SUPREME COURT OF QUEENSLAND

CITATION:	*Dawson v Joyner* [2011] QSC 385
PARTIES:	**GARRY DANIEL DAWSON** (Applicant) **And** **LEIGH JAMES JOYNER (as executor of the Will of Daniel Dawson deceased)** (Respondent)
FILE NO/S:	S355 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	12 December 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	5 December 2011
JUDGE:	McMeekin J
ORDER:	**Application is dismissed.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRINCIPLES UPON WHICH RELIEF GRANTED –SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRINCIPLES UPON WHICH RELIEF GRANTED – where applicant not provided for in large estate – where applicant is adult son – where applicant estranged from deceased – where the only other son is the sole beneficiary under the will – where that beneficiary has considerable wealth – where applicant has assets and gainful employment – whether an order for adequate provision should be made *Succession Act* 1981 (Qld) *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494 *Collicoat and Ors v Mcmillan and Anor* [1999] 3 VR 803 *Goodman v Windeyer* (1980) 54 ALJR 470 *Gorton v Parks* (1989) 17 NSWLR 1 *Hughes v National Trustees Executors and Agency Co of*

Australasia Ltd (1979) 143 CLR 134

McCosker v McCosker (1957) 97 CLR 566

Palmer v Dolman [2005] NSWCA 361

Re Sinnott [1948] VLR 279

Singer v Berghouse (1994) 181 CLR 201

Vigolo v Bostin (2005) 221 CLR 191

Walker v Walker (unreported, NSWSC, 17 May 1996)

COUNSEL: GC Crow SC and AM Arnold for the applicant

L Nevison for the respondent

SOLICITORS: Johnson Law Pty Ltd for the applicant

Rees R & Sydney Jones for the respondent

[1] **McMeekin J:** The applicant is Garry Daniel Dawson. He is a son of Daniel Dawson, deceased ("the testator"). He seeks an order under Part IV of the *Succession Act* 1981 (Qld) for further provision out of the estate of his late father.

[2] The respondent, Mr Leigh Joyner, is the executor of the estate of the deceased and opposes the application. He is supported in that opposition by the only other child of the deceased, Ross Hamilton Dawson. There is another beneficiary under the last will of the testator who was not served as it is not intended that her entitlement be affected in any way by any order made.

[3] Without meaning any disrespect I will refer to the family members by their Christian names for ease of reference.

Relevant Principles

[4] The application is brought pursuant to s41(1) of the *Succession Act* 1981 which provides:

> "**Estate of deceased person liable for maintenance**
>
> 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, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, 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 dependant."

[5] The approach that the court should take to applications of this type has been explained by the High Court in *Singer v Berghouse* (1994) 181 CLR 201. There is a two stage process. The first stage concerns the jurisdictional question. That involves determining a question of objective fact, albeit that value judgements are necessarily involved. The second stage concerns a determination of what provision

ought to be made for the applicant if the jurisdictional question is satisfied. That involves an exercise of discretion.

[6] In *Singer* the majority of the court said in relation to these two questions:[1]

> "The first question is, was the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life'? The difference between 'adequate' and 'proper' and the interrelationship which exists between 'adequate provision' and 'proper maintenance' etc were explained in Bosch v. Perpetual Trustee Company Ltd. 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, among 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 legitimate claims upon his or her bounties.
>
> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant was found to have been left without adequate provision for proper maintenance."

General Background

[7] The testator died on 15 April 2009 aged 79 years. He was married but that marriage ended in divorce in 1985-86 and a property settlement reached. The applicant, Garry, fell out with his father at the time of his parents' divorce and remained estranged, at least, for the next 22 years.

[8] Garry is the testator's elder son born 25 January 1962, now aged 49 years, 47 at death. Ross was born the following year on 4 December 1963. Both are married although Garry separated from his wife Wendy in April 2010. They say they are irreconcilable.

[9] Both Garry and Ross have children. Garry's children are now aged 23, 21 and 18 years. They are all in employment. Ross is married with two children aged 26 and 13. The younger child, Kasey, is still a dependent student. Both Garry and Ross are in good health, as are their children, and without special needs. Garry's wife Wendy suffers from migraine attacks which are starting to interfere with her work as an administrative officer.

The Terms of the Deceased's Will

[10] By the terms of his will the testator provided that, apart from a small legacy to a named beneficiary, his estate was to go to his son Ross. No provision was made for Garry.

