SUPREME COURT OF QUEENSLAND

CITATION:	*Helmore v Helmore* [2007] QSC 348
PARTIES:	**ESTELLE MAY HELMORE** (applicant) **v** **ALAN DOUGLAS HELMORE** (first respondent)
FILE NO/S:	SC No 1888 of 2007
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	26 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2007
JUDGE:	de Jersey CJ
ORDER:	**1. That the last will of the deceased Mark Henry Yorke Helmore dated 24 January 2006 be varied in the following respects:** **(a) In clause 3(a), deleting 'thirty thousand dollars ($30,000)' and inserting in lieu thereof 'one hundred and twenty thousand dollars ($120,000)';** **(b) Inserting a new clause 2A, as follows:** **'Upon my wife Estelle May Helmore executing and delivering to my executors an assignment of her entitlement to a refund of the accommodation bond payable under her 'Residential Care Agreement' dated 5 October 2006 with RSL (Qld) War Veterans' Homes Ltd, I direct my executors to pay forthwith the balance accommodation bond payable under that agreement, as if it were a liability borne by me.'** **2. That the costs of all parties, on the indemnity basis, be paid from the estate** **3. That there be liberty to apply**
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 deceased made his last will ten months before death, when he and the applicant, his widow, lived together at home – where

deceased and applicant subsequently moved to a retirement facility due to ill health – where deceased had previously ensured applicant had the right to reside in property for life – where will provided a legacy of $30,000 for applicant, and varying amounts for deceased's children – where applicant obliged to pay an 'accommodation bond' to reside in retirement facility, which bond will be refunded on death of applicant – where bond expense not anticipated at time will made – whether estate should bear cost of accommodation bond for applicant – whether bond refund should in due course be made to the estate – whether sufficient provision made for applicant

Aged Care Act 1997 (Cth), s 44.10(3)

Succession Act 1981 (Qld), s 41

COUNSEL: A S Mellick for the applicant
N A Martin for the first respondent

SOLICITORS: MacDonnells Law for the applicant
Harris Sushames Lawyers for the first respondent

[1] The applicant is the 79 year old widow of the deceased, who died on 18 November 2006. The first respondent is his sole executor, the second respondent having renounced her executorship.

[2] The deceased was 90 years of age at death, and the father of six children, all of whom survive him. The applicant was the deceased's third wife, his first two wives having died. The applicant married the deceased on 18 December 1990. They had lived together from March 1986.

[3] The deceased's last will is dated 24 January 2006, some ten months before his death. At that time, the deceased and the applicant were living together at 4 Ibis Parade, Jacobs Well. They had always lived there. But during the year 2006, the deceased suffered serious ill health, and on 26 September 2006, he entered the nursing home at the Talbarra Retirement Community, as a permanent resident, on a 'high care' basis. The applicant moved in three weeks later, on a 'low care' basis.

[4] Because the applicant entered on a low care basis, the applicant was obliged to pay an 'accommodation bond'. See cl 2 of her 'Residential Care Agreement' with the operator of the retirement village, RSL (Qld) War Veterans' Homes Ltd. The agreement is dated 5 October 2006. The amount of the bond is a large amount, $184,999, calculated on the total assets of the applicant and the deceased. The evidence of Ms McGill established that figure, calculated in accordance with the *Aged Care Act 1997* (Cth) (s 44.10(3)).

[5] The applicant has not paid that bond, apart from a $10,000 'deposit'. The sum of $174,999 remains contractually due. While it has remained outstanding, she has been required to pay interest to the provider, totalling $23,255.70.

[6] The deceased intended the amount of the bond be paid from his Heritage Building Society account (in his sole name). The amount of the bond, subject to some deduction, is to be refunded upon the death of the applicant (cl 4.1(a)). The outstanding issue of the bond has rendered the applicant's living situation uncertain, and is occasioning her distress.

[7] By his will, the deceased provided a legacy of $30,000 for the applicant, whom he described in the will as his 'devoted and loving wife'. He then made detailed and apparently carefully crafted provision for his children: $1,000 to Lorelle, 30% to Patricia, 25% to each of Robert and Alan, and 10% to each of Ronald and Chris.

[8] As at the date of death, or approximately so, the deceased's estate amounted to approximately $341,000 (see p 6 of Ex 4, excluding the amount of approximately $65,000 jointly owned (para 7 Ex 5)) and in addition, a debt payable to the deceased's estate of $83,900, due three months after the applicant's death. By the terms of a deed dated 3 September 2003, while selling the Ibis Street property to his son Alan, the first respondent executor and Alan's wife, the deceased had ensured that the applicant would have the right to reside there for life. (That property, valued at $300,000, was sold for only $84,000, explained on the balance of the evidence by Alan's agreeing the deceased and his wife could live there for the rest of their lives.) Bearing in mind that at the date of the deceased's death the applicant was the joint owner, with him, of accounts totalling $65,000, the deceased may have considered that he had made appropriate provision for the applicant.

