

SUPREME COURT OF QUEENSLAND

CITATION: *Cox v Timms* [2009] QSC 329

PARTIES: **MAUREEN COX**
(applicant)
v
ANGELA LOUISE TIMMS
(respondent)

FILE NO/S: BS 10201 of 2008

DIVISION: Trial Division

PROCEEDING: Application on the papers

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 12 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 9 October 2009

JUDGE: White J

ORDER: **Order as per the draft.**

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 the applicant was married to the deceased testator – where no provision was made for the applicant in the testator’s will – whether further and better provision for the applicant’s proper maintenance and support should be ordered out of the estate of the testator pursuant to s 41 of the *Succession Act 1981* (Qld)

Status of Children Act 1978 (Qld), s 7, s 8
Succession Act 1981 (Qld), s 41

SOLICITORS: Attwood Marshall for the applicant
Hopgood Ganim for the respondent

[1] Leslie Wallace Cox (“the testator”) died on 11 January 2008 aged 64 years. He left a will dated 30 November 2007 appointing Angela Louise Timms as executrix and sole beneficiary. She is the adult step-daughter of the testator because her mother, Maureen Cox, married the testator on 24 December 1992. Ms Cox filed her originating application for an order for further and better provision for her proper maintenance and support out of the estate of the testator pursuant to s 41(1) of the

Succession Act 1981 (Qld) on 10 October 2008 just before the expiration of the nine month limitation period for the bringing of such applications.¹

- [2] Probate of the will was granted to the executrix as the sole executor named in the will on 21 April 2009.
- [3] The basis of Ms Cox's application is that there was no provision made for her in the testator's will. By cl 4 the following appears:

“**I MAKE** no provision in this my Will for my wife as she has already been adequately provided for prior to the execution of this my Will, by transferring assets into her sole name and/or by registering real property that I own into both my wife's name and my name as joint tenants.”

Whatever the testator's intention might have been when he included those words in his will he did not carry them into effect.

- [4] The testator died possessed of a house property situated in Dysart, Central Queensland, a portfolio of shares, cash in a credit union account and other monies now in a solicitor's trust account.
- [5] In December 2008 the house property in Dysart was valued at \$410,000. The cash monies either held in or invested through the trust account of the solicitor total \$421,915.13 net of solicitor's costs and the costs of administering the estate to July 2009. The liabilities of the estate are outstanding income tax and payments made from the superannuation and life insurance policies.
- [6] Just before he died the testator purchased a house property in Auchenflower with the apparent intention that the executrix, her children² and Ms Cox would live in it together for mutual support. The house was purchased solely from funds provided by the testator but in the names of the executrix and Ms Cox as tenants in common in equal shares. The settlement of the purchase contract did not take place until after the testator had died. Whilst not an asset of the estate it is a matter which must be taken into account. The relationship between the executrix and Ms Cox is such that they can not share a home.
- [7] The parties have reached agreement subject to one matter. An application made under Part 4 of the *Succession Act* is made on behalf of all potential claimants.³ Ms Cox has two children, the executrix and a son, Philip Miles. He is, therefore, an adult step-son of the testator. He has advised in writing by letter to Ms Cox's solicitors that he does not wish to become a party to the proceedings nor to claim any provision out of the estate and, having been provided with a proposed draft order, makes no objection to that order.
- [8] There is also an “unknown daughter” of the testator. The only knowledge of her existence comes from information provided by the testator. Ms Cox deposes:

“Les did have a daughter however he had no contact with her throughout his life time. I recall he saw her once while we were married. Les was never previously married or involved in any

¹ *Succession Act*, s 41(8).

² She is a sole parent with responsibility for three young children.

³ *Succession Act*, s 41(6).

de facto relationship, nor does he have any surviving parents or siblings.”

[9] The executrix deposes:

“He told me about a daughter he fathered, who was a few years older than me. He did not want anything to do with her, but she had tracked him down some years ago to the Dysart house and apparently asked for money. I do not know whether he gave her any money. When he was dying I asked the deceased if he wanted me to try to find this daughter to tell her of his declining health. He said he did not want me to do this.”

