SUPREME COURT OF QUEENSLAND

CITATION:	*Serle v Walsh & Ors* [2006] QSC 377
PARTIES:	**BARRY EDWARD ERNEST SERLE** (applicant) **v** **RHONDA ANN WALSH** (first respondent) **GARY ROY BOCCALATTE** (second respondent) **DIANNE KAY CREED** (third respondent) as executors of the Will of Iola Rita Serle
FILE NO/S:	BS1537 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	13 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2006
JUDGE:	Muir J
ORDER:	**I order that further provision be made to the applicant out of the estate of the deceased and that the will of the deceased be varied by inserting before clause 3(g) a new paragraph (f)(a) as follows:** **"(f)(a) To give $40,000 to my husband BARRY EDWARD ERNEST SERLE absolutely."**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY SPOUSE – where testatrix made bequests to the applicant and others – where inter vivos gifts to testatrix's children – whether an order ought be made for the applicant's proper maintenance and support *Family Provision Act* 1982 (NSW) *Succession Act* 1981 (Qld), s 41, Part IV *Bladwell v Davis* [2004] NSWCA 170, applied

Cooper v Dungan [1976] 50 ALJR 539, cited
Grey v Harrison [1997] 2 VR 359, not followed
Hughes v National Trustees Executors & Agency Co of Australasia Ltd (1979) 143 CLR 134, considered
Luciano v Rosenblum (1985) 2 NSWLR 65, distinguished
Re Allen (Deceased) Allen v Manchester [1922] NZLR 218, considered
Singer v Berghouse (No 2) (1994) 181 CLR 201, applied
Vigolo v Bostin [2005] 79 ALJR 731, applied

COUNSEL: R I Cameron for the applicant
M K Conrick for the respondents

SOLICITORS: Pollock Ingram for the applicant
Heiner & Doyle for the respondents

Introduction

[1] Iola Serle died on 2 June 2005, leaving a will dated 1 September 2004. In the will she made a few minor specific bequests, left to the applicant (her husband) her interest in the corporate trustee of a family trust and her interest in the family trust,[1] and gave the residue of her estate to the applicant and her three adult children in equal shares. The applicant applies, pursuant to Part IV of the *Succession Act* 1981, for an order that "adequate provision" be made for his proper maintenance and support out of the deceased's estate.

[2] In the course of submissions it emerged, by inference at least, that the applicant's objective was to obtain the estate's principal asset, a dwelling house in Albert Street, Caloundra, in which he had resided with the deceased for a great many years. The precise terms of the order sought were not formulated.

The assets of the Estate

[3] At the date of her death, the deceased's assets were: the house at Albert Street, Caloundra, valued at approximately $525,000; $47,474 in a Suncorp account; house contents insured for $46,000 but of very little commercial value; and personal effects of no commercial value. The house was purchased by the deceased before her marriage to the applicant and remained in her name.

[4] The costs of administering the estate are estimated to be about $5,000 and the respondents' costs of these proceedings are estimated to be to the order of $40,000. The pecuniary bequests totalled $26,000. They are not disputed by the applicant.

The family history

[5] The respondents are children of the deceased's first marriage which ended in about 1971. Ms Walsh is 47 years of age, Mr Boccalatte is 44 and Ms Creed is 42.

[6] At the time of her divorce, the deceased had some money from the division of property between her and her former husband and some other money "from an

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1 The deceased had transferred her shares in the company to the applicant prior to her death.

inheritance". She purchased a house in Cairns. Shortly after that purchase, the deceased and the respondents moved to Caloundra. The deceased sold the Cairns house, purchased and sold a block of flats at Golden Beach, Caloundra, and then purchased the Albert Street house with her own money. The latter acquisition was in about 1973.

[7] The applicant and the deceased married on 27 December 1978, a year or so after they had started living together. From about 1973 until 1997, the deceased worked at the Caloundra Hotel in a capacity which the evidence does not disclose. After that time she was in receipt of a pension, probably the Age Pension. The applicant is 62 years of age and a concreter by trade.