[9] But that provision did not anticipate the applicant's move into the retirement village, with its attendant expense. The applicant had her own share of medical problems at the time her husband died. See the affidavit of N M Lythall filed 9 March 2007. It was reasonably foreseeable, when the deceased made his will, that the applicant would in due course have to live in a care facility, and she in fact was at the death of the deceased. The only reasonable conclusion is that the applicant will remain where she is for the rest of her life.

[10] The applicant has few means. She receives a pension of $543.50 per fortnight, and her accommodation fees at Talbarra, not including incidentals like hairdressing, amount to $549.92 per fortnight. Her pharmaceutical needs are at the order of $50 to $70 per month. Her assets comprise only $41,530.83 held in bank accounts – two accounts previously in their joint names. At 79 years of age, she has a life expectancy of 10.4 years.

[11] The executor conceded the applicant should receive increased provision from the will. Ms Martin, his counsel, acknowledged that the applicant should receive at least an additional $40,743.70, comprising $720 per annum for pharmaceutical expenses, the interest paid (because of the non-payment of the bond moneys) of $23,255.70, and the $10,000 deposit moneys paid. Ms Martin also acknowledged that arrangements should be made to have the estate put up the bond moneys, on the basis the refund would in due course be made to the estate. Allowing for the amount held in the bank accounts, totalling $41,530.83, Ms Martin submitted that the applicant would then be properly provided for.

[12] Mr Mellick, for the applicant, submitted that the further provision should include payment of the amount of the bond moneys to the applicant outright. But it seems to me that in determining what is 'adequate provision … for [her] proper

maintenance and support', a wise testator would reasonably have proceeded on the basis this then 78 year old woman, not in good health, would remain at Talbarra for the rest of her life. Provided her accommodation were secured, through payment of the bond moneys, her 'proper maintenance and support' otherwise should not require the provision of a substantial capital amount. It would have been different had the applicant, at the time of the deceased's death, been living, say, in rented accommodation.

[13] As mentioned during the argument, giving the applicant the $175,000 for the bond moneys outright, would enable her to pay the bond, but on her death that money would be refunded to her estate. The object of a family provision order is relief of an applicant's own position, not that of the beneficiaries of her estate. If the deceased's estate can provide the bond moneys, an ultimate refund to that estate would effectuate the deceased's testamentary intent.

[14] I approach the matter on the basis this is a carefully crafted will, and that I should disturb it no more than is reasonably necessary.

[15] As foreshadowed at the hearing, however, a larger amount than the approximate $70,000 acknowledged by Ms Martin, should in my view be allowed, so that the applicant may be in a position to deal more comfortably with future contingencies, such as further declining health and the need for possibly expensive medical treatment. While there is no particular basis for thinking all necessary care will not be available for the applicant at Talbarra, as it was for the deceased, there needs to be some allowance for the possibility it may not be.

[16] I intend increasing the $30,000 legacy to $120,000. That involves another $50,000 on top of the approx $70,000 the executor acknowledged should be allowed, bringing her legacy to a point where it represents 35% of the value of the estate as at death (not including the $83,900 debt payable subsequently). I consider that justified.

[17] The current balance of the Heritage Building Society account is $361,230.05. The estate's other asset is the debt of $83,900 owed by the first respondent and his wife, though not payable until after the applicant's death. The executor's costs of the application are estimated at $35,000 to $50,000, and $5,000 is otherwise due. The applicant's costs will also have to be met from the estate. The implementation of the following orders should be practicable, allowing for the disposition of the assets of the estate.

[18] The orders I make are as follows:

1. that the last will of the deceased Mark Henry Yorke Helmore dated 24 January 2006 be varied in the following respects:

   (a) In clause 3(a), deleting 'thirty thousand dollars ($30,000)' and inserting in lieu thereof 'one hundred and twenty thousand dollars ($120,000)';

   (b) Inserting a new clause 2A, as follows:

> 'Upon my wife Estelle May Helmore executing and delivering to my executors an assignment of her entitlement to a refund of the accommodation bond payable under her 'Residential Care Agreement' dated 5 October 2006 with RSL (Qld) War Veterans' Homes Ltd, I direct my executors to pay forthwith the balance accommodation bond payable under that agreement, as if it were a liability borne by me.'

2. that the costs of all parties, on the indemnity basis, be paid from the estate;

3. that there be liberty to apply.