IN THE SUPREME COURT OF QUEENSLAND O.S. No. 94 of 1983

CIVIL JURISDICTION

BEFORE MR. JUSTICE AMBROSE

TOWNSVILLE, 18 MARCH 1988

IN THE MATTER OF "The Succession Act 1867-1968"

- an -

IN THE MATTER OF the lands and goods of MADDELLANA GONZO (deceased)

- an -

IN THE MATTER OF an application by GLENEVRA SLINKO

JUDGMENT

HIS HONOUR: This is an application by a 67-year-old woman pursuant to section 90 of the Succession Act 1867-1968 for provision out of the estate of her deceased mother, who died on 5 May 1981, leaving a will probate which was granted on 20 May 1983. At the date of the testatrix's death the applicant was 60 years of age.

A preliminary point taken by the respondent executors is that the Court has no jurisdiction because of the repeal of that Act by the Succession Act of 1981, which was passed on 7 October 1981 and proclaimed on 1 January 1982. Section 3 of the 1981 Act provides inter alia that the Acts specified in the first schedule are repealed, and one of the Acts specified in the first schedule as being repealed

is the Succession Act 1867-1968. Section 4(1) of the 1981 Act, which I will refer to as the new Act, provides that “save where otherwise expressly provided, this Act applies in the case of deaths occurring after the commencement of this Act”, which as I have indicated was 1 January 1982. The testatrix died prior to 1 January 1982 and it is contended that by virtue of section 4(1) of the Act, the new Act does not, therefore, apply to give the applicant the right to seek provision out of the testator's estate pursuant to section 41 of the new Act. However, it is further contended that as from 1 January 1982 the repealed Act, pursuant to which the applicant brings this application, ceased to have legal effect. Pursuant to section 90(8) of the repealed Act, it is provided, “Unless the Court otherwise directs, no application shall be heard by the Court at the instance of a party claiming the benefit of this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 (of the Act) unless the proceedings for such application be instituted within six months from the date of the grant in Queensland of probate of the will or letters of administration of the estate of the deceased person...”. It is contended, therefore, that although the testatrix died long before the repealed Act ceased to have effect, that is on 1 January 1982, the applicant had no right to make an application under that repealed Act until, at least, probate of the will of the testatrixhad been granted on 20 May 1983.

It was further contended that by the time probate had been granted, the new Act had come into operation and, as a result of section 3, the repealed Act had ceased to have effect and, therefore, no application could be made under section 90 of that repealed Act. It was further contended that section 41 of the new Act gave the applicant, of course, no right to make application for provision out of the estate of the testatrix because the death of the testatrix occurred prior to 1 January 1982. It was contended that any right to make application under the repealed Act, which may have existed, was extinguished by the express terms of section 3(1) and 4(1) of the new Act and it was not protected either by section 3(2) of the 1981

Act or by section 20(1) of the Acts Interpretation Act 1954-1977. A number of authorities were cited to support in an indirect way these propositions. However, it was conceded that there seems to be no authority directly in point.

In my view, any right which the applicant had to seek provision for her support out of the estate of the testatrix, pursuant to section 90 of the repealed Act, was preserved by the express terms of both the Acts Interpretation Act and the 1981 Succession Act. By its terms, section 3(2) of the 1981 Act does not limit the operation of the Acts Interpretation Act. I go, first, therefore, to the Acts Interpretation Act.

Section 20(1)(b) provides that the repeal of an Act shall not affect the operation of any repealed Act, or alter the effect of the omission of anything prior to that repeal. Section 20(1)(c) provides that such a repeal shall not affect any right exercisable prior to such repeal and section 20(1)(d) provides the repeal shall not affect any legal proceeding or remedy in respect of any such right; “And any such legal proceeding, or remedy may be instituted as if the repealing Act had not been passed”.

The effect of an omission by a testatrix to make adequate provision for the proper maintenance and support of a child under the terms of the repealed Act was to give that child a right to apply to the Court for an order; that such provision, as the Court might think fit, be made out of the estate of that testatrix. In my view, the applicant's right to make this application is preserved by the terms of section 20(1), (b), (c) and (d). I will go next to the 1981 Succession Act.

