SUPREME COURT OF QUEENSLAND

CITATION:	*Oswell v Jones & Ors* [2007] QSC 384
PARTIES:	**MARGARET FRANCES OSWELL** (applicant) **v** **MARGARET ANNE JONES, ELIZABETH CATHERINE JONES and JAMES GEORGE DEEB AS EXECUTORS FOR THE ESTATE OF FRANCIS BRUCE OSWELL DECEASED** (first respondents) and **PETER WILSON AS LITIGATION GUARDIAN FOR LEWIS GWYNN JONES** (second respondent) and **SIMON JAMES OSWELL and CHRISTOPHER JOHN OSWELL** (third respondents)
FILE NO:	S4123 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2007; 4 December 2007
JUDGE:	Chesterman J
ORDER:	**Order in terms of paragraph 81 of this judgment**
CATCHWORDS:	SUCCESSION – EXECUTORS AND ADMINISTRATORS – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – PRINCIPLES ON WHICH RELEIF GRANTED – PRINCIPLES OF EXERCISE OF DISCRETION – CIRCUMSTANCES TO BE CONSIDERED– where the testator had three adult children from his first marriage – where the applicant was the severely disabled daughter of the first marriage - where the testator left each of those adult children a fixed sum of money - where the testator left the majority of his estate to his second wife and her grandson - where the applicant made application for an order that better provision be made for her out of the testator's estate - whether the applicant was left

with inadequate provision for her proper maintenance and support – whether an order for the transfer of the entire estate or some lesser part of the estate would constitute proper maintenance and support

Social Security Act 1991 (Cth), s1209L, s1209M, s1209P (2)(b)
Succession Act 1981 (Qld), s 41, s52

Bosch v Perpetual Trustee Co Ltd [1938] AC 463, applied
Singer v Berghouse (1994) 181 CLR 201, applied
Vigolo v Bostin (2004) 221 CLR 191, applied
Whitmont v Lloyd NSWSC Unrep. 31 July 1995, applied

COUNSEL: Ms. R.M. Treston, with her Mr D Salisbury for the applicant
Mr D R M Murphy S.C. for the first respondents
Mr D.J Morgan for the second respondent
Mr A.S Mellick for the third respondents

SOLICITORS: Biggs & Biggs for the applicant
McCullough Robertson for the first respondents
MPN Lawyers for the second respondent
John Cross & Co for the third respondents

[1] Francis Bruce Oswell ('the testator') died on 19 August 2003 at the age of 83. His wife of 41 years, Glenda Mavis Oswell, predeceased him in 1986. On 28 July 2003, 22 days before he died, the testator made a will. It was admitted to Probate on 6 October 2004.

[2] The executors of the will are Margaret Anne Jones, her daughter-in-law Elizabeth Catherine Jones, and Mr James George Deeb, a partner in the executors' firm of solicitors.

[3] Mrs Margaret Jones had known the testator and his wife for many years. She was a widow when Mrs Oswell died in 1986. She and the testator deepened their friendship. They agreed not to marry but cohabited from 1987 until December 2002 when the testator was hospitalised with the illness from which he died eight months later. The term '*de facto* wife' is often used disparagingly, and to refer to transient and even casual relationships, but the evidence suggest the testator and Mrs Margaret Jones were man and wife in fact for 16 years and lived harmoniously in a relationship of mutual comfort and support, financial, physical and emotional.

[4] The testator was survived by three adult children, Simon James Oswell now 53; Christopher John Oswell now 52; and Margaret Frances Oswell now 51. The sons have made successful careers for themselves and are financially independent. Mr Simon Oswell is a musician who has lived and worked in America but now lives in Toowoomba. He is married and has three children. They are the testator's only grandchildren. Mr Christopher Oswell is a ship's captain who has lived for many years in America. Miss Margaret Oswell is single. She is severely disabled. She was born with cerebral palsy and has always been totally dependent on others.

[5] Mrs Margaret Jones has one grandchild, Lewis Gwynn Jones, who was born in July 1995 and is 12 years old. His parents are Mrs Margaret Jones' son, Mr Morris Jones, and Elizabeth Catherine Jones who is one of the executors.

[6] By his will the testator made the following gifts:

> '3.1 **I GIVE** a legacy of **ONE HUNDRED THOUSAND DOLLARS ($100,000)** to each of my sons **SIMON JAMES OSWELL and CHRISTOPHER JOHN OSWELL** absolutely –
>
> 3.2 **I GIVE** the sum of **ONE HUDRED THOUSAND DOLLARS ($100,000)** to my trustees to invest the same and at the absolute discretion of my trustees to pay or apply the whole or any part of the income and capital thereof to or for the benefit of my daughter **MARGARET FRANCIS OSWELL** during her lifetime and after the death of **MARGARET** my trustees shall hold any balance capital or income remaining (if any) upon trust for my defacto wife's grandson **LEWIS GWYNN JONES** until he attains the age of 25 years –
>
> **EDUCATION FUND**
>
> 4. **I GIVE** my unit at Unit 51 Riverview Gardens, 26 Lower River Terrace, South Brisbane, described at Lot 31 on BUP 6721 or in the proceeds of sale if it is sold by my trustees in the administration of my estate ('the education fund') free of all duties and charges to my trustees **UPON TRUST** for the following –
>
> 4.1 as soon as practicable after my death to set aside, appropriate, and invest in their names the education fund out of my estate –
>
> 4.2 to produce firstly by the income and secondly from the capital sufficient funds to provide for the medical (and dental) expenses and the education of my defacto wife's grandson **LEWIS GWYNN JONES** until the distribution date later defined and, ancillary to the above purposes, to provide for other expenses LEWIS or persons having the care of **LEWIS** may incur as my trustees in their sole discretion may agree to meet –
>
> 4.3 'education' shall mean and include all tuition fees, boarding fees, funds for text books, sporting equipment, uniforms, excursions, travelling expenses and all other expenses arising directly or indirectly out of **LEWIS'** primary, secondary and tertiary education as my trustees may in their sole discretion decided to be paid out of the education fund –
>
> 4.4 my trustees shall pay or apply the net income during each year or shorter period of the trust to or for **LEWIS** for the above

purposes, with power given to my trustees to carry forward any losses incurred in any one year in the investment of the education fund, and to accumulate unused or unapplied income in any one year for future years, but that any accumulated income shall be income to which LEWIS is absolutely entitled upon attaining the age of 18 years –