Financial arrangements

[8] Throughout the period of his marriage to the deceased, the applicant carried on a concreting business through Faysham Pty Ltd as trustee of a family trust. The deceased transferred her shares in the company to the applicant in March 2005. Up until then she had looked after the books and records of the company and the trust and their financial affairs generally. The respondent attended to all of the more physical activities of the business.

[9] The gross income of the concreting business in the years ended 30 June 2002, 30 June 2003, 30 June 2004 and 30 June 2005, as revealed by the trust's income tax returns, was $44,963, $51,955, $71,829 and $38,488, respectively. The respective net profit for those years was $17,758, $20,728, $50,261 and $22,092.

[10] The applicant and the deceased maintained separate bank accounts throughout their married life. He swears that all household expenses were met from the earnings of the concreting business and that the deceased's income from the Caloundra Hotel was paid into a savings account maintained by her. The applicant also swears that he was given $100 a week spending money by the deceased and that he had no idea of the accounts into which the deceased paid the income of the business or her wages.

[11] The applicant's taxable income for the years ended 30 June 2002, 2003, 2004, 2005 and 2006 as disclosed by his income tax returns was respectively: $13,868, $20,867, $23,797, $29,983 and $27,561. The income was derived from distributions from the family trust.

[12] The applicant swears to doing "all of the small maintenance around the home throughout the years of [the marriage] and to having built an extension for the house" for Mr Boccalatte to live in. The evidence does not disclose the source of the moneys which met the costs of the extension. Ms Walsh swears that her mother paid for the maintenance of and improvements to the house and provides some supporting evidence in that regard. I consider it probable that any improvements to the house were met from the deceased's own bank account, but it is impossible to draw any conclusions as to the extent, if at all, to which the account contained income from the concreting business. I find that the applicant did very little towards the general care, maintenance or improvement of the house or its grounds.

[13] In an affidavit sworn on 23 November 2006, the applicant swore to depositing in mid-2004 a total of $22,000 from the company's account into the deceased's account at her request. The deceased was travelling overseas at the time with Ms

Walsh, and according to the applicant, required the money to meet hospital expenses. The applicant's account in this regard was not corroborated by any documentary evidence. Ms Walsh gave evidence, which I accept, that she rang the applicant from Switzerland in mid-2004 and requested that the applicant pay $5,000 into her mother's MasterCard account and that the $5,000 was subsequently repaid on 28 June 2004, very soon after the deceased's return to Australia. Ms Walsh produced a document which corroborated her evidence. Ms Walsh is not in a position to know whether or not the deceased separately asked the applicant for money while she was in hospital, but I am not satisfied that any such request was made or honoured. It is unlikely that the deceased whilst in hospital, having made one request for money through her daughter, would have made another request or other requests herself and without informing her daughter.

[14] In an affidavit filed on 24 November 2006, the applicant listed his assets as follows:

(a)	Truck and concrete pump	$7,700
(b)	Ford motor vehicle	$10,000
(c)	Cash at Bank	$25,946
(d)	Superannuation	$51,926
(e)	Shares	$8,590
	Total	$104,163

The applicant had valued the truck and concrete pump at $35,000 in an affidavit filed on 24 February 2006.

[15] The applicant swore in an affidavit, filed on 24 February 2005, that owing to the strenuous nature of his work he may have to retire in between two and five years' time. I accept that he is unlikely to continue working long after reaching 65. There is also an appreciable risk that ill health or injury will affect his ability to continue with his business before that time.

[16] The applicant swore that after the deceased was discharged from hospital in late 2004, having been diagnosed with cancer, he limited his work to two days a week so that he could care for her. The respondents disputed the extent of this assistance and asserted that the major part of the burden of caring for the deceased was borne by Ms Walsh. The income of the concreting business in the year ended 30 June 2005, compared with its income for the previous year, supports the conclusion that the applicant reduced his working hours substantially in the former year. I accept that he provided care and assistance to the deceased until her death on 2 June 2005, but find that his role in that regard was a subsidiary one.

