitors had helpfully given that advice in 2007, referring specifically to the *Succession Act* and advising of the relevant time limits. The male appellant had also received similar advice in February 2008.

[25] Against that background, the appellants could not have a justifiable belief that the caveats somehow constituted an application for provision. It was far more likely the appellants did not proceed with any application because they did not think it was worthwhile. They were content to thwart the respondent's attempt to obtain probate, thus preventing her from getting access to the limited part of the estate, comprised by the accounts held in Australia, while under the impression they would ultimately share in the far more substantial assets held in Italy.

[26] The primary judge found that what had triggered the current action was the realisation that the funds in Italy were at risk of forfeiture and formed part of the Australian estate. The appellants' hope or expectation that they would be entitled to a share of the Italian funds, in circumstances where the male appellant had moved those funds out of the jurisdiction and withheld information as to the account, and where both appellants were actively preventing the obtaining of probate, did not justify their failure to make the application for provision within time. Further, as both appellants knew of their right to apply for family provision as early as February 2007, and of the relevant time limits, there was no compelling explanation of why they could not have found the means to make the application within time.

[27] The primary judge found that as the appellants had not a reasonable explanation for the delay of almost a decade in making the application, and the delay had occasioned some prejudice to the respondent, should she now have to defend the application, justice would not be done by extending time.

Appellants' submissions

[28] The appellants submit that the primary judge erred in focussing on the element of delay only. That element ought to have been considered and weighed against other factors, including that the appellants' claim was arguable. Further, the failure to comply with the prescribed time limitations resulted predominantly from the appellants' inability to raise substantial funds and their reliance upon advice that a caveat could preserve their right in respect of the family provision claim.

[29] The appellants also submit the primary judge erred in law in finding the money had initially been sent overseas by the male appellant in order to deny the respondent access to those funds. The male appellant submits that Italian law recognised foreign wills, with the result that sending the money overseas would not have the consequence of concealing it from access as part of the deceased's estate.

[30] The respondent submits the primary judge did not err in fact or law. The primary judge weighed the relevant factors and reached a decision which was reasonably

open in the exercise of the primary judge's discretion. As no error had been shown in the exercise of that discretion, the appeal should be dismissed.

Consideration

[31] Whilst section 41(8) of the *Succession Act* provides that any application for family provision must be commenced within nine months of a testator's death, the court has an unfettered discretion to extend time, if to do so will enable the Court to do justice between the parties.

[32] Relevant factors in the exercise of that discretion include any explanation for the delay, any prejudice caused by the delay, any unconscionable conduct by the applicant, and the prospects of success of the substantive application.[1]

[33] The primary judge had specific regard to each of those factors. The weight to be given to those factors was ultimately a matter for the primary judge, in the exercise of that discretion.

[34] Whilst the appellants contend that the primary judge made an error of law and/or fact in finding that the male appellant deliberately sent the proceeds of the sale of the deceased's house to Italy in an effort to evade those funds forming part of the deceased's estate, there was ample basis for that conclusion. The evidence, as accepted by the primary judge, was that the male appellant, knowing of the contents of the deceased's last will, transferred the funds to Italy with the expectation that Italian law would require those funds to be distributed equally to the deceased's children on his death. It was open to the primary judge on those findings to reject the male appellant's stated reason for forwarding those funds to Italy, namely, to secure an aged care facility for the deceased.

[35] Whilst that finding obviously impacted upon the primary judge's assessment of the male appellant's credibility generally, there is no basis to conclude that the finding improperly affected the primary judge's conclusion in relation to the inadequacy of the appellants' explanation for the inordinate delay in bringing the application. The evidence placed before the primary judge overwhelmingly supported a conclusion that the appellants, knowing of the need to bring a separate application for family provision and knowing of the time limits in relation to the bringing of such an application, chose not to bring any such application for a period of almost 10 years.

[36] That evidence also supported the primary judge's conclusion that the decision not to bring an application was not based on some genuine belief that the filing of the caveats constituted the commencement of such an application. The appellants had received information specifically to the effect that the caveats did not operate in that way.

[37] Further, the timing of the application for an extension of time, was entirely consistent with a conclusion, as found by the primary judge, that the application was only brought when the appellants became aware that Italian law may have the effect of rendering the Italian assets part of the deceased's estate to be distributed in accordance with his last Will.

[38] Once those conclusions were reached by the primary judge, it was open to the primary judge to conclude that, notwithstanding a finding that the appellants had an

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1 *Hills v Chalk* [2009] 1 Qd R 409 at [75].

arguable claim for family provision, the inordinate and inadequately explained delay, in the context of prejudice being occasioned to the respondent by that delay, warranted a conclusion that the interests of justice did not favour the granting of an extension of time.

Conclusion

[39] The decision of the primary judge involved the exercise of a discretionary judgment. Such a decision will not be overturned unless it is established that an error occurred in the exercise of that discretion.[2]

[40] No error has been established by the appellants. The primary judge did not act upon wrong principles or mistaken facts. The decision of the primary judge was not contrary to the terms of the evidence or plainly wrong.[3] There is no basis to interfere with the exercise of that discretion.

Orders

[41] I would order the appeal be dismissed with costs.

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2 *House v The King* (1936) 55 CLR 499 at 504-505.
3 *Spencer v Burton* [2015] QCA 104 at [96]-[97].