4.5 **I EXPRESS THE WISH** that my trustees give **LEWIS** every assistance and advantage in attaining the best education possible within **LEWIS'** limits, including the payment of income or advancement of capital in respect of expenses that will be incurred, such as future tuition fees, prior the distribution date but which relate to periods of tuition etc which may occur after the distribution date –

4.6 the distribution date shall be the earlier of the following events –

(a) **LEWIS'** date of death, if he dies before attaining the age of 25 years –
(b) **LEWIS'** 25th birthday –

4.7 if the distribution date is (a) above my trustees shall distribute to **LEWIS'** estate the accumulated income to which he is absolutely entitled and the capital of the education fund shall revert to my residuary estate later defined –

4.8 if the distribution dated is (b) above my trustees shall distribute the capital of the education fund on the distribution date of **LEWIS** absolutely –

GIFT OF RESIDUE

5. **I GIVE** all my real and personal estate wherever it is and in whatever form it is not otherwise disposed of by this will or any codicil including any property over which I may have any power of testamentary disposition unto my trustees **UPON TRUST** with power to collect, sell and convert, to pay all my debts, funeral and administration expenses, all legacies (if any) given by this will or any codicil, any cost of delivery of any specific gift in this will or any codicil, and to hold the balance then remaining ('my residuary estate') upon the following trusts, namely –'

[7] At the time of the testator's death the home unit, the proceeds of sale of which were to provide the education fund, was valued at about $740,000. The residuary estate was valued at about $794,000. The unit increased in value after his death and the value of the fund created by cl 4 of the will was, at 17 November 2007, $814,410.64. On the same date the residuary estate had a value of $370,556.74. It had been depleted by the payment of income tax and costs to the executors' solicitors and the litigation guardian of Lewis Jones. The executors have made an

advance of $10,000 to the applicant in partial satisfaction of the gift made her by cl 3.2 of the will.

[8] The residuary gift has been calculated after taking into account the costs of the executors and the second respondent up to and including the trial,. The third respondents' costs have been estimated by their solicitors in the sum of $45,392.13. This includes counsel's fees in the sum of $11,715. The applicant's costs have likewise not been included in the calculation of the residue. They are much higher. The solicitors estimate their costs and professional fees will amount to $170,751.81. Separately, fees for junior counsel are estimated at $44,110. The applicant, it appears, has chosen to litigate expensively.

[9] As at 17 November 2007 the testator's estate had been wholly converted into cash and amounted to $1,474,967.38.

[10] Margaret Oswell has applied pursuant to s 41 of the *Succession Act* 1981 (Qld) ('the Act') for an order that better provision be made for her out of the testator's estate. She seeks orders that her brothers' legacies be exempt from any order the court might make but otherwise seeks an order that the whole of the estate be paid to her as an absolute legacy. The executors do not contend that better provision should not be made for the applicant but contend that the applicant may be properly maintained and supported by something less than the whole estate. The second respondent, the litigation guardian for the infant beneficiary, adopts the same position. The third respondents, the adult sons, support their sister's application but contend their legacies should be exonerated from the burden of any order.

[11] Section 41 of the Act provides:

> 'If any person (the *deceased person*) dies … and in terms of the will … adequate provision is not made from the estate for the proper maintenance and support of the deceased person's … child … the court may, in its discretion, on application by … the said … child … order that such provision as the court thinks fit shall be made out of the estate … for such … child …'

[12] The section requires the court to carry out a two-stage process. The first calls for a determination of whether the applicant has been left without adequate provision for her proper maintenance and support. If the determination is affirmative the second stage requires the court to exercise a discretion and decide what provision should be made from the estate for the applicant. See *Singer v Berghouse* (1994) 181 CLR 201 at 208; *Vigolo v Bostin* (2004) 221 CLR 191.

[13] In *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 Lord Romer said for the Privy Council at 476:

> 'The first thing to be noticed is that the powers given to the court only arise when any of the persons mentioned is left without adequate provision for … her proper maintenance … . The use of the word "proper" in this connection is of considerable importance. It connotes something different from the word "adequate". A small sum may be sufficient for the "adequate" maintenance of a child, for instance, but, having regard to the child's station in life and the

> fortune of his father, it may be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for the "adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is "proper" in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children a sum insufficient for his "adequate" maintenance. Nevertheless, such sum cannot be described as not providing for his "proper" maintenance, taking into consideration "all the circumstances of the case" as the subsection requires shall be done. In the next place, it is to be observed that, when the condition precedent to the exercise of the powers … is fulfilled, those powers extend to making such provision as the court thinks fit for … proper maintenance. The task thus imposed upon the court is obviously one of great difficulty.'

[14] Callinan and Heydon JJ pointed out in *Vigolo* (at 231):

> '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 on which to survive or live comfortably. Adequacy or otherwise will depend upon all the relevant circumstances … . 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.'

[15] The applicant is gravely handicapped. She has, as I mentioned, cerebral palsy. She has spastic quadriplegia and athetosis, the involuntary movement of her upper body, head and neck, and limbs. She has limited use of her hands. Ms Oswell is totally dependent upon others. She cannot wash herself, dress herself or feed herself. She cannot get in or out of bed unaided. She is also incontinent. She is mobile in a wheelchair but needs assistance to go anywhere outside her home. She is of high average intelligence but has great difficulty in communicating because of dysarthric speech.

[16] The life expectancy of a 50 year old woman is about 30 years. The applicant is said to have such an expectancy but the opinion was offered by a general practitioner who did not know her well and I do not know that it can be taken at face value. The applicant's condition has worsened considerably in recent years and the evidence is that the ordinary ageing processes are likely to be more severe and more rapid because of her condition.