The financial circumstances of the respondents

[17] Ms Walsh is a divorcee who has resided with her present partner in rented accommodation since March 2006. She does not own a house and has no assets other than savings of about $5,000; household effects; a Honda motor vehicle given to her by the deceased; and superannuation of about $250,000. She has liabilities of about $18,000. She worked for Woolworths for many years as a retail assistant but was obliged to cease work due to ill health in August 2005. Since then she has received approximately $920 a fortnight under an income protection insurance policy. She hopes to return to paid employment.

[18] From about Easter 2005 until the deceased's death Ms Walsh was her principal carer and the organiser of her care.

[19] Ms Creed works part-time as a domestic assistant. Her husband is a truck driver and they reside with their nine-year-old daughter in their house in Gympie. It has a market value of about $300,000 and is mortgaged to secure a loan, the balance of which is $144,000. Mr Creed's gross income for the year ended 30 June 2006 was $57,000. The Creed's assets, apart from their equity in their home, are minimal and Ms Creed swears that they "live from wage to wage". Ms Creed's work as a domestic assistant provided a gross income in 2006 of $7,000. She has a back condition which adversely affects her ability to work.

[20] Mr Boccalatte is a self-employed photographer whose taxable income in the year ended 30 June 2006 was approximately $20,000. He resides in a house, jointly owned by him and his partner, which was acquired largely with his partner's money. Its market value is approximately $450,000 and about $95,000 is owing on it. The current monthly repayments of $685 are insufficient to reduce the amount of the loan. Mr Boccalatte's partner had a taxable income in 2006 of about $30,000 and she and Mr Boccalatte support her two children aged six and 13. They also find it difficult to make ends meet.

[21] Each of the respondents was given $40,000 by deceased in early 2005. Ms Walsh had also received $7,000 from the deceased in early 2004.

The matrimonial and familial relationships

[22] The applicant was a heavy drinker who was frequently inebriated. He has three convictions for driving with a blood alcohol level higher than that permitted by law. On all three occasions he was grossly over the statutory limit. I mention these convictions merely with a view to revealing something of the nature of the applicant's difficulties with alcohol. His consumption of alcohol created stress within the marriage. It led to frequent remonstrations by the respondent, which resulted in arguments and aggression on the part of the applicant. In the course of such arguments the deceased occasionally threatened to evict the applicant and he, in turn, threatened to destroy the house.

[23] The applicant and deceased, for many years prior to her death, had very little social life together and few, if any, interests in common. The deceased travelled to sporting events such as the Melbourne Cup, and Grand Prix racing events in Adelaide and the Gold Coast, on her own. On more than one occasion she travelled overseas on her own and in 2004 she travelled overseas with her daughter, Ms Walsh, who paid her own way. The deceased did not inform the applicant of the nature of her illness for an appreciable period after leaving hospital, probably after making her will in September. Later that year she travelled to Perth with a friend to seek treatment. Those matters, in my view, say something of the relationship between the applicant and the deceased. The applicant's social interests revolved around drinking with his friends, attending race meetings and betting at the TAB.

[24] The applicant and the respondents never managed to form a comfortable relationship. At the time of the marriage the deceased was 41, the applicant 34 and the respondents were aged 14 (Ms Creed), 16 (Mr Boccalatte) and 19 (Ms Walsh). The applicant made little or no attempt to assist the deceased with her children by doing the things a father normally does, such as: discussing the children's school days and progress; offering encouragement in relation to scholastic, sporting and other matters; attending sporting and school events; and generally engaging with the

children in sporting activities. There was very little communication between the applicant, on the one hand, and the three respondents on the other. Ms Walsh and Ms Creed found the atmosphere in the household uncomfortable and as a result they left home as soon as they were able; Ms Creed at 18 and Ms Walsh at 16.

[25] The applicant's consumption of alcohol and its consequences must be kept in perspective. There is no suggestion that the applicant was unable, as a result of his drinking, to carry on the concreting business with reasonable efficacy. Nor does it appear that his consumption of alcohol, generally, was such as to have a materially adverse affect on his speech or movement.

