SUPREME COURT OF QUEENSLAND

CITATION:	*Manly v The Public Trustee of Queensland* [2007] QSC 388
PARTIES:	**LOUELLA RENAS MANLY** (applicant) **v** **THE PUBLIC TRUSTEE OF QUEENSLAND** (respondent)
FILE NO/S:	BS344/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Southport
DELIVERED ON:	18 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	10 December 2007
JUDGE:	McMeekin J
ORDER:	**The application is dismissed**
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 two weeks before death – where marriage was pursuant to an agreement – where Will left residuary estate equally to his three sons and the applicant – whether sufficient provision made for the applicant spouse *Succession Act 1981* (Qld), s 41(1) *Evidence Act 1977* (Qld), s 92 *Allen v Manchester* (1922) NZLR 218, cited *Bladwell v David* [2004] NSWCA 170, cited *Borham v Montague* [2006] NSWSC 1289, cited *Carpio v Roncalla* [2000] NSWSC 1000, cited *Elliott v Elliott* (unreported – 29 April 1986 – NSW COA), cited *Helmore v Helmore* [2007] QSC 348, cited *Hovart v Hocking* [2007] QSC 348, cited *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, applied *Luciano v Rosenblum* (1985) 2 NSWLR 65, cited

Marshall v Carruthers [2002] NSWCA 47, cited
McCosker v McCosker (1957) 97 CLR 566, cited
Singer v Berghouse (1994) 181 CLR 201, cited

COUNSEL: R Peterson for the applicant
RT Whiteford for the beneficiaries

SOLICITORS: Collas Moro Ross for the applicant
McCowans for the beneficiaries

[1] This is an application under s 41 of the *Succession Act 1981* by Mrs Louella Aranas Manly in respect of the estate of her late husband, Walter James Manly, who died on 3 June 2005 at the age of 83 years. The deceased was survived by the applicant and his three sons by an earlier marriage who are each beneficiaries under his Will. The applicant and the deceased had no children of their relationship. The application is opposed by the deceased's three sons.

The Will of the Deceased

[2] The deceased made his Will on 23 May 2005, that is, two weeks before his death. By clause 6 of his Will, he made specific bequests. To the applicant he left a motor vehicle and its accessories (valued at $7,000) as well as furniture, books, paintings and other household and domestic effects (estimated by the Public Trustee as having a value of $1,000).[1] To his sons Dennis and Gary, he left his tools (estimated by the Public Trustee as having a value of $1,000), a bush radio, a generator and camping and fishing gear along with a dressing table set (estimated by the Public Trustee as having a value of $100). As well to Dennis he left a chainsaw (estimated by the Public Trustee as having a value of $50). There is no dispute about these bequests.

[3] By clause 7 of his Will the deceased left his residuary estate equally to his three sons and the applicant. The applicant effectively claims to be entitled to the whole of the residuary estate.

Assets in the Estate

[4] Apart from the specific bequests that I have referred to, the assets in the estate (and this constitutes the residuary) known to the Public Trustee are:

(a) a cash sum totalling $106,266.77;

(b) the residence at 28 Allinga Street, Coombabah valued at $370,000.

[5] The Public Trustee estimates that in the absence of any further assets of the estate being identified, further costs and expenses in the range of $500 to $1,000 will be incurred by the Public Trustee to finalise the estate.[2]

[6] The Public Trustee estimates its legal costs in respect of this application as being approximately $19,620.[3]

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1 I assume that para 2(f) of the affidavit of Timothy Feely intends to refer to cl 6.05 of the Will and not cl 6.03

2 Para 5 of Mr Feely's affidavit

3 Para 9 of Mr Feely's affidavit

[7] The applicant's costs in respect of this application are estimated at $75,000. The respondent sons' costs are estimated at between $80,000 to $90,000. I note in passing that if all costs were allowed out of the estate approximately 40 percent of the estate has been expended on legal costs associated with these proceedings.

A Desertion and Re-establishment of a Relationship

[8] The deceased was born in about 1922.[4] He married Norma Smith in about 1945 and there were three children of that marriage:

(a) Ronald, born 23 August 1947;

(b) Dennis, born 3 July 1950; and

(c) Gary, born 26 December 1951.

[9] The deceased and Norma Smith separated in about 1953.[5] The sons remained in their mother's custody following the separation. The deceased provided them with no financial support and effectively abandoned them. Norma Smith has now died[6] but the evidence does not disclose when.

[10] Following the separation, the deceased had no contact with his sons until about 1987 when he contacted them with a view to re-establishing his relationship with them. At that time, the deceased was aged about 65 years and living alone in a two bedroom relocatable home at Labrador at the Gold Coast. He was in receipt of a Veteran's Affairs pension. Ronald was then living in Canberra and Dennis and Gary living in Sydney. Subsequently, all kept in touch through cards and telephone calls. Ronald visited the deceased at his relocatable home on several occasions. Dennis, who was supporting a wife and two daughters, could not afford to travel to Queensland but visited the deceased in 1989 when his mother-in-law paid for a holiday on the Gold Coast. He had arranged leave to visit his father, but his father's death intervened.[7] The deceased visited Gary on two occasions in 1988 and September 2002. Gary was able to travel to Queensland only once to see the deceased because of limited funds.

[11] Some independent evidence as to the developing nature of the relationship between father and sons could be gathered from an earlier Will of the deceased made on 4 December 1990 appointing Ronald as executor and leaving his estate equally to his sons.[8] As will be seen the sons were acknowledged in each succeeding Will over the next 15 years.