[17] In 1992 the applicant developed left hip pain caused by the early onset of arthritis. The pain increased the difficulty of transferring her from wheelchair to bed or wheelchair to taxi and other such transfers. In the same year she developed lower back pain caused by postural asymmetry which led to a deterioration in her capacity to walk. In 1999 she underwent surgery to fuse two cervical vertebrae. The surgery was undertaken to alleviate symptoms of pain and weakness in her arms. The applicant suffers stenosis in her cervical spine. Her symptoms are of pain, altered sensation and weakness in her arms. The condition is likely to worsen without surgery.

[18] A full account of the applicant's disabilities is contained in the report of 18 May 2006 compiled by five therapists associated with the Cerebral Palsy League of Queensland. It is attached to the affidavits of Phillips, Unkles, Pacheco, Daniloff and Morewood. It is unnecessary to set out its contents in detail. The applicant is unemployable and incapable of independent living. She requires substantial assistance in the basics of daily living and in any modest social activity or recreation.

[19] The applicant is in receipt of a disability support pension presently worth $265.45 per week. The pension is untaxed but is subject to a means test. As well, she has the benefit of a pensioner concession card and is a recipient of the Medical Aids Subsidy Scheme which meets most of the costs for medical aids and equipment such as her wheelchairs, and the sling and hoist by which she is put into and got out of bed. Her entitlement to these concessions and subsidies is conditional upon her continued entitlement to receive the pension.

[20] Additionally, the applicant receives the benefit of an Adult Lifestyle Support Package paid by Disability Services Queensland. It is presently worth $86,930 and is paid to the Cerebral Palsy League of Queensland for the provision by it of carers to assist the applicant in daily living. The money is not paid directly to the applicant but is entirely expended on her behalf. It is untaxed and not subject to a means test.

[21] The applicant presently lives in a rented house at Wellington Point provided for her by the (State) Department of Housing. The rent is $62.40 per week which is equal to 25 per cent of her pension income. The house was specially built for occupation by the disabled.

[22] The applicant lives frugally but a comparison of her income and expenses shows that the latter exceed the former by about $78 per week. The shortfall is paid from her capital resources. Ms Oswell inherited some moneys from her mother's estate and presently has a credit balance of about $50,000 in her bank account. She owns no other property.

[23] The paucity of the provision made for the applicant cannot be explained by any estrangement between her and her father. Ms Oswell's own evidence, corroborated by Mrs Margaret Jones, shows their relationship to have been close and affectionate. Indeed Mrs Jones described the testator as being devoted to the applicant who, she said, was an integral part of their family. The testator gave the applicant substantial financial support in his lifetime. He built a swimming pool at a family home to assist her to exercise. He paid the applicant's private health insurance premiums, bought her clothes and paid for physiotherapy and holidays. He bought a house in Sunnybank for the applicant's occupation. She shared it with other disabled people but it became unsuitable when the carers on whom they depended found it impossible to park their cars within a reasonable distance. The house was then sold.

[24] There is no evidence of a breakdown in the bond between father and daughter. The applicant took her father's death very hard.

[25] It is therefore difficult to understand why, given the applicant's obvious need, the provision for her should have been so small. It is more difficult to understand why such disproportionate generosity should have been shown to Mrs Margaret Jones'

grandson, whose parents are comfortable, if not affluent, who is an only child and has an adoring as well as a wealthy grandmother.

[26] It is not necessary, of course, for an applicant to prove why the testator did not make adequate provision for her proper maintenance. Her entitlement to relief is made out upon proof only of that circumstance. The reason for the testator's moral failure to make adequate provision is not in this case relevant to the enquiry as to what constitutes proper maintenance and support, though it may be in others.

[27] The answer, I suspect, appears in the testator's circumstances when he made his will. He had been very ill for over eight months. He had congestive heart failure and widespread mylitis, causing partial paralysis and incontinence. His sight was failing. He had been an active, accomplished and successful man but his illness made him depressed. He had 'given up' on life. Both his sons lived overseas, and had done so for many years. Mr Simon Oswell has since returned to Australia but during his illness his sons were physically absent and, it would seem, distant from his affections.

[28] Mr Christopher Oswell and the testator had had a substantial disagreement about 12 years earlier. It arose out of a business venture in which they were both involved. Mr Christopher Oswell left for America where he has remained. His former close relationship with his father was never re-established. Mr Simon Oswell on the other hand remained in touch and was concerned about his father's deterioration in health. He made many visits from California to Australia to see his father between 1992 and 2002.

[29] Both sons have deposed to an alienation between them and their father initiated and exacerbated by Mrs Margaret Jones. Nothing is to be gained by descending into detail or seeking to ascertain right from wrong. There is enough in the material to think that Mrs Jones did not encourage the testator to think kindly about his sons. It is, I think, significant that she did not let Mr Simon Oswell know of the testator's impending death. He barely made it home for the funeral.

[30] Mrs Jones had performed many acts of assistance and kindness to the applicant when the testator was alive. She attended their house on many occasions and was made part of the social events there. After the testator's death she did not see or speak to the applicant until they met at the mediation of these proceedings in June 2006. Her rejection of the applicant cannot be explained by her brothers' complaints about the will. They lodged a caveat prohibiting the grant of probate, alleging that the testator lacked testamentary capacity to make his will and was subjected to undue influence when making it. The proceedings were discontinued after about a year. No doubt these proceedings have engendered hostility between Mrs Jones and Messrs Oswell but the relationship had been fraught before that. The applicant was not a party to the caveat proceedings and Mrs Jones ceased contact with her immediately after the funeral.

[31] Probate has been granted and it must be accepted that the testator was of sound mind, memory and understanding when he made the will and was not subject to any undue influence as to its making. Nevertheless it would seem a proper inference that the will was made by the testator when he was depressed, in decaying health and had come to believe that his own family had ceased to care for him.