Credibility

[26] The credibility of each of the respondents was unshaken by cross-examination. I formed the view that although each of them had no time for the applicant, they were capable of a reasonable degree of objectivity as far as he was concerned and endeavoured not to overstate the deficiencies in his conduct which they perceived. They each displayed a willingness to make concessions where concessions were due. The applicant was shown by cross-examination to have a poor recollection and to be a generally unreliable witness. For example, he overstated the extent of the deceased's overseas travel; despite swearing in an affidavit to three convictions for driving with an excessive blood alcohol level, he said in oral evidence that he thought there were only two convictions; he erroneously linked the circumstances of his third such offence with his becoming aware of his wife's terminal cancer; his account of providing money in mid-2004 to pay for the deceased's hospitalisation is uncorroborated and in conflict with Ms Walsh's corroborated evidence; and his evidence to the effect that the deceased told him that she intended to change her will is implausible and inconsistent with a substantial body of credible evidence.

[27] Despite my findings on credit, in considering the respondents' evidence, I am mindful of the fact that they are step-children who never liked their stepfather. It would therefore not be surprising if they had difficulty viewing his character and conduct charitably and dispassionately. It would be naïve also to accept, without question, the accuracy of a child's appreciation of the nature and quality of his parents' relationship or the relationship of his parent with a step-parent. In this case, however, the evidence of the respondents concerning the relationship between the applicant and the deceased is corroborated to a degree by other evidence.

[28] The applicant swears that shortly before the deceased died she told him that she was going to transfer the house into his name. Ms Walsh swears that in July 2004 her mother told her that she had made a new will and "that she didn't want anything to go to [the applicant], especially the house" and that the house was to be the respondents' when she died. Ms Walsh reported her mother as saying that she wanted to buy a unit for the applicant and that the applicant would not agree to that course. Ms Creed also recalls hearing her mother say to the applicant, some weeks before her death, words to the effect, "I would really like to sell the house". That, according to Ms Creed, provoked an argument in which the applicant said words to the effect "you sell this house someone is seriously going to get hurt". I accept that the evidence of Ms Walsh and Ms Creed is substantially accurate. I do not accept the applicant's evidence in this regard.

Applicable statutory provisions and principles of law

[29] Section 41 of the *Succession Act* relevantly provides that if a person dies and leaves a will making inadequate provision from his or her estate "for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion … 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."

[30] Section 41(1A) prevents the making of such an order unless the court is satisfied "having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant".

[31] In *Singer v Berghouse (No 2)*,[2] addressing provisions of the *Family Provision Act* 1982 (NSW) which are analogous to the statutory provisions under consideration, Mason CJ, Deane and McHugh JJ described the process to be followed by a court in applying the provisions as follows:

> "It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question' … That description means no more than that the court's power to make an order in favour of an applicant under s. 7 is conditioned upon the court being satisfied of the state of affairs predicated in s. 9(2)(a).
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> …
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> The first question is, was the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life'? The difference between 'adequate' and 'proper' and the interrelationship which exists between 'adequate provision' and 'proper maintenance' etc. were explained in *Bosch v Perpetual Trustee Co* ((8) (1938) AC at 476.). The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
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> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process,

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[2] (1994) 181 CLR 201 at 208-9.

> that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like *Ellis v Leeder* ((9) (1951) 82 CLR 645.), where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors.
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> …
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> Strictly speaking, however, the jurisdictional question, though it involves the making of value judgments, is a question of objective fact to be determined by the judge at the date of hearing. … The decision made at the second stage, by contrast, does involve an exercise of discretion in the accepted sense …"

[32] The two-stage approach identified in *Singer v Berghouse* was accepted by all members of the court in *Vigolo v Bostin*,[3] in which the authority of *Singer v Berghouse* was not questioned. In their joint judgment in that case Callinan and Heydon JJ observed, however:

> "22. We do not therefore think that the questions which the court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

[33] Gleeson CJ pointed out in his reasons that in *Singer v Berghouse* Mason CJ, Deane and McHugh JJ had said that in Australia it has been accepted that the correct approach to the exercise of jurisdiction under testator's family maintenance legislation is that stated by Salmond J in *Re Allen*.[4] The Chief Justice had previously said:

> "Perhaps the most frequently cited statement of basic principle underlying this legislation is that of Salmond J in *In re Allen (deceased), Allen v Manchester* ([1922] NZLR 218 at 220-221):
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> > 'The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.'
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> That statement was adopted by the Privy Council in a New South Wales appeal in *Bosch v Perpetual Trustee Co* ([1938] AC 463 at

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3 [2005] 79 ALJR 731

4 *Vigolo v Bostin* at 735.