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1 (1994) 181 CLR 201 at pp209-210 per Mason CJ, Deane and McHugh JJ

The Estate

[11] The principal asset of the estate is a freehold grazing property of some 3000 acres that the parties call "Punchbowl" valued in October 2010 at $1,995,000. It formed part of an aggregation of three properties on which the deceased had conducted grazing operations with his brother Keith, until his death in 2003, and with Ross and his wife Marcia.

[12] The remaining assets of the estate are:

(a) Cash of $141,121.97;
(b) Livestock consisting of 165 head of cattle, the precise value being in dispute but probably around $156,000[2];
(c) 360 shares in AMP Ltd valued at $1,465.20;
(d) A one-third interest in a grazing partnership, "Spottswood Grazing Company", conducted between Ross, his wife Marcia and the testator, with an estimated value of $490,000.[3]

[13] The value of the total assets of the estate is estimated at around $2,800,000.

[14] There are some liabilities said by the applicant to be $32,941.50. That ignores a claim made by Ross for recompense for conducting the estates' grazing interests since the death of the testator in the sum of $63,250. I cannot see why Ross would not be entitled to remuneration for his work and the amount agreed between he and the respondent does not seem inappropriate.

[15] I would asses the net value of the estate at about $2.7M. The respondent contends for about $2.48M. I do not think the exact value matters greatly.

Ross' Relationship with the Testator

[16] Ross stayed on the family property and worked alongside his father until he became incapacitated a few years before his death. He continues to live and work on the properties. He has done so all his life and full time since he left school at age 15.

[17] Until the testator "slipped into dementia" as his general practitioner, Dr Tan, put it Ross appears to have been a dutiful son. He had no contact with him after admission to a home at Yeppoon. He was not asked why in evidence. The state of his relationship with the testator was not identified as a contested issue.[4] While I am conscious that there is material in the medical records that indicate a distancing of the relationship when the testator was still on the property there was no notice that this was to be an issue of relevance and no cross examination to enable Ross to give his version or to alert him to any need to call evidence to support his position. I am not prepared to make any finding that Ross inappropriately abandoned the testator when in need and still having his faculties. Nor do I draw any adverse inference about any lack of contact when institutionalised. There was no evidence that the testator recognised this or suffered because of it.

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2 I doubt that precise values need be determined but evidence of more recent purchases of cattle by Ross probably provide the best guide to values

3 The respondent values the interest at $289,169. I understand the principal difference to lie in the cattle values. I prefer the applicant's approach. I do not think the precise value to be greatly relevant.

4 See Notice of Disputed Issues filed 15 June 2011

[18] It is apparent that the testator was not an easy man to get along with. Ross said, and Garry did not disagree,[5] that the testator was a "hard man" of the "old school" "difficult to live and work with".[6] Despite this they worked together from the time that Ross left school at age 15 years – a period of about 30 years.

[19] Ross and his wife Marcia lived on the principal grazing property "Spotswood" for their entire married lives from March 1989 and only 200m or so from the testator. He did not remarry. Marcia did all his shopping for him and he ate with Ross' family most nights.

[20] Ross has sworn, and it was not contested, that the testator became very difficult to manage in his later years. Ross explained that the testator's behaviour was erratic and "this made things even more difficult and trying" for himself and his family.[7]

[21] Quite apart from the contribution made to the conservation and preservation of the family gazing properties Ross and his wife obviously made a very significant contribution to the testator's welfare and happiness during his lifetime and under trying circumstances.

Garry's Relationship with the Testator

[22] A significant area of debate involved the relationship between Garry and the testator.

[23] Until about age 23 Garry had precisely the same relationship with the testator as did Ross. Both were raised on the family property. Both worked on the property as children being paid very modest sums. Garry was sent off to Agricultural College with the intent that he return and work on the property. Ross stayed on the property. As adults they were paid an award wage together with benefits such as fuel, free meat and milk, accommodation, and groceries to be charged to the testators' account up to $30 per week. While there may be some dispute about the detail of the payments made it seems clear that both worked hard for fairly modest financial returns.

[24] Garry claims that the testator dissuaded him from pursuing alternative career paths as a teacher and cane farmer. The testator disputed this claim in the family law proceedings. While Garry seemed to make some complaint of this he made it plain that his "first love" was working on the land.[8] Whatever be the situation Garry plainly accepted, as a young adult, that he would work in the family grazing business. The testator made it plain to his two sons that the intention was that the aggregation would be built up by their joint efforts to enable their two families to live off the properties and that they would one day inherit the family properties.