[32] There is no doubt as to the answer to be given to the first enquiry mandated by s 41. The testator's estate was reasonably substantial. The applicant's needs are great and the provision for her was paltry. The real contest comes with stage 2: what provision should be made for the applicant's proper maintenance and support?

[33] A convenient starting point is a survey of the circumstances of the competing claims.

[34] The major beneficiary, Lewis Jones, is 12 years old. He attends St Peter's Lutheran College and has done so since Grade 1. He is healthy, gifted musically and very intelligent. He attends the school's gifted students program and excels at school work. As far as one can forecast the future of any 12 year old, his appears bright. His parents expect him to graduate from university.

[35] They both work, Mr Jones in the Australian Tax Office and Mrs Jones as a school teacher and assistant principal. Their combined gross salaries are about $140,000. Their home in St Lucia is unencumbered and they are compiling a substantial superannuation investment. Mr Jones sacrifices $57,000 of his $71,000 annual salary into superannuation. The family is able to afford January holidays to Canada for the skiing. The boy needs some orthodontical treatment and speech therapy but the costs are modest and there is no suggestion his parents cannot afford them. His grandmother, Mrs Margaret Jones, has paid his school fees for the last two years.

[36] Lewis Jones was never dependent on the testator. There is no reason to conclude that his parents are unable to provide a comfortable upbringing and first class education. His grandmother has demonstrated a willingness to provide financial assistance from her own resources.

[37] It must be a proper assumption that he will in the future benefit from his grandmother's testamentary generosity. He is obviously very dear to her and she is well motivated towards him. At present her testamentary dispositions are in favour of her two sons but even if that remains the position, the young man will benefit in time. He is, as I have pointed out, his parents only child.

[38] Mrs Margaret Jones is the residuary beneficiary. She lives in her own home unit in Taringa which is worth about $575,000. It is unencumbered and was bought by the testator in joint names: his and Mrs Jones. It passed to her on his death by survivorship.

[39] She owns her own car, bought recently, and worth about $25,000. She has a credit balance in her bank account of about $34,000.

[40] She and one of her sons are the trustees of a self-managed superannuation fund of which she is the sole member. The present net value of the fund is $1,272,000. The fund pays Mrs Jones a monthly income of about $8,100. Her expenses are a little less that $4,000 per month. She deposes to an excess of income over expenses of $51,432 per year.

[41] The financial benefits did not flow in only one direction. Mrs Jones' unit at Taringa is the fourth home she and the testator owned. She contributed to the purchase of the others and lost money on the sale of one of them. When they first commenced cohabitation they lived in Mrs Jones' unit at South Bank.

[42] The testator was the major shareholder in a company, FB Oswell & Associates Pty Ltd which developed land on Bribie Island. In about 1994 the venture was in danger of failing. The company had substantial bank debt but needed more capital. Mrs Jones lent it, at the testator's request, $300,000. The advance was repaid by two instalments, one in June 1998 and the other in October 2002. As well, amounts were paid by way of interest between August 1996 and June 2002. The amounts paid were substantial, $131,400 but amounted to less than a commercial return on such an investment. It is a distinct possibility that without Mrs Jones' advance the company may have become insolvent. As it was the development was finished successfully and returned the company a substantial profit which formed the bulk of the testator's estate.

[43] Mrs Jones assisted the testator in other ways and on other occasions. Together with the testator, Mrs Jones gave a guarantee to the Commonwealth Bank of Australia to be liable for any default of FB Oswell & Associates Pty Ltd with respect to the moneys it had borrowed from the bank to undertake the development. The risk was, obviously, considerable. In 1989 Mrs Jones lent the testator about $12,000 which he repaid. She cannot recall the terms of the transaction. It seems also that in the years 1990 and 1991 Mrs Jones lent another of the testator's companies about $50,000. Mrs Jones cannot now recall whether that debt was repaid but makes no complaint about it. In 1990 the testator underwent surgery to replace a hip. Mrs Jones paid an amount of $17,700 towards the cost of the operation and hospitalisation. The amount was not repaid and Mrs Jones did not ask for repayment.

[44] Mrs Jones is 74 years of age and has a number of medical ailments typical of someone of that age. She takes medication for her conditions but is, overall, in good health. Such medical expenses as she might incur in the future she can meet from her own resources.

[45] The applicant's solicitors have taken advice from therapists and doctors used to caring for sufferers of cerebral palsy and have obtained from them a list of equipment and services which will benefit the applicant's physical and psychological health. These services and chattels are then designated as 'needs' which must be met from the testator's estate. The computation of the amount necessary to provide for the satisfaction of those needs has been undertaken as though the proceedings were a claim for damages against a statutory insurer. I will mention some of the detail later, but the total of the sums said to be necessary to provide the applicant with an appropriate quality of life is the sum of $1,370,000. It will be seen that the claim exceeds the value of the estate but the applicant's submissions, having recognised this fact, continue:

> 'Ordinarily we (*sic*) would submit that judgment ought to be given in [the applicant's] favour for the whole of the estate, but the applicant … continues to exonerate the gifts to her brothers.
>
> Proper provision for the applicant therefore is the rest and residue of the deceased's estate, after payment of the pecuniary legacies to her brothers.'

[46] A point which has to be addressed and which it is appropriate to deal with before considering what, in the circumstances, is proper provision for the applicant's

maintenance and support is what relevance the provision of social security to the applicant has to the question. The point is whether relief should be structured so that she continues to enjoy the benefits of pension payments and ancillary benefits, or whether she should be given a lump sum, the whole or a substantial part of the estate, with the consequence that she will lose those benefits.

[47] The question has been considered, though in the slightly different context of whether the court ought to make any order in favour of an applicant where to do so will deprive the applicant of pension entitlements and may not make him/her much better off, and will deplete the testamentary gifts thought appropriate by the testator. The question here is slightly different: it is whether the form of relief should be moulded to take account of the availability of pension entitlements and to preserve them if possible.

[48] Young CJ in Eq in *Gunawardena v Kanagaratnam Sri Kantha* (2007) NSWSC 151 reviewed some of the cases and concluded that the submission that:

> 'The better and perhaps prevailing view seems to be that the court may take social service benefits into consideration, at least in cases where … the estate is relatively small.'

was 'probably correct'.

