

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No 7865 of 2007

GARNET REGINALD HILLS

Applicant

and

JOHN NEWTON CHALK,
SUSAN MARIE CRITTALL AND
MARGARET GRACE WATSON

Respondents

BRISBANE

..DATE 26/10/2007

ORDER

HER HONOUR: There is an originating application before the Court which has been filed in Court seeking adequate provision be made for the proper maintenance and support of Garnet Reginald Hills from the estate of the deceased, Marie Sylvia Chalk. There are applications made today both by the applicant to the originating application and by the respondents, who are the executors of their mother's estate.

1
10

It is convenient to deal with the application made by the applicant that the application be heard and determined notwithstanding it is instituted outside the time limited for the bringing of such applications because unless that application be granted, then the proceedings cannot be successful and a determination of that application traverses much, if not all, of the matters to be traversed on the application made by the respondents.

20
30

The time limit for the originating application is found in section 41(8) of the Succession Act 1981 which provides:

"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 nine months after the date of death of the deceased; but the Court may, in its discretion, hear and determine an application under this part although a grant has not been made."

40

It is clear from that subsection that the time limit which is ordinarily provided for the making of an application the type of which is found in paragraph 1 of the originating application is the period of nine months from the date of death of the deceased. The deceased, Mrs Chalk, died on 26

50

February 2003 and the originating application was filed on 6
September 2007, well outside the nine months allowed. There
is, however, found in section 41(8) the proviso that that time
limit applies unless the Court otherwise directs, so the Court
has a discretion to exercise when the matter is raised as to
whether or not to allow the application to be heard and
determined notwithstanding that it has been instituted more
than nine months after the date of the death of the person
from whose estate further provision is sought.

1

10

Counsel are not in any disagreement as to the criteria to be
considered by the Court in examining whether or not an
extension of time ought be granted. They are conveniently set
out in Mr Morris's submissions as being governed by four
principal factors. Let me at once say that it should not be
thought that an extension of time should be granted just for
the asking; whether or not an extension of time ought be
granted depends very much on the individual circumstances of
the case.

20

30

The first matter to be considered is whether or not there is a
sufficient explanation for the delay in making the claim. Mr
Hills has covered that in his affidavit material. He gave
evidence in Court so I had the great advantage of seeing him
and hearing from him and being able to assess from that what
his health circumstances appear to be, how he is affected by
his age and whether or not his explanations were adventitious
or in fact true explanations of his state of mind. He did
appear, in giving his evidence, to be doing his best given his

40

50

extreme hardness of hearing and the memory lapses consistent with his age and his health problems to give honest answers to the questions asked of him.

1

His affidavit material shows in summary that he is not a lawyer, he has never had a personal solicitor, he did not know of any right to claim further maintenance and support from the estate of the deceased until quite recently.

10

Further, the provision made for him in the estate was a right to reside in what had been the home in which he lived with his second wife, who is the deceased, and while that was not entirely suitable to him, his deteriorating health has made continuing to live there quite unsuitable for him. This is supported by expert evidence and, of course, supported by from what I could see of Mr Hills in the witness box, he does not appear to be a man who can continue to live on his own in a big house set on difficult terrain and those factors together have explained why it is that it is now that he is making the application. I accept that there is an adequate explanation for the delay. In my view there is no prejudice to the respondents in this application being made now as opposed to being made within the nine months so that matter need not further concern me.

20

30

40

Two matters were pressed by Mr Morris on behalf of the executors, the first was the question of whether or not he had any prospects of success and the second whether or not the applicant had engaged in unconscionable conduct and, indeed,

50

that second matter was the subject of searching
cross-examination.

1

In my view, the evidence of the applicant amply demonstrated
that he has not behaved in an unconscionable way. He is an
old, sick and needy man who, in my view, is making perfectly
appropriate application for further provision from the estate.
This was characterised in questions to him that he was seeking
to take money more or less from his deceased wife's children
instead of his own. He is not, in fact, doing that, he is
seeking further provision from the estate of his deceased
wife. In my view, there can be no valid suggestion that his
conduct is unconscionable.

10

20

That brings me to the prospects of success in the action.