Section 3(2) of that Act provides inter alia (a) “All things... created by or under any of the repealed provisions, or existing or continuing under such a provision immediately before the commencement of this Act shall... continue to have the same operation and effect as they respectively would have had if those provisions had

not been repealed". Section 3(2)(b) provides that "In particular and without affecting the generality of (a), such repeal shall not disturb the continuity of operation or effect of any...matter or thing done... accrued... existing... or acquired...under any of those provisions before the commencement of this Act."

In my view the right given to the applicant under section 90 of the repealed Act is a "thing" created by or under the repealed Act and section 3(2)(a) of the 1981 Act expressly provides that that right or "thing" shall have the same effect as it would have had if section 90 of the repealed Act had not been repealed. It is my view, therefore, that the failure of the testatrix to make adequate provision for the proper maintenance and support of the applicant if shown pursuant to section 90 of the repealed Act must have the legal effect of giving the applicant a right to make application under that section, which had accrued and which existed at the time of the repeal of the repealed Act, and pursuant to section 3(2)(b) of the 1981 Act, that legal effect was not disturbed. In my view, the right given to the applicant under section 90 of the repealed Act cannot be said to arise only upon the grant of probate. Section 90(8), to which I have referred, of the repealed Act merely provides that "unless the Court otherwise directs", no application under section 90(1) shall be heard unless it is heard within six months of the grant of probate. The Court has a discretion to hear an application under section 90(1) despite the fact that it was made prior to a grant of probate. It is not possible, in my view, to conclude, then, that the grant of probate is a condition precedent to the coming into existence of a right under section 90(1) of the Act.

I reject, therefore, the respondent's contention and hold that the applicant properly brings this application pursuant to section 90 of the Succession Act 1867-1968 and the Court has jurisdiction to hear the application. I will turn now to the merits of the application.

At the date of the death of the testatrix, the applicant was 60 years of age. She lived with her husband in the matrimonial home at 45 East Esplanade, Innisfail. That home is constructed on a 66 perch river front allotment of land on the Johnstone River at Innisfail and the applicant “supposes” it may have a value considerably in excess of $40,000. She and her husband, together, built this house themselves, or to a very substantial extent, at any rate, and have lived in it for the past 40 years. It was described as a comfortable home and, indeed, the property has featured and appeared in a magazine called “House & Garden”, and I infer from this that it is reasonably presentable in appearance. The matrimonial home is owned by the husband of the applicant. It is not clear upon the evidence, however, whether her husband was working at the time of the death of the testatrix. However, it is clear that both the applicant and her husband were able to support themselves and had sufficient money over to meet the expense of educating and assisting to support their daughter while she attended medical school both before and after the death of the testatrix.

At the date of the testatrix's death, the applicant's husband was about 67 years of age. At the date of this application, both the applicant and her husband received an old age pension amounting in total to $137.60 per week and interest upon a joint account at Esanda Limited containing $12,000. It is stated that the interest on this sum is $32.30 per week. The applicant and her husband were able to send their daughter sums of money saved from income they received to assist her to support herself before she became totally self supporting after finishing her residency at the Brisbane General Hospital. At the date of application this sum amounted, apparently, to about $25 per week.

The matrimonial home of the applicant and her husband is unencumbered. The applicant's husband is now 74 years of age and the applicant is now aged 68 years. She describes her health as variable and that of her husband as reasonably good in 1983. However, at the date of hearing of

the application in March 1988, she said she experienced very bad health for the preceding 11 years. She received hospital treatment for heart attacks in 1973 and 1975 before the testatrix's death, and again in 1982 subsequent to her death. At the date of hearing the applicant and her husband received $193.50 per week by way of pension and only $13.84 per week for interest from the $12,000 still invested with Esanda Limited. It is not clear to me on the material why the interest they now receive is less than half what it was five years ago unless, perhaps, the difference is treated as being “set aside” for their daughter.