The formulation in the submission is hedged about with qualification and caution. His Honour himself concluded that:

> '… There were cases where it was appropriate to take into account a pension entitlement when considering whether to make an order under the Act',

but thought that:

> '… Generally speaking, the object of the legislation is to compel persons to make provision for their dependents and not throw the maintenance of the dependents upon the public purse …'

[49] In an earlier judgment, *Parker v Public Trustee* (unreported 31 May 1988) Young J had attempted to formulate 'the attitude that the court takes in this area of the law' in a number of propositions some of which, with respect, are not easy to reconcile with others.

[50] The opinion with which I find myself in agreement is that of Bryson J in *Whitmont v Lloyd* (Supreme Court of New South Wales unreported 31 July 1995) which was approved by Sheller JA in *King v Foster* (NSWCA unrep. CA 40372/95). Bryson J at 16 said:

> '… The availability of … pensions and other social benefits is a circumstance which should be regarded, and particularly in small estates it may be appropriate to leave an applicant wholly or partly dependent on them or to mould the provision made so that their availability is observed in whole or in part. The acceptance of benefits which statute law provides is in every way legitimate, involves no social stigma and incurs no disapproval from the court.'

His Honour expressed one reservation:

> '… It is not appropriate that where there is wealth in an estate it should be directed away from the less fortunate and successful of the eligible persons so as to enhance their claims to social benefits and maximise the resources of others; the court should not disregard the interests of the public and public funds, which can receive incidental protection from the workings of this legislation. Where wealth is available it should be used to meet needs to maintenance, education and advancement of eligible persons. The significance of social benefits is related to the available resources.'

[51] Despite what I regard as the overstatement of the applicant's needs there is no doubt that she requires substantial provision from the testator's estate. Although the estate is substantial it is not huge by today's standards, and is not sufficient to make adequate provision for the applicant without regard to pension and other social security benefits. If the whole of the estate were given to the applicant she would lose all her means-tested social security benefits and, depending on circumstances and the length of the applicant's life, there is a distinct possibility that the estate might be exhausted and she would again be compelled to rely upon those payments. The estate might be completely consumed without having made complete provision for the applicant for the rest of her life.

[52] In my opinion the better approach is to accept the applicant's disabilities are such that it is appropriate she continue to receive public benefaction in addition to provision from the estate so that she can have financial security for the rest of her life but that something of the estate is preserved for those whom the testator wished to benefit.

[53] There is a way in which this goal can be achieved. On 20 September 2006 the *Social Security Act (Cth)* 1991 was amended to include Part 3.18A – Private Financial Provision for Certain People with Disabilities. It permits the creation of 'special disability trusts' to assist families who have the financial means to make their own provision for the future care and accommodation of family members who are severely disabled. The explanatory memorandum which introduced the amendments stated:

> 'The measure allows … family members to establish a special disability trust for the current and future accommodation and care of the severely disabled person. All trust income and trust assets up to the value of $500,000 will not affect the family member's social security payments … . In addition … gifts to the trust (to a total of $500,000) from … family members will not affect the donor's social security payment …'

[54] To be a special disability trust the trust must meet the statutory definitions set out in s 1209L of the *Social Security Act*. In essence this means that the trust must have only one principal beneficiary who must be disabled as defined in s 1209M. The trust must be protective in nature and its purpose must be to provide solely for the care and accommodation of the disabled beneficiary. There are reporting and auditing requirements. There must be a trust deed which takes the form determined by the Secretary to the Department of Families, Community Services and

Indigenous Affairs. Such a determination was made on 18 September 2006 propounding a model trust deed.

[55] There is no doubt that the provisions of Part 3.18A may be applied to set up a special disability trust for the benefit of the applicant. The capital of the trust fund to be paid from the testator's estate can be invested and the income applied for the benefit of the applicant who will continue to be eligible to receive her disability pension, pension concession card benefits, and the Medical Aids Supply Subsidies, all of which are of considerable value to the applicant.

[56] It is convenient now to return to the particular claims made on behalf of the applicant. The first is for a sum sufficient to provide her with her own home. Presently she lives in completely suitable accommodation provided at a subsidised rent by the Queensland Department of Housing. Unfortunately the provision of any substantial award in the applicant's favour will almost certainly lead to her losing her eligibility for subsidised state housing. Ms Clark, the general manager of Community and Public Housing, could not give a definitive answer to the question but her testimony shows that it is likely that the award of any substantial lump sum to the applicant will make her ineligible for Department of Housing accommodation and it is apparent that proper provision for the applicant requires something in addition to the establishment of a special disability trust. Not unreasonably the Department of Housing requires those with financial resources of their own to pay for their own accommodation so that the limited resources of public housing is made available to the truly indigent. Ms Clark's evidence was that an award to the applicant which gave her an annual income of $80,000 or more would make her ineligible for public housing. Curiously a lump sum payment is treated by the Department as income in the year in which the lump sum is paid. It is also probable that the Department will introduce an assets test to gauge whether persons are eligible to receive public housing. Assets in excess of $72,000 will deprive their owner of eligibility for public housing.

[57] The applicant must have a home and any worthwhile provision for her from her father's estate would make it impossible for her to receive public housing. She must therefore be provided with a capital sum with which she can buy her own home.

[58] The evidence shows that suitable accommodation can be bought for about $420,000. Mr Pascucci is building a block of home units in Sherwood. According to his affidavit:

> 'The block is on three levels and consists of 15 units. Each unit is on a single level and will have two bedrooms and two bathrooms, one of which will be an en suite to the main bedroom. The living area is open plan. Each unit has a basement garage. The design includes an electric lift providing access to all floors.
>
> The foundations have been poured and the estimated completion of the project is June 2008.
>
> I am able to modify a unit … to meet the requirements for disabled access. … I would be able to modify the design … in order to meet the very specific requirements of [the applicant]. … If I was able to

> sell a unit off the plan to [the applicant] before 14 February 2008 I would be prepared to sell her a top floor unit inclusive of … modifications for $420,000.'