The Deceased and the Applicant Marry

[12] The applicant was born in the Philippines on 14 September 1954. She deposes that she was introduced to the deceased by a mutual friend at a time when the deceased was in the Philippines in about 1994 and thereafter their relationship consisted of an exchange of letters and phone calls.

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4 Ex LAM1
5 Affidavit of Ronald James Manly dated 24 August 2006, para 4
6 Affidavit of Dennis Manly dated 12 October 2006, para 37
7 T96/55
8 Affidavit of Dennis Manly dated 12 October 2006, ex B

[13] Mrs Manly says that the deceased first proposed to her in 1997,[9] but she did not agree to marriage. In her evidence she said that she declined the deceased because:

> "I am not sure yet, because I don't know him very well and, secondly, I have my job offer overseas and I give priority to that".[10]

[14] Mrs Manly says that they commenced a sexual relationship in 1998. Mrs Manly deposes that in late 2000, whilst she was working as a nurse on a contract in Saudi Arabia, the deceased proposed again and she accepted.[11] In about October 2001 Mrs Manly came to Australia[12] and commenced to live with the deceased in his relocatable home at Labrador.

[15] The applicant and the deceased married on 8 December 2001. The deceased was then aged 79 years and the applicant 47 years.

[16] At the time of the acceptance of the deceased's proposal and of coming to Australia, it would appear that Mrs Manly was unaware that the deceased in fact had family from a previous marriage.[13]

[17] Mrs Manly deposes in her affidavit that as a result of the proposal of marriage from the deceased in late 2000 that she should quit her job as a contract nurse in Saudi Arabia, come to Australia and marry him, that she terminated that contract in May of 2001, implicitly prematurely, and applied for her "fiancée visa" for Australia.[14] This is not in accordance with her oral evidence and misstates the true position. Under cross-examination, she explained that she commenced her contract in Saudi Arabia in February 1997, that the contracts were for a period of two years and that she renewed the contract in 1999, such that it expired in May 2001. Mrs Manly expressly stated that she finished her contract before coming to Australia.[15]

[18] As I have mentioned, the deceased and Mrs Manly married on 8 December 2001. The ceremony took place at the Magistrates Court at Southport, Queensland. In her affidavit Mrs Manly deposes that the only members of the family to attend the ceremony were Gary Manly with his wife and daughter. She deposed:

> "The rest of the family did not bother to attend".[16]

[19] Presumably the inference sought to be drawn was that the relationship between the deceased and his sons, Ronald and Dennis, was not particularly close.

[20] The sons maintain that their father gave them no notice of the marriage. It is evident from Mrs Manly's oral evidence that she was probably aware of this. According to that oral evidence, Gary and his family were visiting the deceased at the time and it was a coincidence that their visit coincided with the wedding and that the visit had not been scheduled because of the wedding.[17]

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9 T 46/55
10 T 35/30
11 Affidavit of Mrs Manly dated 21 January 2006, para 20
12 T48/10
13 T 36/5
14 Affidavit of Mrs Manly supra, para 21
15 T 47/40
16 Affidavit of Mrs Manly supra, para 22
17 T 34/10

[21] Ronald deposed that he had no knowledge of his father's plans to marry Mrs Manly and that he only found out about the marriage after the event.[18] Dennis deposed that he was not aware of the date of the marriage but merely aware that his father probably wanted to marry someone because he was asked to provide his mother's death certificate. He only found out about the fact of marriage when his brother Gary so informed him.[19] Gary deposes that when he advised his father of the weekend that he would be visiting him, his father told him that he had a wedding to attend to but did not tell him that it was his own wedding to the applicant. He found that out after his arrival.[20] That is in conformity with Mrs Manly's oral testimony.

[22] It is relevant to note Mr Gary Manly's observations of what he saw at the wedding:

> "What I saw was that my father was very, very shaky because of his Parkinson's disease. He basically had to be sort of led to be sat down; led to be – you know, helped sign the paperwork sort of thing. Not in the wrong manner, but, you know, sort of helped for that."[21]

The Agreement to Marry

[23] One of the disputed issues in the case concerned the nature of the relationship between the deceased and the applicant. The sons contended that the marriage between their father and the applicant was pursuant to an agreement that in exchange for marriage the applicant would provide care for the deceased in his latter years. The benefit for the applicant was to obtain Australian residency and the pension due to a widow of a veteran. The applicant strongly denied that there was any such agreement.

[24] The evidence that the beneficiaries put forward as supporting their contention that the marriage came about as a result of an agreement between the applicant and their father fell into three categories:

(a) conversations between the sons and their father;

(b) a conversation between Ms Farrer, a former de facto partner of Gary Manly, and the applicant; and

(c) the contents of an earlier Will of the deceased which became ex 8.

[25] Because of the applicant's denial that there was any such agreement and any such conversation as was alleged by Ms Farrer it is necessary that I make findings as to credit.