479.) *Bosch*, in turn, has been followed and applied in this Court many times. In *McCosker v McCosker* (1957) 97 CLR 566 at 571-572, Dixon CJ and Williams J, referring to what is sometimes called the primary or jurisdictional question, said:

> 'The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch v Perpetual Trustee Co (Ltd)* the word "proper" in this collocation of words is of considerable importance. It means "proper" in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent.' (Footnote omitted)

[34] Callinan and Heydon JJ, in their joint reasons, also referred with apparent approval to decisions in which the above passage from *In Re Allen (deceased)* had been cited with approval.[5]

[35] Gummow and Hayne JJ, in their joint reasons, expressed disapproval of the "moral duty" concept utilised in *In re Allen* and subsequent decisions in the Privy Council and High Court. They said in this regard:[6]

> "The correct approach to construction of the first or 'jurisdictional' limb of provisions such as s 6(1) of the Act is that indicated in the joint judgment in *Singer*. Their Honours referred to the statement of Gibbs J in *Goodman*:
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> > '[T]he words "adequate" and "proper" are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards.'
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> Their Honours then added:
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> > 'It is clear from this passage that his Honour was conveying that the primary judge was in essence making a value judgment

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5 *Vigolo v Bostin* at 752.

6 *Vigolo v Bostin* at 745-746

> in much the same way as a primary judge makes a sound discretionary judgment in personal injury cases when he or she assesses the quantum of damages say for pain and suffering, and for loss of amenities of life.'
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> They earlier had observed:
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> 'The evaluative character of the decision stems from the fact that the court must determine whether the applicant has been left without *adequate* provision for his or her *proper* maintenance, education and advancement in life.' (original emphasis)"

[36] They then quoted, with approval, a passage from the reasons in *Singer* set out in paragraph [31] above[7] and emphasised the need to consider the totality of the relationship between the applicant and the deceased.[8]

[37] Gleeson CJ disagreed with the view that reference to moral duties and claims was apt to mislead and ought be abandoned. He said:

> "In explaining the purpose of testator's family maintenance legislation, and making the value judgments required by the legislation, courts have found considerations of moral claims and moral duty to be valuable currency. It remains of value, and should not be discarded."[9]

[38] Callinan and Heydon JJ also endorsed the traditional approach of resorting to "the concepts of a moral duty and a moral claim in deciding both whether, and how much provision should be made to a claimant under the Act".[10]

[39] Whether the abandonment of reference to moral claims and duties in favour of the approach described in the reasons of Gummow and Hayne JJ is likely to make a material difference to the outcome of most, if not all, *Succession Act* claims may be doubted. I do not consider that it would in this case. But any doubt as to the continued authority of the traditional approach[11] has been removed by *Vigolo*.

Application of principle to the facts

[40] The applicant's claims are based on: the duration of the marriage; the age of the applicant (he is now 62); the fact that under the will he loses the ability to continue to reside in the matrimonial home; and his contribution to the family income over a long period of time.

[41] It was submitted on behalf of the respondents that the applicant is an able-bodied man capable of supporting and maintaining himself until he becomes entitled to a pension. That submission is factually correct but, as the respondents' counsel acknowledged, these facts are but part of a number of often competing considerations to which it is necessary to have regard. The applicant and the respondent maintained separate bank accounts and the applicant has not established

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7 At 751.

8 At 751.

9 *Vigolo v Bostin* at [25].

10 At 752.

11 In *Grey v Harrison* [1997] 2 VR 359 the Court of Appeal regarded the subject pronouncements in the joint judgment in *Singer* as obiter and declined to apply them. A contrary approach was taken in New South Wales in *Massingham v Massingham* (unreported, NSW Court of Appeal, 27 June 1996).

that his income was applied towards the accumulation of assets by the deceased. I find that some of the applicant's income was used to defray household expenses, but the evidence does not disclose whether the applicant contributed more in that regard than the deceased.