[59] The applicant is anxious to take advantage of the offer which seems appropriate. The applicant is a middle aged woman dependant on others. Apart from the few years when she lived in a house bought for her by the testator she has resided in a variety of housing, not all suitable, and has never been really settled. She faces an uncertain future once an award is made in her favour and she cannot live in public housing. It is entirely appropriate the estate should provide her with a capital sum to secure her accommodation during her lifetime. The sum should be $450,000 to allow for incidental expenses associated with its acquisition.

[60] The submissions advanced by the applicant's counsel include a detailed account of what is said to be her needs and the cost of meeting them. These have been set out in schedules. The present value of the weekly cost of meeting each of the 'needs' over 31 years, the period said to be the life expectancy of the applicant, has been calculated by reference to the five per cent actuarial tables and the sum then discounted by 20 per cent for contingencies. The figures are substantial. They are summarised in the submissions:

> '190.
>
> 190.1 Schedule 1 – Hydrotherapy - $83,279.94;
>
> 190.2 Schedule 2 - Physiotherapy - $31,210.80;
>
> 190.3 Schedule 3 - Maxi taxi costs - $158,088.48;
>
> 190.4 Schedule 4 - Miscellaneous costs - $37,220.83;
>
> 190.5 Schedule 5 - Motor vehicle costs - $61,501.09;
>
> 190.6 Schedule 6 - Respite care - $269,484.16;
>
> 190.7 Schedule 7 - Holiday costs - $55,391.00;
>
> 190.8 Schedule 8 - Capital Expenditure – Aids, Equipment & Surgery - $20,000 to $30,000;
>
> 190.9 Schedule 9 - Day Trips/Recreation and Leisure Programs - $8,004.48 and $25,014.00.
>
> 191. The amount sought as proper provision therefore comprises:
>
> 191.1 a capital sum for the purchase of a home $450,000.00;
>
> 191.2 $50,000 for maintenance costs to that home;
>
> 191.3 a sum representing future paid care $250,000.00;
>
> 191.4 a sum for the purchase of a car $51,000.00;

191.5 ongoing costs for motor vehicle including petrol, insurance, registration and maintenance $75,000.00;

191.6 hydrotherapy costs $83,000.00;

191.7 physiotherapy costs $31,000.00;

191.8 respite care costs $270,000.00;

191.9 holiday costs $55,000.00;

191.10 aids and equipment $30,000.00;

191.11 day trips/recreation and leisure programs - $25,000.00'

[61] When the applicant goes out she must utilise a maxi taxi which can accommodate her wheelchair. The taxi fares are subsidised by the State. It will be observed that the applicant seeks almost $160,000 for the future engagements of such a taxi as well as $125,000 for the purchase and maintenance of a motor vehicle of her own, as well as the cost of paying a carer to drive the car. The schedules include therapies and services which the applicant has managed to live without in the past such as regular respite care and holidays. No doubt she would enjoy them but it is questionable whether they should be categorised as 'needs', a word with connotations of necessity.

[62] The applicant would probably derive some benefit from all, or most, of the services and equipment described in the schedules. However, it is to make no criticism of the applicant; nor is it a failure to recognise her severe disabilities, to say that the claims are, in the context of the proceedings and the estate, extravagant. It is one thing to say that the testator failed, as he did, to make adequate provision for her proper maintenance: it is another thing altogether to say that the applicant must receive the whole of the estate, save for the parties' costs and her brothers' legacies.

[63] I could not help but think during the course of the applicant's case that it had a sub-text: that the application, based as it is upon the applicant's admitted need for better provision, is a means by which the testator's estate may be distributed to the members of his family rather than Mrs Margaret Jones' family. An absolute gift of the whole estate goes beyond what is necessary for the applicant's maintenance during her lifetime. Yet the applicant's counsel insisted on such a gift. She would on her death, presumably, leave the unexpended portion of the estate to her brothers who are quite clearly distressed at their father's indifference to them.

[64] The second stage of the enquiry required by s 41 is to decide, as a matter of discretion, in the context of all relevant circumstances, what is 'proper maintenance' for the applicant. One of the circumstances is the testator's express desire to benefit his second wife (and Mrs Margaret Jones was in fact his second wife) and her grandson. The exercise required by s 41 is to make minimal disturbance to the dispositions of a will consistent with ordering 'proper maintenance' for an applicant. The testator's wishes are not to be disregarded though they must be modified because of his failure to make that provision.

[65] Another circumstance is that Mrs Margaret Jones does have a competing claim. I cannot accept Ms Treston's submissions to the contrary. It is true that her claim is not as compelling as the applicant's because of her own individual wealth and the applicant's complete inability to provide for herself. But it is not right that Mrs Jones has no claim. She was, in truth and in fact, the testator's companion and wife for the last 16 years of his life. She provided him with comfort, companionship and support, no doubt emotional as well as financial. The testator wanted to be her benefactor and although he was overly generous at the expense of his daughter the court must respect his wishes to the extent possible.

[66] The major gift was to Mrs Jones' grandson but this is not, I think, an aberration, as Ms Treston might wish to categorise it. The gift to Lewis Jones must, I think, be regarded a deriving from the testator's affection for Mrs Jones. She was not, to his knowledge, in need of his financial support but to reward her for her performance of wifely duties, affection and support he chose to advance the person for whom she had most affection.

[67] The only gifts from which substantial provision can be made for the applicant are those to Lewis Jones and the residuary gift to Mrs Margaret Jones. Having regard to the considerations I have just discussed it would be appropriate, if it were possible, to limit the provision for proper maintenance to the applicant to a life interest in the funds to be established so that on her death something may go back to the testator's chosen beneficiaries. The income will be sufficient for the purpose, once Ms Oswell has her own home. It may well be that the applicant will outlive Mrs Margaret Jones, but on the applicant's death the remainder of the trust funds to be established for her lifetime should pass to the grandson.