[26] Mr Gary Manly's account is that in a conversation with his father that occurred on the weekend that he came to visit his father and learned that he was about to be married, his father mentioned to him that:

> "…he and the applicant had come to a mutual agreement whereby the applicant who was a trained nurse would come to Australia, agree

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18 Affidavit 21 August 2006, para 24

19 Affidavit 27 September 2006, para 37 and see T 96/40

20 Affidavit 22 September 2006, para 30 and see T 101/40-60

21 T 105/50

> to be his wife on the understanding that she would be his carer as he got older. In return she would become entitled to receive Australian citizenship and qualify for a Department of Veteran's Affairs pension".[22]

[27] Mr Ronald Manly says that he learned of this arrangement at a time when his father asked him to prepare a letter to his father's solicitor in Sydney, shortly after the purchase of the Allinga St residence, because his father wanted to make a new Will. He says that at that time his father told him:

> "(a) he had an arrangement with the applicant whereby she was to be his carer and in return she would receive permanent residency in Australia;
>
> (b) he wanted to give the applicant his car and the furniture from the house and the benefit of his Veteran's Affairs pension after his death;
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> (c) my brothers and I were to share my father's tools and other personal items; and
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> (d) the applicant, my brothers and I were to share his residuary estate equally."[23]

[28] Following that conversation, Mr Ronald Manly says he did in fact prepare a letter in accordance with his father's wishes and forwarded it to a solicitor. He said that he had no further involvement in the preparation of a Will and never saw a copy of it.

[29] Ms Farrer gave evidence by telephone. She had previously sworn an affidavit. In the affidavit she deposes that during a conversation with the applicant that occurred in the kitchen of the home that the applicant shared with the deceased and on the occasion of the weekend of their marriage, the applicant told her:

> "That her marriage to Wally was an arranged one. She had a deal with Wally that she was a trained nurse and would look after him until his death. In return she knew that:
>
> (a) she would be entitled to an Australian citizenship;
>
> (b) upon Wally's passing she would receive a Department of Veteran's Affairs pension; and
>
> (c) Wally planned to make a Will where she would receive one-quarter of his estate."[24]

[30] Each of these deponents were cross-examined as to the issue. Each maintained their account of what had taken place save that Ms Farrer was uncertain of some of the details of the conversation at the time of giving her evidence.

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22 Affidavit Gary Manly dated 22 September 2006, para 32

23 Affidavit Ronald James Manly 21 August 2006 para 22

24 Affidavit of Ms Farrer dated 5 October 2006, para 8

[31] In assessing Ms Farrer's evidence, it is necessary to bear in mind that she separated from Mr Gary Manly in August 2005, swore her affidavit on 5 October 2006 and apparently did not have a copy available to refresh her memory on the matters that she had previously deposed to[25]. The effect of her responses in cross-examination was that she believed her recollection would have been better the year before when she swore her affidavit than it was as she was being cross-examined in relation to a conversation that took place in December 2001. Ms Farrer became upset during the course of the cross-examination when her honesty was attacked. She impressed me as endeavouring to do her best to recall accurately the conversation that she had with the applicant. She was not sure, as she gave her evidence, that the statement contained in para (c) quoted above was in fact said then or on another occasion.[26] There was no suggestion that she had any interest in the outcome of the dispute.

[32] The final piece of evidence relied on by the beneficiaries is an earlier Will of the deceased dated 16 April 2003. The beneficiaries, whilst suspecting the existence of that Will, were unaware as to its terms at the time the trial commenced. I gave leave to the parties to examine a file produced by the Public Trustee. I was informed in the course of the hearing that there had been located on the file a copy of this Will which is now ex 8. Clause 8 of that Will provides:

> "I record that the provisions which I have made for my wife Louella Manly are in accordance with a verbal agreement made between us prior to our marriage".

[33] The provisions of the Will of 16 April 2003 are substantially the same as the last Will of the deceased.

[34] I admitted the statements by the beneficiaries as to conversations they had had with their father into evidence, not as going to the truth of their contents but rather under the long-standing practice, recognised by Gibbs J in *Hughes v National Trustees Executors and Agency Co of Australasia Ltd*.[27], of receiving such evidence as going to the reasons why a Will may have been made in the terms it was.

[35] The conversation between Ms Farrer and the applicant is in a different category. It is an admission against interest made by a party to the proceedings.

[36] Mr Whiteford, who appeared for the beneficiaries, submitted that cl 8 of the Will should be received as going to the truth of its contents, the Will being a statement by the deceased and admissible pursuant to s 92 of the *Evidence Act 1977*. Mr Peterson, who appeared for the applicant, made no submission to the contrary and I think the submission is right.

[37] I have no doubt there was an agreement made between the deceased and the applicant prior to their marriage as the beneficiaries allege. Quite apart from the over 30 year age difference and the fact of the deceased's already failing health[28], the coincidence between the provision recorded in the Will of 16 April 2003, the conversations that two of the sons independently had with their father, and the terms of the conversation between Ms Farrer and the applicant (noting that Ms Farrer had

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25 T 110/15

26 T 117/10-40

27 (1979) 143 CLR 134 at 150

28 In this regard I note the applicant appeared at trial as young for her age and healthy

no interest in this matter one way or the other) left me in no doubt that such an agreement was reached.

[38] Further, the lack of notice to the sons of the imminent occurrence of the wedding, and Mrs Manly's lack of knowledge of the existence of the sons prior to coming to Australia says a great deal about the nature of the real circumstances behind the marriage.

[39] Finally, the demeanour of the witnesses, and in Ms Farrer's case the manner in which her evidence was given, strongly confirmed that view. Each of the sons gave evidence in a forthright manner. They appeared to be calm, moderate and balanced individuals. So was Ms Farrer as best one can tell over a telephone line. I was impressed by their evidence.