Mr Morris on behalf of the executors criticised Mr Hills for
his uncertainty at this stage as to precisely what he wants.
Of course it appeared from his answers to the question that
part of the reason for his uncertainty as to precisely what he
wants is caused by the uncertainty of an 81 year old man in
poor health of precisely what will happen to him over the
ensuing years. He may remain well enough to live in supported
accommodation, he may need higher levels of care but those
factors are ones that are part of the human condition that we
cannot predict precisely what we will need in our old age and
I do not think he is in any different position from any other
person. All that is clear is that his current accommodation
is unsuitable.

30

40

50

In my view, he has reasonable prospects of success on an application for further provision to be made from the estate and so I grant the application for this originating application to be heard and determined, notwithstanding that it has been instituted outside the time limited for the bringing of the applications. The respondents' applications were first that the originating application be summarily dismissed on the grounds that the applicant has no real prospect of succeeding and there is no need for a trial of his claim. For the reasons I have already given I will dismiss that application.

1
10
20

The second is that alternatively if the only evidence to be relied on by the applicant at the hearing of the application is the affidavit of Garnet Reginald Hills sworn 5 September 2007, that the originating application be dismissed on the ground that the said affidavit does not disclose any arguable basis for an extension of time, a matter I have already dealt with for any substantive relief under the provisions of part 4 of the Act - or does not contain the material facts necessary for the Court to determine the applicant's claim for substantive relief and quantify that claim if it is otherwise successful.

30
40

In my view that is not a reason for the matter to be dismissed. It may well be that further affidavit material will need to be provided and Mr Hills will have to be clearer in the provision that he seeks, understandable that it is that he is uncertain as to those matters because it is important

50

that this matter be resolved and, in my view, in such a way
that it is a once and for all resolution so that there is no
ongoing financial relationship between the parties which might
engender, given what has occurred so far, continuing hostility
or uncertainty.

1

I agree with Mr Morris that directions should be given for
further material to be filed but that awaits the giving of
proper directions which, I believe, should be given in this
matter.

10

There is an application for security for costs on the basis
that the applicant is suing for the benefit of another person
or persons, that is the issue by his first marriage, rather
than for his own benefit and there is reason to believe that
he will not be able to pay the respondents' costs if ordered
to pay them. I do not accept that the applicant is suing for
anyone's benefit apart from his own. His need is manifest and
I do not accept that the reason for this suit is to benefit
other persons, even if other persons might be incidentally
benefited.

20

30

40

If he is successful when receiving the money to build a granny
flat at his daughter's home, the quid pro quo for her and her
family is that they will have to provide care to Mr Hills and
that will be some burden to them and an increasing burden as
time goes on.

50

So the substantive order I make is that the granting of paragraph 2 of the originating application - now I wish to give directions. I will allow the parties the opportunity to reach agreement on the directions to take the matter to mediation and, if necessary, to trial.

1

10

...

HER HONOUR: And I will order that all parties participate and act reasonably and genuinely in the mediation so they are obliged to by Court order.

20

...

HER HONOUR: The costs order that I propose having heard the submissions on costs, will be that the applicant's costs on an indemnity basis on each of the applications will be his costs in the originating application.

30

Now that means that I will make order 1 of the draft orders; order 2 of the draft orders; that orders 4 and 5 need to be changed and expanded to suit the directions that the parties actually seek to prepare the matter for trial; paragraph 6 will need to be adjusted to change the date, most likely in (a) and (b); in paragraph 7 maybe we still have priority on the callover list but the fact is once a matter is on the callover list you can have it set down so you do not need to be with priority, so I will take that out.

40

50

You might need to change the paragraph number, I think, from paragraph 3, that might just be something that has come over from some precedent you have. Paragraph 8 looks a little bit loose given the present position of the parties so I think you need to sort out between each other, presuming you can, precisely how many days' notice. If you cannot sort it out then I would order two days' notice, but try and sort it out and paragraph 9 will be deleted and the costs order will be as I have said.

1

10

Now, when do you think you could get to me a draft order with the directions that suit both parties - 4 p.m. on Monday?

20

MR PETERSON: That's adequate, you Honour, yes.

...

30

MR PETERSON: Thank you, your Honour.

HER HONOUR: But I should say if a reasonable proposal is put by one party which is not reasonably accepted by the other, then cost consequences would follow. I am sure that will not be the case.

40

50