The only beneficiary under the will is Mark Anthony Gonzo, the grandson of the testatrix. At the date of her death he was about 20 years of age. His father, a son of the testatrix, died on 5 December 1975 when Mark was only 14 years of age. It was on 10 December 1975 that the testatrix appointed the applicant's husband and her daughter-in-law, Elizabeth Gonzo, who is the wife of Mark's deceased father, to be her executors and left the whole of her property to Mark. One might infer reasonably, I think, that the loss of Mark's father only five days before had something to do with her making a will in those terms when she did.

Within 12 months after the death of his father Mark was obliged to leave school to work the applicant's family cane farm for the support of his mother and brothers and sisters. This involved him abandoning the academic career which he had set forth on and he was required to adopt the role of provider for his family in lieu of his deceased father. The testatrix had lived in a home next door to the house occupied by Mark and his family before the death of Mark's father. Mark shifted into the testatrix's house shortly after his father's death. Apparently there were problems in his adolescence regarding the burden he had assumed and a close relationship developed between Mark and the testatrix. Eventually, the testatrix moved into Mark's family home with his mother and the rest of his family in

about 1979 and she resided there, apart from occasions when she visited various of her relatives around Australia, until her death in 1981 although, it is fair to say, that she spent some time in hospital, and so on, in the months preceding her death.

The estate is quite a small one and it comprises the old house, which the testatrix used at various stages of her life, which has been valued at the present time at about $14,500. There is also money in the bank, presently in the sum of about $4,350. At the time of the testatrix's death the house was valued at $11,000 and there was only $2,450 in the bank. The increase in the value of the estate over the past six or seven years seems to be due to inflation, and so on, with respect to the realty and to interest earned on the money whilst it has remained in the bank. Put shortly, at the date of death, the value of the estate was about $13,450 and it is presently valued at about $18,850. There is no evidence as to the costs of obtaining probate or administering the estate. There was an estimate made that the respondent's costs of meeting this application would be about $4,600. If the applicant succeeds, her costs, I suppose, will be in the same general range.

Prior to her death, the testatrix wrote letters indicating that each of the following three children - the applicant, Glenevra Slinko, a woman named Evans and Gustav Gonzo - should be paid a thousand dollars each. In fact, Mark has taken upon himself the obligation of meeting the wishes of the testatrix and has offered to pay each of those children of the testatrix a thousand dollars. Two of the children have agreed to accept this sum and one has been paid it. The applicant, however, has declined to accept the offer.

Approximately two years elapsed after the death of the testatrix before probate of the will was obtained in May 1983. However, nearly five years have elapsed since that time before this application has come on for hearing. In

the interval, therefore, of seven years subsequent to the death of the testatrix, some rental income has been derived from the house property which has not been recorded; money has been spent on insurance, rates and minor repairs which also have not been recorded. Mark Gonzo seems to have treated the house property and its income as if it might be used for the purposes of his father's estate and for his own purposes. It seems to have been used from time to time for his own purposes and the purposes of relatives and farm workers, and so on, as if it were part of the family farm or part of the property in which he and his family generally have an interest and in which he had some sort of special claim.

I must consider, of course, the effort which the applicant put in towards building up the estate of the testatrix, even in an indirect way, over the years. In one way or another I assume that the estate of the testatrix was derived directly or indirectly from her deceased husband, for whom the applicant says she performed very hard and demanding work both as a school girl and for a year or two after leaving school. Indeed, she said she contributed her earnings made off the farm towards the support of her parents and their children for some time. However, she married in January 1946 and thereafter lived with and was supported by her husband at Innisfail until his retirement from the workforce. This had been the position, therefore, for about 30 years prior to the testatrix making her will and for about 35 years prior to her death.

Prior to the testatrix's death, the applicant and her family had taken two overseas trips. The six week trip that the applicant and her husband took to London in 1983 at the expense of their daughter, who was in practice over there seems to me to be irrelevant except to the extent, perhaps, that it indicates that their daughter may regard herself as under some obligation to help her parents in their old age while they are on the pension, but that really seems to me to be as far as it is relevant.

Upon the whole of the evidence I am satisfied that the relationship between the testatrix and the applicant was not a happy one for many years preceding the testatrix's death. On occasions it appears to have been decidedly unhappy. In reaching this conclusion I am assisted by the evidence of Doctor Catton who, I infer was not affected by the inter-family disaffection and indeed hostility which I detected in particular in the applicant when she was giving evidence relating to her sister Guilemena Evans and the loan of $5,000 in cash (which apparently, at that stage, she kept in the house) which she made to her in 1976.