[40] Whether the applicant was aware that she was to receive one-quarter of the deceased's estate upon his death is not clear. The provisions of the earlier Will suggest she was. However, I am quite satisfied that the arrangement was one that she was to use her skills as a trained nurse to care for the deceased until his death and that in return she would become his wife, be entitled to residency in Australia and entitled to a pension from the Department of Veteran's Affairs.

Credit

[41] It follows from what I have said that the applicant set out to mislead the court on an issue that she considered to be important to the case. That being so I will treat all of her evidence with care. That does not require all that she said to be rejected. Some matters are not contentious, some inherently probable, and some supported by other testimony.

[42] It follows from my finding that I do not accept the applicant's evidence as deposed to at para 21 of her affidavit. I have already commented that it is misleading in that it suggests that the applicant terminated her contract as a nurse in Saudi Arabia, implicitly prematurely, in order to come to Australia and be with the deceased. As well, the applicant there contends:

> "Our love and Walter's sincere need to be with me, made me decide to leave my life in the Philippines and move complete to Australia to be with Walter".

[43] I am quite satisfied that that statement is not true and that it was the agreement that had been struck and the expectation of the benefits that she had bargained for that was the motivation for the applicant leaving the Philippines and moving to Australia.

[44] It is significant that the applicant could not have expected her commitment to the marriage to be a particularly long one, and that she had no expectation of receiving any benefits over and above the right of residency, the pension and its entitlements, and perhaps a quarter share of the deceased's then very modest estate.[29]

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[29] I note that this is the converse of the situation considered by Gibbs J's in *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* at p 148 (CLR) where he held it relevant that the applicant was encouraged by the deceased to base his life on the understanding that certain property would be his

Was the Marriage a Sham?

[45] Despite my finding that the marriage was pursuant to an agreement with acknowledged benefits on both sides it does not follow that the marriage was a sham. It might be better described as a marriage of convenience to both sides.

[46] There was independent evidence available of the relationship between the applicant and the deceased. The affidavits of Mr and Mrs Coxon, Ms Balcomb and Ms Daniel were relied on by the applicant. Oral evidence was given by Mr and Mrs Coxon and Ms Balcomb. I am quite satisfied, based on their evidence, that the applicant fulfilled her side of the agreement. I accept that in every outward way the applicant behaved as a relatively young wife of an elderly husband in poor health ought to have behaved.

[47] Witnesses are consistent in their statements that she attentively cared for the deceased, especially as he developed significant health problems and dementia. According to the applicant, and it is not challenged, significant health problems developed in late 2003. I accept statements to the effect that the applicant was very tolerant of the deceased, kind to him and attentive to his needs. As well, she kept his home and garden. That latter assistance relating to the home and garden, however, probably placed little burden on the applicant over and above that which she would have incurred in looking after herself.[30]

[48] The applicant maintained that by about June 2003[31] she had to give up work to care for the deceased. This is not in accord with her affidavit where she deposed that it was by the end of the year 2003 that she became the deceased's carer on a full-time basis. She asserts that he became very dependent on the applicant for her assistance.[32] The applicant asserts that during 2004 a renal physician, Dr Alan Parmham diagnosed that the deceased was then suffering from chronic renal failure, dementia and Parkinson's disease. By the end of 2004, the deceased had been admitted to the hospital on three occasions and was very ill. According to the applicant, he could hardly move and could not walk by this time. She describes in her affidavit that the deceased would become extremely irritable and aggressive towards her, was bedridden much of the time and totally dependent on her. She says that she did not leave the house at all during this time and her time was devoted completely to his care.

[49] In her oral evidence, the applicant was asked to elaborate on the sort of things that she did for him. She indicated that the deceased could stay in bed for a whole week, and that the tasks she performed included "changing clothes… getting out, getting him out of bed, cleaning himself and feeding him, shower, housework, all the housework".[33]

[50] The applicant was not challenged on this evidence and it is consistent with observations made by Mr and Mrs Coxon, Ms Balcomb and Ms Daniel. I accept that the applicant undertook the duties that she describes and probably increasingly from late 2003.

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30 I have in mind the cross-examination of Mrs Manly at T 53-54.

31 T 53/18

32 Affidavit 22 December 2005, para 29

33 T 40/30

A Gift from a Brother

[51] The deceased received, by way of an inheritance, from the estate of his late brother, Robert, the sum of $312,608.44.[34] Robert died on 7 September 2002. The substantial asset in the deceased's estate, the house property at 28 Allinga Street, was acquired on 24 April 2003 following and as a result of the receipt of that inheritance.

[52] It is common ground that the only contribution that the applicant made to that property was the work that she performed in the form of housework and work in the garden that she describes in her oral evidence. There is no mention in Mrs Manly's affidavit of bringing any significant assets to the marriage. In the course of her oral evidence she referred to having some $4,000 which she described as her "Saudi award".[35] This was expended, apparently on living expenses, in the early part of their relationship.[36]

[53] The deceased relinquished some of the benefit that he received from his brother's estate, namely his one-half interest in certain land located at Mogo in New South Wales, in favour of his sons. The land was valued in the inventory of property of the estate of his brother at $200,000.[37] Due to the efforts of the administrators of the estate (being Mr Ronald Manly and his cousin Mr Terry Sharp) the land was eventually subdivided and sold for $680,000.[38] As a result Dennis and Gary received $100,000 each and Ronald $121,746.92 (although the excess over $100,000 was applied to expenses that Mr Ronald Manly had incurred and the balance distributed between he and his brothers equally[39]).