[42] The applicant, as I have found, played a role, albeit supporting, in caring for the deceased in the course of her terminal illness. That was to his financial disadvantage. But for many years the deceased had assisted the applicant in the conduct of his business by looking after its administration. She did this, despite having a job of her own until 1997, and did not receive much in the way of reciprocation.

[43] The nature of the matrimonial relationship detracts from the applicant's claim that a "just and wise" spouse "would have thought it [her] moral duty" to leave the house to the applicant. For many years the applicant provided little in the way of emotional and social support and companionship to the deceased and failed to assist her in the upbringing of her children. Nor did he contribute physically to the running of the household or the maintenance of the house, except infrequently and in relatively minor ways.

[44] By way of contrast, the relationship between the deceased and her children was good. They were dutiful children and, within limits imposed by their respective geographical, financial and matrimonial circumstances, continued to provide their mother with physical assistance and emotional support. None of them enjoys even a modest degree of affluence and they are all in a position in which they have no financial buffer against contingencies which may precipitate financial hardship.

[45] The house was the deceased's before the marriage and remained in her name. It was purchased, at least in part, from the proceedings of the property settlement consequent upon the failure of her first marriage. It is thus quite understandable that the deceased would want the children of that marriage to have a substantial share in the proceeds of the disposition of that asset.

[46] Looking at matters in the abstract, it may be thought that the moral claims of a longstanding spouse are likely to be superior of those of an adult child, particularly where, as is the case here, the spouse has lost the right to reside in the matrimonial home. These are matters on which, together with the applicant's impending retirement, the applicant's counsel placed considerable weight.

[47] He submitted that a testator's duty to a widow is paramount and that, if possible, a widow should be left with a secure home, an income sufficient to permit her to live in the style to which she has become accustomed, and a fund from which to meet contingencies. Reference was made, inter alia, to *White v Barron*[12] and *Luciano v Rosenblum.*[13] Reliance was placed also on the following passage from the reasons of Callinan and Heydon JJ in *Vigolo*:[14]

> "The use of the word 'proper' means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the 'station in life' of the parties and the expectations to which that has given rise, in other words reciprocal

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12 (1980) 144 CLR 431.
13 (1985) 2 NSWLR 65.
14 At 751.

> claims and duties based upon how the parties lived and might reasonably expect to have lived in the future.
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> The next of the indications is the expression, in comprehensive language, of the sorts of provision that the court may order, that is, provision by way of maintenance, support, education or advancement. 'Maintenance' may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. 'Support' similarly may imply provision beyond bare need. The use of the two terms serves to amplify the powers conferred upon the court."

[48] It is implicit in the submissions that a widower's position is to be equated with that of a widow.

[49] Emphasis was placed on the following statement of Powell J in *Luciano v Rosenblum*:[15]

> "It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforseen contingencies."

[50] In *Marshall v Carruthers*[16] Hodgson JA doubted that Powell J's principle could have any application to widowers or, for that matter, to widows not in a position of economic disadvantage.[17] Young CJ expressed similar views[18] and Palmer J agreed with the reasons of both of the other judges.[19]

[51] *Bladwell v Davis*[20] is another decision of the Court of Appeal in New South Wales in which the above passage from Powell J's reasons in *Luciano* was considered. Bryson JA, after reviewing the authorities, concluded that the adoption of any such preconceived position or formula was likely to result in error. His Honour said:[21]

> "In the application of the test in s 7, and of the exposition thereof in *Singer v. Berghouse* by Mason CJ, Deane and McHugh JJ at 409-411 it would be an error to accord to widows generally primacy over all other applicants regardless of circumstances and regardless of performance of the stages of consideration described in *Singer v. Berghouse*, in full and with reference to the instant facts. Defeat of the opponents' claims does not necessarily follow from a demonstration, which the claimant can make, that all her needs with respect to income, home renovation, and provision for contingencies cannot be met if any provision is made for the opponents; indeed she could well demonstrate that even if the provisions of the will took effect without any modification, the provision for her is not adequate.