Mark Gonzo, the sole beneficiary under the testatrix's will, is now nearly 27 years of age. About two years ago he helped his young brother take over the running of the farm, and about 14 months ago he obtained a position as manager at some sort of sugar museum at Mourilyan. He has no dependents. I must determine in this case whether, upon the facts as I have stated them very briefly, at the time of the death of the testatrix, it can be said that her will did not make for the applicant adequate provision for her proper maintenance and support.

The testatrix's estate was a very small one the applicant has lived with her husband at Innisfail for thirty five years in a house which he owned and which appears to be unencumbered. The applicant apparently had sufficient cash in hand in the house to lend $5,000 in cash to her sister five years before the death of the testatrix, although the evidence does not disclose whether this became known to the testatrix. The applicant had gone for two overseas trips with her family within the seven year period preceding the death of the testatrix. The testatrix had seen her grandson leave school at 15 years of age to run the farm of his deceased father for the benefit of his family. The testatrix lived both in the house, which is part of the estate, and in the Gonzo house next door where Mark lived, apparently, and indeed this was the situation she observed for the rest of her life. She saw Mark live in this fashion and work the farm instead of pursuing his

education for a period of about five years before her death. I infer that the testatrix thought, in all the circumstances, that she owed a moral obligation to her grandson which outweighed any that she might owe to any of her other children or grandchildren and, in particular, to the applicant in this case.

I have regard to the size of her estate, and also I infer from the proximity of her dwelling-house (which formed the major part of it) to the Gonzo family home occupied by her grandson and other members of his family, that it would be a matter of extreme inconvenience to the Gonzo family, living in this house next to the house of the testatrix, should it be sold, to strangers who, if they occupied the house, would greatly impinge upon the privacy of the occupants of the Gonzo family house. It is apparently not feasible, having regard to the condition of the house, to attempt to move it and relocate it a further distance away from the Gonzo family residence. In all the circumstances of this case I am not persuaded that the testatrix did fail to meet her testatory obligations to the applicant and I, therefore, dismiss the application.

MR. TOY: I am instructed to seek that Your Honour would order that the costs of the application be paid from the estate.

MR. TAYLOR: Your Honour, I would have to advise that we have no instructions on that aspect. Both Mr. Baulch, who is out of town, and the person who is handling the file, are unavailable to be contacted. I was wondering if we could possibly have the matter stood over for several hours to obtain instructions.

HIS HONOUR: I will adjourn the further consideration of the matter on the question of costs.

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 94 of 1983

CIVIL JURISDICTION

BEFORE MR JUSTICE AMBROSE

TOWNSVILLE, 22 MARCH 1988

IN THE MATTER OF “The Succession Act 1967-1977”

-and-

IN THE MATTER OF the lands and goods of MADDELLANA GONZO (Deceased)

-and-

IN THE MATTER OF an application by GLENEVRA SLINKO

ORDER

HIS HONOUR: In this case the estate is a small one. The applicant, at date of hearing, was 67 years of age. In reasons already given in dismissing the application, the applicant failed to show that adequate provision had not been made for her proper maintenance and support.

There is obviously a degree of disaffection amongst various members of the family, some seem to support and side with the applicant and others seem to support and side with the executor beneficiary. There is no doubt the applicant did work very hard in her young days and her work did assist in laying down the foundations for the property that ultimately her father came to own and, as I have already indicated, it seems to me that the testatrix probably derived some part of the estate that she left to

her young grandson, as a result of the work done by the applicant for her father.

That seems to be a fairly fragile basis upon which to found a moral claim.

I have had regard to what Mr. Justice Hoare said in Klease and although the applicant in that case was given costs, His Honour drew attention to the fact that applications in small estates by people who don't really need money cut of the estate, ought be discouraged and I think, doing the best I can, justice will be met in this case if I make no order as to anybody's costs.

The result will be that the executrix will take her cost out of the estate. I think it unnecessary for me to make any order in respect to her costs. The beneficiary and applicant will both have to pay their own costs.