[10] Section 7 of the *Status of Children Act 1978* (Qld) protects an executor who has distributed an estate from any claim by a person who could claim an interest in the estate under Part 4 of the *Succession Act* if the executor “had no notice of the relationship on which the claim is based.” Since the executrix has “notice” of the possible existence of a putative adult daughter of the testator she cannot avail herself of this provision. By s 8 of the *Status of Children Act*, the relationship of father and child for the purpose of an application under Part 4 of the *Succession Act* will be recognised only if:

- “(a) the father and mother of the child were married to each other at the time of its conception or at some subsequent time; or
- (b) paternity has been admitted (expressly or by implication) by or established against the father in his lifetime and, if that purpose is for the benefit of the father, paternity has been so admitted or established while the child was living; or
- (c) a declaration of paternity has been made under section 10 after the death of the father of the child.”

[11] A person who wishes to establish himself or herself as a child of the deceased for the purpose of the claim on the deceased person’s estate under Part 4 of the *Succession Act* may make an application:

“...but such application shall not be proceeded with until the person has obtained a declaration of paternity under that Act [*Status of Children Act*]; and the court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this part.”⁴

[12] It is proposed that an advertisement be placed in the only nationally circulating newspaper in Australia, namely *The Australian*, in a form which is Exhibit GJC-3 to the affidavit of Gregory James Cox filed 5 October 2009. Mr Cox is the executrix’s solicitor. The proposed advertisement describes what is known of the putative daughter and the process of these proceedings. It then provides:

“If the Daughter wishes to oppose the Proceedings, become a party to the Proceedings or to argue that any different order should be made, she should give the written notice of that fact to the Solicitor named below by no later than 5pm on [date which is 28 days after the date of publication of the notice to be inserted].

⁴ *Succession Act*, s 41(9).

If the Daughter does not so give that written notice by 5pm on [date which is 28 days after the date of publication of the notice to be inserted], final Orders will then be made by the Court in the Proceedings without further notice to the Daughter.”

- [13] Neither Ms Cox nor the executrix depose to having any other information which would permit the putative daughter to be traced. The estate is not large and the needs of the two women are considerable and their own resources modest. The testator intended to benefit the executrix, knowing of her needs, and also Ms Cox, although he did not give effect to that intention. The size of the estate does not justify what might prove to be a fruitless search by private investigators who would have virtually nothing on which to base an inquiry. The method proposed to attempt to bring the matter to the attention of any person who might fill the description of “child” of the testator is appropriate.
- [14] It is unnecessary to say too much about the detail of the relationship between the testator and Ms Cox for agreement has been reached between her and her daughter. Although Ms Cox had known the testator since about 1970, when they had known each other briefly in Sydney, it was not until 1990 that they commenced a closer relationship. The testator worked as a drag line operator in the coal mine at Dysart. He was suffering from significant health problems at the time, being overweight and suffering diabetes, high blood pressure, osteoarthritis and migraine headaches. According to Ms Cox, when he was not working he drank excessively. The testator invited her to come to Dysart to live with him on the basis that he would provide her with a home and some security and she would look after him like a housekeeper or nurse. They had separate rooms and she washed, cooked, cleaned and shopped for him. He gave her money for the things that were needed but looked after his own finances.
- [15] They married on 24 December 1992 and their relationship continued along similar lines. The executrix notes that the testator told her that the marriage was formally consummated but that thereafter they lived as they had before. The testator gave Ms Cox a cash card which gave her access to his savings account for the purchase of necessaries. The relationship was somewhat turbulent. In September 2007 the testator was diagnosed with lung cancer and he travelled to Brisbane regularly for treatment. He then commenced more regular contact with the executrix who assisted him in Brisbane. It was shortly thereafter that he executed his last will.
- [16] The executrix was abandoned in 2006 by her husband who lives and works abroad although he has contact with their children for short periods each year. She has been left with no assets although she has a claim in the Family Court. The three children are aged 10, nine and six years. One of the children has special needs which precludes the executrix from working. The executrix has health problems.
- [17] Ms Cox looked after the testator and, notwithstanding the unusual and turbulent nature of their relationship, did so for about 17 years. She receives the aged pension and has an investment account of about \$100,000 as well as her half share in the Auchenflower house. She has a number of health problems.
- [18] The proposed division of the estate whereby the Dysart house property and the testator’s motor vehicle are given to Ms Cox plus assets from a superannuation fund and shares to the value of \$300,000, and the rest and residue of the estate to the

executrix is appropriately beneficial to Ms Cox. She will transfer her interest in the Auchenflower house to the executrix. Those orders will come into being 28 days after the advertisement is inserted in the newspaper if no response is received to it.

- [19] By bringing this application on the papers, considerable costs have been saved to the estate.
- [20] The order is as per the draft.