[54] The balance of the deceased's estate seems to have come from the sale of the relocatable home and money that he had in the bank prior to meeting the applicant.[40]

The Applicant's Health

[55] The applicant claimed that she had "permanent injuries to [her] back which may hinder [her] ability to earn income in the future".[41] She claimed that her "back injuries" required regular medication and physiotherapy and that she was unaware of the likely future costs of treatment. She claimed that she had been warned by her physician that her "back injury is a permanent injury and one that will deteriorate over time". Mr Whiteford took objection to such statements and they were admitted only on the limited basis that they went to the applicant's state of mind.

[56] No evidence was tendered from the applicant's "physician" or any independent medical expert to support these concerns. Indeed, no evidence was opened of a medical nature but in the course of the hearing Mr Peterson tendered three radiological reports that the applicant had obtained, two in June 2005 and one in

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34 Affidavit of Mr Ronald James Manly dated 21 August 2006, para 32

35 T 35/50

36 T51/29

37 See ex RJM8 to the affidavit of Ronald James Manly dated 25 May 2007

38 See ex RJM10 to Mr Ronald Manly's affidavit

39 T 87/35

40 T 85/55-86/10 - the reference to "his first Will" I take it to be a reference to the 1990 Will which is ex B to the affidavit of Mr Dennis Manly of 27 September 2006

41 Affidavit of Mrs Manly dated 22 December 2005 para 44

February 2007.[42] Those radiological reports indicated that there were degenerative changes present in the applicant's lumbar sacral spine described as mild in 2005 and moderate in 2007. There was no evidence of focal disc herniation but some bulging of the annulus at the L3/4, L4/5 and L5/S1 levels.

[57] The significance of this evidence, it was said, was that it impacted upon the applicant's earning capacity. I am not satisfied that that is so. The work that the applicant had done after moving to Australia was cleaning work. She said that she worked as a cleaner in Sun City for three months and then stopped to care for the deceased.[43] Nine months after the deceased's death she returned to work for three months at Beach Haven as a house cleaner.[44] She said that she stopped because of her "back pain. I could not stand up and my legs are numb and in my arms".[45]

[58] I'm not satisfied that the applicant has such a disability. If she has, I would have expected evidence at least from her treating physician and probably from a specialist. The radiological reports, without more, add little to the case. As I have indicated earlier, I am not prepared to rely upon the applicant's unsupported testimony on matters that may be to her advantage in the outcome of these proceedings. I know of no condition in the lumbar spine that would cause the applicant's arms to go numb. A condition preventing her from standing would indicate a very serous disability of which there was no sign at trial. The very absence of the sort of evidence one would expect, if this alleged disability was a significant factor in the applicant's life, says something as to the likelihood of such evidence being available.

The Joice Instructions

[59] The applicant filed an affidavit by a Sydney solicitor, Mr Joice, who deposed that on 13 August 2003 he received instructions from the deceased to make a new Will. He made a note of the conversation he had with the deceased on the bottom of a copy letter. It relevantly reads:

> "All to Louella [i.e. the applicant]. No prvn for boys as has given them Mogo".

[60] No evidence was led that any Will was in fact prepared in accordance with the brief conversation with Mr Joice.[46] Mr Whiteford had raised a query as to whether the affidavit had been sworn in breach of the legal professional privilege that would have maintained between the deceased, his estate and Mr Joice. I was informed from the bar table that the Public Trustee of Queensland had custody of Mr Joice's file and had disclosed it to the applicant's solicitors. Apparently as a consequence, Mr Joice felt free to swear the affidavit that he did.

[61] The relevant point for present purposes is that it would appear that Mr Joice's files were available to be examined and no evidence was led from those files or from

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42 See ex 5, 6 and 7

43 T 39/40

44 T 42/10

45 T 43/20

46 I am mindful of the applicant's affidavit evidence as to the alleged tearing up of a Will when the deceased was upset following a conversation "with one of his sons": para 12 affidavit of 22/12/05. I am not satisfied any such event occurred – it depends on the notion that the sons were placing pressure on their father regarding his Will and so upsetting him.

Mr Joice that any Will came into being. Why that is so is a matter of mere speculation. The evidence is as consistent with the deceased reconsidering the proposed change and determining to leave things as they were as the alternative possibilities.

The Relationship Between the Deceased and His Sons

[62] The tenor of the applicant's evidence was that the deceased's sons were not particularly attentive towards their father and that they placed or attempted to place inappropriate pressure on him so as to influence the terms of his Will in their favour. I reject these claims.

[63] The applicant asserted in her principal affidavit that she "always requested the deceased's sons to come and visit him. They always ignored my requests".[47] I do not accept that there was any such pressure from the applicant, nor do I accept that the sons did not maintain a cordial relationship with their father.

[64] The fact is that there were impediments in the way of the sons seeing a great deal of their father. They lived a good distance apart. There were financial constraints. There were health issues. For example, Mr Gary Manly, on the occasion that he travelled to the Gold Coast in December 2001 and happened on his father's wedding, had to borrow money to purchase a car to make the trip.[48] Mr Dennis Manly has great difficulty travelling.[49] He has osteoarthritis in his left shoulder, right hand and both knees.[50] He has been advised that he requires knee replacement surgery on each knee. He uses a walking stick and did so when he came to give his evidence. He deposed to having great difficulty walking more than 30 metres without having a rest.[51]

[65] Some idea of Mr Ronald Manly's attitude to his father can be gained from the fact that at the time that his father purchased the Allinga Street residence, Mr Ronald Manly travelled from his home at Dalmeny in New South Wales, a journey of some 18 hours, to assist his father in the move. That seems to me to be the action of a very dutiful son.