[68] Ms Treston objects to such an award. She had two grounds. The first, barely articulated, was one I have mentioned: the desire to divert the estate to the testator's own children. This ground must be disregarded. The second is that a gift of income only will be insufficient to support the applicant in a proper manner and that recourse must be had to capital for that purpose. It may be that the income will not provide the applicant with as much comfort as access to capital would do in addition, but for the reasons I have explained it is not appropriate to disinherit Mrs Margaret Jones and her grandson entirely. The applicant cannot have the whole estate if something is to be left for them, as I think it should.

[69] The sum of $500,000 invested safely should return between six and seven per cent per annum. If one takes an average the annual income from the trust fund will be $32,500 or $625 per week. To this will be added the applicant's disability pension of $265 per week giving her an income of $890 per week (or a little less because the trust income will be taxed). The applicant will in addition receive her pensioner entitlements and the community support payments. As well she will have her own home. She will continue to receive the benefit of the Adult Lifestyle Support Package, presently worth $87,000 per year. These amounts by way of income and benefits should provide the applicant with comfortable security, if not everything her counsel wished for.

[70] This discussion is academic. The only way that the applicant can receive a substantial award without losing her social security entitlements is if the award takes the form of a payment to a special disability trust. As I read the legislation

and the terms of the model trust deed the trust fund, both capital and income, will be available for the welfare, as defined by the deed, of the applicant.

[71] There is, I think, a difficulty in limiting the special disability trust to one of income only. Clause 2.1 of the model trust deed provides:

> 'Sole Purpose of Trust
>
> (a) The trustee must hold the trust fund and the income derived in each accounting period on trust and pay or apply all or any part of the income and all or any part of the trust fund for the sole purpose, as defined in the remainder of this clause;
>
> (d) For the purpose of this deed the 'sole purpose' means the reasonable care and accommodation of the principal beneficiary as determined by the trustee from time to time but
>
> (i) shall not include such daily living costs or expenses … that do not relate to reasonable care and accommodation needs;
>
> (ii) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and
>
> (iii) must be in accordance with any requirement or determination made by the Secretary from time to time
>
> …'

[72] By the determination made on 18 September 2006 the Secretary identified 'provisions which must be included in the trust deed and the form of those provisions'. Clause 2.2 of the determination then recited:

> 'For paragraph 1209P(2)(b) of the Act, the provisions which must be included in the trust deed are provisions dealing with the matters mentioned in column 2 in the following table.'

The 'Sole Purpose of Trust' is a matter mentioned in column 2. The determination continues:

> '… A provision dealing with the matter mentioned in column 2 … must be in the form of the clause of the model trust deed mentioned in column 3 …'.

Clause 2.1 appears in column 3. The consequence appears to be that the special disability trust must provide in terms of cl 2.1 so that the trust is one in which both income and capital can be applied for the reasonable care and accommodation of the applicant, principal beneficiary.

[73] Clause 4.2 of the model trust deed provides for distribution of the trust property at the end date which, by virtue of s 1209M(5) means the death of the applicant. In essence cl 4.2 provides that at that time the trustee will return the trust fund to the

donor or in accordance with any nomination made by the donor. In this case the remainder would return to the executors, who will have been the donors, to be dealt with by them in accordance with the will.

[74] The special disability trust of $500,000 will provide a substantial income for the applicant. As well, the trustees may have recourse to the capital of the fund if they think it necessary for her reasonable care and accommodation. It is, in my opinion, unnecessary that the applicant receive any further capital sum. The provision of further capital will have the consequence of diminishing the value of any gift of remainder to Mrs Jones or Lewis Jones. Accordingly the gift contained in para 3.2 of the will should be limited to one of income only. The applicant has been paid $10,000. That should be treated as an absolute gift. The balance of $90,000 should be invested and the income paid for the applicant's benefit. The capital will then be available to fall into remainder.

[75] It is impossible to know what will be left of the trust fund at that time. It will depend upon what determinations the trustees have made as to the applicant's needs for capital and what income may have been accumulated. The value of any remainder that might pass to Lewis Jones is unknown. He will receive the proceeds of whatever home the applicant has when she dies.

[76] In summary the better provision for the applicant from the testator's estate should consist of:

(1) The sum of $450,000 to be paid to trustees to be applied by them in the purchase of residential accommodation for the applicant. No doubt in the first instance it would be one of Mr Pascucci's units though in years to come should circumstances change and other accommodation be more appropriate the unit can be sold and the proceeds applied for the purchase of whatever is then appropriate.

(2) The sum of $500,000 should be settled by the executors on the terms of a special disability trust to be applied in accordance with the terms of the model trust deed.

(3) A gift of $10,000.

(4) The income from the sum of $90,000 invested for the applicant during her lifetime.

[77] The trustees of the three life interests mentioned in the previous paragraph should be persons other than the executors. The evidence says nothing of Mrs Catherine Jones. Mr Deeb is, of course, a solicitor of good reputation. The evidence suggests, unhappily, that there is a degree of animosity between Mrs Margaret Jones and the applicant. The reasons for it are now immaterial. She would not, however, be a suitable trustee by reason of that animosity. As well, she has a particular interest in preserving as much of the capital of the trust funds as is possible for the ultimate benefit of herself and her grandson. The trustees should be persons who honestly and impartially hold the balance between the applicant's interests and the remaindermen. Mr Simon Oswell would appear to me to be appropriate for appointment as one of the trustees. He will be properly protective of

his sister. The other trustee should be 'an honest broker'. I will leave it to the parties to agree upon the appointee. Failing agreement I will make the appointment.

[78] It is appropriate to exonerate the legacies left to Mr Simon Oswell and Mr Christopher Oswell. Although they made no application, and could not have demonstrated the need for better provision, the gifts to them were inadequate having regard to their close blood relationship, their former close ties of affection and the assistance Mr Christopher Oswell rendered his father in developing the land at Bribie. I think it must be accepted that Mrs Jones supplanted their place in their father's affection with her own grandson and encouraged alienation between father and sons. The benefit the young man will receive, though delayed, will in all likelihood be more substantial than the testator's own sons' gifts. In the circumstances they should not be diminished in order to provide for the applicant who, expressly seeks an order for the exoneration.

