



Transcript of Proceedings

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Date: 3 October, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

Application No BS1654 of 2004

DEBORAH ANNE SMALL

Applicant

and

THE ESTATE OF WILLIAM ROBERT BRUCE SMALL

Respondent

BRISBANE

..DATE 20/09/2005

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The matter before me is an application by Dr Small in proceedings numbered BS1654 of 2004. By that application, Dr Small seeks relief under section 41 of the Succession Act 1981.

I am informed that the relevant parties, who are Dr Small, the executrix and parties for whom Mr Couper QC and Mr Quinn appear, who will be referred to as the "testator's cousins", have agreed to compromise this claim, but the terms of the compromise are to be kept confidential.

Counsel for the testator's cousins, nevertheless, handed me a draft order, which I was asked to make by all parties, pursuant to the jurisdiction created by section 41. By that draft order, it would be ordered that the will be varied by substituting pecuniary legacies in favour of the testator's cousins for the present gifts to them, which are of a shareholding in the companies which had been co-owned by the testator and the present applicant, Dr Small.

The draft order further provides that the entitlement or entitlements of the testator's cousins would be exonerated from any entitlement of the applicant, Dr Small, to provision out of the deceased's estate.

However, the order makes no reference to what provision is to be made in favour of Dr Small. That is because the parties wish to keep the terms of the compromise confidential.

I decline to make the order according to this draft for two reasons.

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The first is that as the evidence in support of the application has been outlined to me, it seems to me that it far from satisfies the test prescribed by section 41(1), which is that the will has failed to make adequate provision for the proper maintenance and support of Dr Small.

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The affidavit of Dr Small shows that on any view of the matter, she is a wealthy woman and is the owner of many millions of dollars in assets. It is unnecessary here to detail her financial affairs, but according to her affidavit, her assets include not only her shares in the Bruce Small group of companies, which on any view of the evidence and notwithstanding the litigation involving those companies, must be worth something in the millions of dollars, but also assets such as the 100 per cent ownership of health centres in Melbourne, including their freehold land, a valuable house in Melbourne, a house at the Gold Coast of a value in excess of \$4 million and other assets.

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In her affidavit, she swears that her current sources of income are twofold: first, rent which she receives from the Gold Coast house, which she says she puts back into the property for maintenance and second, her dividends from shares she holds in "publicly listed companies", which I read as excluding her shares in the company Moonee Ponds Mindbody Health Centre Proprietary Limited, which is a proprietary

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company, 100 per cent owned by her, which conducts the health centres. She is a practising medical practitioner. She is now 55 years of age, but has no dependents.

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She does have some substantial borrowings, but overall, it seems to me that she is, as I have said, on any view, a wealthy woman, who is a practising professional, with other substantial assets from which she also derives income.

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It is relevant in the consideration of this question, to have regard also to the presence or otherwise of what are described as competing claims upon the estate. In that respect, her application might seem to be more promising, but the absence of a competing claim does not in itself establish that adequate provision has not been made in terms of the section.

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The second reason why I decline to make the draft order is that it makes no provision in favour of the applicant. I do not question the thinking behind keeping the compromise of these proceedings confidential, but the jurisdiction I am asked to exercise is one whereby in terms again of section 41(1), the Court would order such provision as the Court thinks fit out of the estate for the applicant.

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It is often ordered that a will be varied so as to make an order for provision under section 41. It does not seem to me, however, at least absent any authority, that the Court is able to make an order for the variation of the will, purportedly

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under section 41, but not at the same time, make an order for
provision.

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