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15 (1985) 2 NSWLR 65 at 69-70.
16 [2002] NSWCA 47.
17 At [65].
18 At [74].
19 At [78].
20 [2004] NSWCA 170.
21 At [19].

> That is not a demonstration that no claim by an eligible person can succeed; the claims and circumstances of the opponents also have to be weighed, and they too have their needs and merits."

[52] The other members of the court agreed with Bryson JA's reasons, Ipp JA adding:[22]

> "I would add, however, that where competing factors are more or less otherwise in equilibrium, the fact that one party is the elderly widow of the testator, is permanently unable to increase her income, and is never likely to be better off financially, while the other parties are materially younger and have the capacity to earn more or otherwise improve their financial position in the future, will ordinarily result in the needs of the widow being given primacy. That is simply because, in such circumstances, the widow will have no hope of improving herself economically, whereas that would not be the position of the others. In that event, the need of the widow would be greater than that of the others."

[53] I respectfully agree with the above passages from *Marshall* and *Bladwell*. Plainly, the provisions of the Act must be applied. The approach to be taken in that regard is that spelt out in authorities such as *Singer* and *Vigolo*.

[54] The estate is a small one and there are competing claims on the bounty of the deceased. Her solution to the problem was to treat her spouse and children equally. In my view, subject to the qualification stated subsequently, it cannot be said that her solution was one which breached her duty as a testatrix and as a wise and just spouse to make adequate provision for the proper maintenance of the applicant having regard to all the relevant circumstances, including the "totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon … her bounty".[23]

[55] The following observations of Gibbs J (as he then was) in *Hughes v National Trustees Executors and Agency Co of Australasia Ltd*[24] are apposite:

> "It has long been established that in exercising the power given by a section such as s 91, the court is not entitled to re-write the will of a testator in accordance with its own ideas of fairness or justice.[25] According to the classical statement in *Bosch v Perpetual Trustee Co* (1938) AC 463, at pp 478-479:
>
> ' … in every case the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.'"

[56] It is incorrect in principle to approach the exercise of discretion under the Act on the basis that children of a testator should be treated equally.[26] In this case, the financial

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22 At [2].

23 *Singer* at 209.

24 (1979) 143 CLR 134 at 146.

25 Compare the remarks concerning testamentary freedom of Callaway JA in *Grey v Harrison* [1997] 2 VR 353.

26 *Cooper v Dungan* [1976] 50 ALJR 539 at 540.

circumstances and economic claims of each of the respondents are not as to warrant distinguishing between them.

[57] Prior to the hearing, the respondents made an offer to the applicant to settle on the basis that the estate acquire an apartment at a cost of not less than $260,000, nor more than $310,000, in which the applicant would have the right to reside for life, provided that he met all costs of maintaining and insuring the apartment and maintained it in good order and repair. Such an interest was to be in substitution for his 25 per cent of the residue. The offer lapsed on 23 November 2006. The applicant, on the hearing, expressed no interest in living in an apartment and did not seek an order that he be given a life interest. I do not consider that such an order would be appropriate, having regard to the applicant's life expectancy and the ages of the respondents. The creation of a life interest might hold the respondents out of enjoyment of any benefits under the will for a substantial part of the remainder of their lives.

[58] The respondents received from the deceased gifts totalling $120,000 and the deceased's estate was thereby diminished shortly prior to her death. As mentioned earlier, there is no principle requiring equality of treatment but these benefits must be taken into account when assessing the competing claims on the deceased's bounty. When regard is had to them and to the other matters supporting the applicant's claim, whilst acknowledging the modest size of the estate and the competing claims, I find, applying the test in paragraph [55] that the deceased should have made a separate testamentary gift to the applicant of $40,000.

[59] I order that further provision be made to the applicant out of the estate of the deceased and that the will of the deceased be varied by inserting before clause 3(g) a new paragraph (f)(a) as follows:

> "(f)(a) To give $40,000 to my husband BARRY EDWARD ERNEST SERLE absolutely."

[60] I will hear submissions on costs.