[79] Lastly, there is a dispute about interest. The pecuniary legatees are entitled to interest at eight per cent from the first anniversary of the testator's death: see s 52 of the *Succession Act*. The executors seek an order that the rate be reduced. They advance two bases. The first is that the estate has earned only about four percent and interest payable at eight per cent will come from the executors' own pockets. The second ground is that the legatees were responsible for at least part of the delay in paying the legacy by reason of their challenge to the will.

[80] The submissions have some substance. Section 52 appears to allow for a reduction in rate though not an alteration to the period for which interest is to be paid. I think it is fair to assume that the legatees' actions caused about a year's delay so that interest should in fairness be paid from the second anniversary of the testator's death. That result can be achieved by allowing interest at four per cent for the statutory period.

[81] I will publish my reasons. The parties have agreed upon and a form of order giving effect to the applicant's better provision which I have described and it is reproduced below:

> "1. Adequate provision for the proper maintenance and support of the Applicant, Margaret Frances Oswell be made by reading and construing the will of the deceased dated 28 July 2003 as though
>
> (a) clause 3.2 of the Will was deleted and the following clauses were inserted in lieu thereof:
>
> '3.2.1 I GIVE the sum of FIVE HUNDRED AND FORTY THOUSAND DOLLARS ('the fund') to SIMON JAMES OSWELL and MARGARET LAURELLE MCNAMARA, solicitor of Biggs & Biggs, (in this clause called 'my trustees') to be held by them upon the following trust, subject to the following terms and conditions –
>
> (a) my trustees shall apply the fund to the purchase of a dwelling to be used by my daughter Margaret Frances Oswell as her principal place of residence;

(b) the fund may be applied towards the payment of the purchase price, the cost of the acquisition, legal costs and search fees, titles office registration fees, stamp duty, the cost of any building searches and the cost of modifications to the residence once purchased to accommodate Margaret Oswell's needs and those of any carer, or other occupant of the residence, and the due administration of the trust and the fund;

(c) Margaret Oswell may live in the residence, as her principal place of residence for as long as she wishes, provided she pays;

(i) the rates and outgoings levied on the property;

(ii) the premiums on any insurance policies taken out by my trustees on the residence;

(iii) any excess payable by my trustees in the event of damage to the residence which is not covered by insurance and the cost of any normal and reasonable repairs or maintenance (including repainting where necessary) to the residence;

(iv) the cost of any claim against my trustees by any adjoining owner or authority; and

(v) any other costs of my trustees in the administration of the fund where there is insufficient funds to reimburse my trustees.

(d) any part of the fund which is not applied in accordance with sub-clause (b) is to be invested and the net income is to be applied:

(i) firstly, towards the payment of any of the expenses in (b) and (c) above; and

(ii) secondly, to Margaret Oswell, with discretion given to my trustees to accumulate any excess income for the purpose

of applying towards future outgoings on the residence;

(e) should my trustees, in liaison with Margaret Oswell, conclude that the residence so purchased is at any stage unsuitable for her, they are at liberty to sell the residence and purchase another residence out of the proceeds, to which the same provisions expressed in this trust shall apply, and any cash balance arising from the sale and purchase shall be invested with the income to be applied (d) above. In exercising their power pursuant to this subclause, my trustees shall act to achieve the sole and ancillary purposes of this trust, and have regard to the priority of MARGARET FRANCES OSWELL, as set out in subclause (h) hereof;

(f) my trustees shall also be at liberty to apply the fund in the payment of a deposit, bond, or lease payments for Margaret Oswell in any hostel or nursing accommodation, notwithstanding that by doing so the capital value of the fund may decrease, the primary object of this trust being to provide a substantial residence for Margaret Oswell for as long as she wishes, which is expected to be for the rest of her life;

(g) when Margaret Francis Oswell shall cease to live in the residence as her principal place of residence, or in any new residence provided in substitution for the previous residence, then the residence, any capital of the fund invested, and any accumulated income shall be held in accordance with the terms of this will.

(h) in carrying out their responsibilities under this trust, my trustees are required to ensure the interests of Margaret Frances Oswell are to take precedence over any interest or expectancy as to net income or capital of any beneficiary to receive an entitlement on the termination of this trust;

(i) any amount paid by MARGARET FRANCES OSWELL pursuant to sub-clause (c) (iii), (iv) and (v) shall be a charge against the fund and repayable to Margaret Oswell or her estate when this trust is wound up;

(j) my trustees of this fund under this trust shall have all the powers available to them at law, and in clause 6 of my will

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3.2.2 I GIVE the sum of $500,000.00 (FIVE HUNDRED THOUSAND DOLLARS) or any lesser sum that is available in my estate unto my trustees, upon trust to create a Trust Fund that qualifies as a special disability trust within the meaning of the Social Security Act 1991, to be known as “the Margaret Oswell SD Trust, for the primary benefit of my daughter Margaret Frances Oswell, the terms of the trust being acceptable to the proposed trustees of the trust AND I DIRECT that the trustees of the said trust be PETER ANTHONY ARCHOS and MARGARET LAURELLE MCNAMARA, solicitors, of the firm Biggs & Biggs.

3.2.3 I give the sum of $10,000.00 (TEN THOUSAND DOLLARS) to my daughter MARGARET FRANCES OSWELL absolutely.

2. The terms of the Margaret Oswald SD Trust be those contained in the draft trust deed annexed hereto marked ‘annexure A’.
3. The legacies of $100,000 (ONE HUNDRED THOUSAND DOLLARS) to each of the deceased’s sons, Simon James Oswell and Christopher John Oswell, in clause 3.1 of the Will be exonerated from the burden or incidence of this order.
4. Interest on the legacies referred to in clause 3.1 of the Will is to be paid at the rate of 4% for the statutory period.
5. The cost of all parties are to be assessed on an indemnity basis, unless otherwise agreed, and paid out of the estate.”