[66] Each of the sons denied making phone calls demanding that their father make a new Will in their favour, as the applicant asserted in her material. I believe them in those denials.

[67] In any case, there was no admissible evidence that any pressure was placed by the sons on their father. The relevant evidence was at paras 35 and 37 of Mrs Manly's principal affidavit. Passages in those paragraphs were struck out as being inadmissible. When Mr Peterson attempted to lead evidence to establish the matters successfully objected to, the applicant failed to proffer any further admissible evidence. When he asked what the contact between the deceased and his children consisted of, Mrs Manly replied:

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47 Para 37

48 Para 29 of the affidavit sworn 22 September 2006

49 T 96/45

50 Affidavit sworn 27 September 2006, para 16

51 Affidavit sworn 27 September 2006, para 21

> "I have no idea because I only – I only answered the phone and then I give it to my husband".[52]

This is in accord with the evidence given by the sons.

[68] The irony of the situation is that if anyone was in a position to influence the deceased it was the applicant. On her account, the deceased was bedridden much of the time, totally dependent upon her for a reasonably significant period of time and with her day in and day out. She was the one who took him to the Public Trustee to make the new Will of 23 May 2005 although the applicant says she was not aware of the purpose of the visit to the Public Trustee.[53]

The Financial Position of the Applicant

[69] The applicant maintains that she owns no property either in Australia or the Philippines. Mr Dennis Manly deposed to overhearing the applicant telling someone at the wake following his father's funeral that the applicant now owned two houses, one in the Philippines and one in Australia.[54] Ms Farrer deposed that the applicant told her that she, the applicant, owned a house in the Philippines.[55]

[70] The applicant denied having said any such thing as was sworn to by these deponents. I am satisfied that Mr Gary Manly and Ms Farrer did in fact relate accurately conversations that they overheard or had respectively. However, that does not take the matter very far. Without evidence of what any property might be that the applicant holds in the Philippines, its value and her true title to it, it can have no bearing on this application.

[71] The applicant deposed to having minimal savings as at the time of swearing her affidavit (22 December 2005). Those savings were then said to be about $2,000. At that time, she was working as a casual cleaner at the Beach Haven Hotel at Broadbeach earning approximately $270 per week on average. That was in addition to a widow's pension from Veteran's Affairs which she said was worth $260 per week. Her only liabilities were her everyday living expenses. The motor vehicle that was gifted to her in the Will was said to have a value of $7,000 at that time.

[72] In her oral evidence, Mrs Manly said that her pension was now $280 per week. I had the impression from her evidence[56] that the applicant's living expenses did not exceed her pension.

[73] The applicant is entitled to receive free medical care as a result of the Veteran's Widow's Pension which she receives.

Ronald James Manly

[74] Mr Ronald Manly is now aged 61 years. He is a self-funded retiree receiving a pension from the Public Service Superannuation fund of the Australian

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52 T 39/10
53 T42/50
54 Affidavit of Mr Dennis Manly sworn 27 September 2006, para 44
55 Ms Farrer's affidavit sworn 5 October 2006, para 9
56 T 45/1-30

Government. He tendered his 2007 notice of assessment which revealed an average weekly income of $376.[57]

[75] Mr Ronald Manly owns a two bedroom fibro asbestos cottage situated at 2 Harrison Street, Dalmeny which was valued at between $270,000 and $290,000 as at July 2006 and which property is unencumbered. He has moneys in a bank account which he estimated as being $79,000 at the time of swearing his affidavit in August 2006. He owns a motor vehicle worth about $8,000 at that time. His liabilities and expenses were related to the maintenance of his home and his general living and medical expenses.

[76] He has significant health concerns. He deposes that in October 2003 he contracted a serious viral infection which damaged his immune system. Subsequently, he developed chronic fatigue syndrome. He manages that but has not made a full recovery. He is required to avoid stress and limit his physical activities. He has arthritis in both hips and is concerned he will require hip replacements in the future which will cost more than $15,000 per hip.

[77] He is separated from his wife and has been for in excess of five years. He has no children who are financial dependent on him.

Dennis Manly

[78] Mr Dennis Manly is 57 years old. He is married with two children born on 27 January 1980 and 22 April 1985.

[79] Mr Dennis Manly was employed as a factory hand but because of his health was on light duties for the last five years of his employment and was eventually retrenched on 15 September 2006. He now receives a disability support pension of $200 per week. His wife is also unemployed and in receipt of a disability support pension in the sum of $200 per week. Mr Manly's younger daughter, Sarah, lives at home with he and his wife. She suffers an intellectual impairment. She receives a disability support pension of $500 per fortnight. Mr Manly deposes that this is not sufficient to cover her needs and that she is supported to some degree by him and his wife.

[80] Mr Manly has no significant liabilities. His asset position is as follows:

(a) his home at 203 Polding Street, Fairfield West valued at between $300,000 and $330,000;

(b) savings of about $10,900;

(c) a motor vehicle, being a 1999 Toyota RAV 4 valued at $8,830;

(d) a superannuation fund valued at $97,303.34 that he will be able to access after he reaches the age of 60 on 3 July 2010.

[81] Mr Manly has significant health problems. I have previously mentioned his complaints of osteoarthritis and his need to mobilise on a walking stick. He requires bilateral knee replacements costing $38,000. In addition, he suffers from:

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57 Ex 9

(a) gout requiring medication;

(b) high blood pressure requiring medication;

(c) a food allergy requiring him to carry an adrenalin pen at all times;

(d) diabetes requiring daily insulin injections.

[82] I think it evident that Mr Manly has virtually no prospect of obtaining paid employment.

[83] In addition, Mr Manly's wife, Kim, has significant health problems. They include:

(a) insulin dependent diabetes complicated by retinopathy (she is blind in one eye) and nephropathy;

(b) asthma;

(c) high cholesterol;

(d) high blood pressure;

(e) hearing loss requiring hearing aids.

[84] Mr Manly estimates that his wife's medications cost $360 per month. He estimates that his medications cost $240 per month. The combined total is nearly 40 per cent of their income.

Gary John Manly

[85] Mr Gary John Manly is 55 years old. He is a single man. As I have mentioned, he separated from Ms Farrer in August 2005. There is one child of that relationship born 8 July 1994 who lives with Ms Farrer. Mr Manly pays $120 per week child support.

[86] Mr Manly is employed as a maintenance carpenter at a Sydney Hospital where he has been for some 34 years. His average net weekly income in the 2007 tax year was $752.

[87] Mr Gary Manly owns his residence at Chester Hill which is valued at about $330,000 to $340,000, a weekender at Greenwell Point which he says is not lawful to rent which is valued at $250,000 but in respect of which there is a mortgage of $112,853, a motor vehicle worth $20,000 and a superannuation fund valued at 30 December 2006 of $111,347.81.

Relevant Principles

[88] The application is brought pursuant to s 41(1) of the *Succession Act 1981* which provides:

"Estate of deceased person liable for maintenance

> 41(1) If any person (the 'deceased person') dies whether testate or intestate and in terms of the Will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse … the court may, in its discretion, on application by or on behalf of the said spouse … 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 dependent".

[89] The approach that the court should take to applications of this type has been explained by the High Court in *Singer v Berghouse*.[58] There is a two stage process. The first stage concerns the jurisdictional question. The second stages concerns a determination of what provision ought to be made for the applicant if the jurisdictional question is satisfied.

[90] In *Singer v Berghouse* the majority of the court said in relation to the jurisdictional question:

> "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 a legitimate claim upon his or her bounty".

[91] Of particular importance in this case is the significance of the word "proper" in the phrase "proper maintenance and support" that appears in s 41(1). This point was stressed by Dixon CJ and Williams J in *McCosker v McCosker*:[59]

> "As the Privy Council said in *Bosch v Perpetual Trustees* 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 the relative urgency … 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 of life of the applicant, having regard to all the circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testamentary dispositions to the necessary extent".

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58 (1994) 181 CLR 201

59 (1957) 97 CLR 566 at 571-2

[92] Counsel each drew my attention to various authorities they contended assisted in the resolution of the case. The cases largely turn on their own facts as one might expect in a jurisdiction of this type.

[93] Of particular note is the reference that Mr Peterson made to Powell J's dictum in *Luciano v Rosenblum*[60] to the effect that as a "broad general rule" the duty of a testator to a widow is "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 unforeseeable contingencies". I accept Mr Whiteford's submission that the broad general rule has no application to this case. Mr Whiteford referred me to *Elliott v Elliott,*[61] *Bladwell v David,*[62] and *Marshall v Carruthers*[63] in support of his submission. To the same effect is the decision of Macready AsJ in *Borham v Montague*[64] to which Mr Peterson referred me. My reasons for that view I set out later.

The Jurisdictional Issue

[94] Mr Peterson submitted that the applicant had demonstrated a need for further maintenance and support and that the appropriate order was one effectively giving to her the residence at Allinga St and any left over capital sum. In making that submission, he made reference to *Horvat v Hocking*[65] and *Helmore v Helmore*.[66]

[95] Mr Peterson supported this submission with the following observations:

(a) the competing financial needs of all the other beneficiaries are not as compelling as the applicant's position as they each have a residence and money on deposit and are "comfortably placed";

(b) provision was made for them from the deceased's inheritance and the *inter vivos* transfer to them of a little over $100,000 each;

(c) the applicant cannot hold down full-time employment and is unlikely to do so with her spinal chord degeneration.

[96] In my view, the applicant has not discharged the onus of demonstrating that the provision made for her in the deceased's Will was inadequate for her proper level of maintenance and support. I do so for the following reasons.

[97] Firstly, this is a relatively small estate. After deduction of the Public Trustee's costs it is worth only about $457,000. In such a case, what is "proper" must be adjusted to the circumstances: *Allen v Manchester*.[67]

[98] Secondly, there is the arrangement that I have found was in place between the deceased and the applicant. It has considerable bearing on the "totality of the relationship between the applicant and the deceased" referred to as a significant factor by the High Court in *Singer v Berghouse*. By the disposition in the Will the

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60 (1985) 2 NSWLR 65 at pp 69-70
61 Unreported – 29 April 1986 – New South Wales Court of Appeal
62 [2004] NSWCA 170 per Bryson JA at [18] – [19]
63 [2002] NSWCA 47 per Hodgson JA at [63] – [65] and per Young CJ in Eq at [72] – [74]
64 [2006] NSWSC 1289
65 [2007] NSWSC 212
66 [2007] QSC 348
67 (1922) NZLR 218 at 221-222 per Salmond J

applicant has received what she bargained for. Indeed with the windfall from the brother's estate she has received considerably more than that.

[99] Thirdly, there is the short duration of the marriage – a period of about 42 months.

[100] I am, of course, mindful of the care and companionship that the applicant undoubtedly provided to the deceased in the last years of his life. I am mindful too that I should not, through the back door so to speak, permit the arrangement that was in place between the deceased and the applicant, result in an effective contracting out of the legislation.[68] No doubt with the passage of time any arrangement entered into prior to marriage would become of less and less significance. However, I am not satisfied that such a period of time has passed in this case.

[101] Fourthly, there has been no contribution to the acquisition of the principal asset of the estate by the applicant and only some minor contribution to the maintenance of it - but this benefited her as much as the deceased.

[102] Fifthly, despite my view that this is not a case in which the dictum of Powell J in *Luciano v Rosenblum* has any application, the provisions in the will go a considerable way to meeting the test there laid down. I have described the applicant's financial position. She is hardly well off. However, the provision made for her by the deceased would have provided her with a sum of money in excess of $110,000 and a motor vehicle. That sum of money would have been sufficient to provide the applicant with the standard of home that she enjoyed until the deceased received the windfall inheritance from his brother's estate i.e. the relocatable home in the caravan park, and a small capital sum for contingencies.[69] She had, and in my view maintains, a capacity to gain employment to supplement her pension. She has the benefit of a life time pension and free medical care.

[103] Sixthly, in my view, the sons had a legitimate claim upon the deceased's bounty. It could hardly be said, as Mr Peterson submitted, that the sons are "comfortable". Ronald Manly has a home and some savings but against that lives on modest pension and has multiple health problems with the prospect in the near future of undergoing bilateral hip replacements costing in the order of $15,000 per hip.

[104] Dennis Manly has multiple health problems, requires bilateral knee replacements with a potential cost of about $38,000, has a wife who has herself multiple health problems and supports a young daughter with an intellectual impairment. He has a home, modest savings and a superannuation fund that he can access when he turns 60.

[105] Gary Manly is 55 years of age and maintains employment despite multiple health problems. He supports a 14 year old child and is facing substantial medical bills. Given his health problems, Gary's future employment prospects must be considered to be uncertain.

[106] Seventh, there is the fact that the deceased abandoned his children for 34 years. There is no doubt that the distribution of his inheritance from his brother's estate to

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68 That is against public policy: see for example *Lieberman v Morris* (1944) 69 CLR 69; *Re: Willert* [1937] QWN 35

69 The relocatable home sold for either $35,000 or $50,000 in 2003 with site fees at $97 pw: T59/55; 85/55

his sons in his lifetime must be weighed in the balance but I cannot accept that that distribution necessarily discharged all legitimate claims upon his bounty.

[107] Fundamental to Mr Peterson's submissions as I understood them was the notion that the applicant had a legitimate expectation - that ought to be enforced by the court in this application - of receiving the same standard of accommodation as she had enjoyed in the last two years of the deceased's life. I do not accept that there should be any such legitimate expectation in the circumstances that pertain here.

[108] Further, as Mr Whiteford submits, the authorities that Mr Peterson relied on do not support the applicant's contentions here. They are all plainly distinguishable

[109] *Borham v Montague*[70] concerned an estate worth in excess of $1,000,000 and a marriage of about 12 years duration.

[110] *Carpio v Roncalla*[71] involved an allegation on the part of the applicants that the deceased's marriage to the respondent was a sham or a marriage of convenience. There the contention was rejected (and I note significantly because the widow had been appointed executor of the deceased's Will and sole beneficiary and as well had transferred to her by the deceased in his lifetime for a nominal consideration a one-half interest in the house property - the contrary being the case here). The case is distinguishable further because there the widow was the respondent, not the applicant, and had no obligation to justify her entitlements under the Will and the applicants (the deceased's sons and a former wife) had no significant contact with the deceased over a period of 18 years prior to his death.

[111] *Horvat v Hocking*[72] involved an estate worth in excess of $1,700,000 and a marriage of about 14 years duration.

[112] *Helmore v Helmore*[73] involved a relationship of some 20 years and a marriage of nearly 16 years. It was conceded by the executor that the applicant should receive an increased provision from the Will. The deceased had not made provision for the expenses attendant upon a move into a retirement village. The Chief Justice there held that such a move was foreseeable as at the date of making the Will and the applicant was in fact in a care facility at the date of death. Those are very different circumstances to the ones that pertain here.

[113] In my view, the applicant has not demonstrated that the jurisdiction of the court is enlivened to alter the distribution made to her under the Will.

Costs

[114] I wish to say two things about the costs position. The costs are said to have amounted, if one includes all parties, to the sum of approximately $180,000. Firstly, they are out of proportion to the work and difficulty involved in this case. Secondly, there is little point to litigation in these modest estates. The executor is entitled and, save perhaps in a clear case, duty-bound to uphold the Will. Parties and their legal advisors would be well advised to bear this firmly in mind before embarking on litigation in such circumstances.

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70 [2006] NSWSC 1289
71 [2000] NSWSC 1000
72 [2007] NSWSC 212
73 [2007] QSC 348

Orders

[115] The application is dismissed.

[116] I will hear the parties as to the appropriate order as to costs.