[25] On 5 November 1983 Garry and Wendy married and lived on the property, with Garry continuing to work in the family business.

[26] That Garry was an integral part of the testator's plans is clear not only from the direct evidence but also from the purchase in Garry and Wendy's names of a

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5 T1-40/8-10
6 Affidavit filed 10 November 2009 para 23
7 Affidavit filed 10 November 2009 para 25
8 E.g. T1-25/21

property located at Dingo they called "Gordon" or "Sunset" probably in June 1984 for $164,000.[9] The purchase was financed partly by a loan from a financial institution ($71,000) and partly by the testator putting monies into the purchase from the family trust ($8,315), which he controlled, and a substantial sum that he had inherited from his own mother's estate ($63,000). Ross contributed $5,000.[10] It is common ground that Garry made no financial contribution.

[27] Meanwhile the relationship between the testator and his wife was far from a happy one. They separated in April 1984. Garry thought that his father treated his mother inappropriately. The mother brought property settlement proceedings. It would appear that the testator needed to raise money to pay out his, by now, former wife.[11] A letter dated 6 August 1985 was sent by the testator's solicitors to Garry demanding repayment of a "loan" said to be owing in respect of the purchase of the property "Sunset". Garry disputes that any monies were owed in respect of the purchase of the property or that there had been any prior discussion of a loan.

[28] Whether the demand was made in an effort to put the testator in funds, or whether the testator perceived Garry was aligning himself with his mother in the family dispute, or whether the testator genuinely thought that an amount was owing from Garry is difficult to know from this remove. Perhaps all three motivations were relevant. Within days of receiving the letter Garry had left the family property never to return. Garry claims in his evidence that when he challenged his father about the alleged loan he was threatened with violence.

[29] Garry intervened in the family law proceedings between his parents seeking both a declaration that he did not owe any monies in respect of the purchase of "Sunset" and an order that the testator pay him $150,000. The claim for the payment of monies was apparently based on the assertion that by his efforts Garry had "contributed substantially to the production of income and particularly to the improvements to the properties now owned by my father, to the stock and plant and equipment either owned by my father or EH Dawson & Sons, or owned by the Daniel Dawson Family Trust."[12] This contribution was limited to his work as a child and from his return from college in about December 1979 to August 1985 for which he had been paid the award wage with the benefits that I have described.[13]

[30] Eventually a Deed dated 19 November 1986 was executed resolving the dispute between the testator, his wife and Garry. So far as Garry was concerned the Deed recorded the fact of the dispute about the existence of the loan and that the parties agreed that each "severally releases his or her rights to make an application for provision or further provision under the Testator Family Maintenance provisions of the Succession Act 1981" acknowledging that the terms agreed were to their

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9 The Maintenance Agreement executed in 1986 that I later refer to has the acquisition cost as $156,000. I cannot resolve the discrepancy. Again it maters little I think.

10 I take the figures from the testator's affidavit sworn 14 September 1984 in the family law proceedings it being the closest contemporaneous record by someone who was familiar with the facts.

11 There is evidence that the testator was unable to raise a loan to pay his wife following a settlement

12 Affidavit of the applicant filed in the Family Court of Australia sworn 22 August 1985 para 12 at p 84 of the exhibits to the respondent's affidavit (Ecourt doc no 22)

13 I note that many years later, on the death of the testator's brother Keith, Garry and Ross each received an amount of about $126,000 from the Salvation Army to whom the property was left, intended to reflect their work on their uncle's property, "Kiddell Plains".

respective advantages.[14] The respondent contends that whilst the clause is void in so far as it purported to preclude the applicant from pursuing his entitlements under the *Succession Act* 1981[15] it nonetheless informs this Court as to the intention behind the settlement reached – namely that Garry was severing all ties and claims on his father.

[31] It is common ground that thereafter there was no communication of any sort between Garry or his family and the testator until 2007 – a period of 22 years since Garry had left the property.

[32] Garry swore that the relationship was "reformed" in 2007 when he commenced to visit the testator in a nursing home. He had been advised by Ross that their father had suffered from dementia and could no longer stay on the property where he had lived all his life and had been placed in the home. He determined to visit the testator and did so, first at Yeppoon and later at the Wahroonga Retirement Village at Biloela.

[33] Whilst it is clear that Garry did visit the testator on about a dozen or so occasions over a two year period before his death it is far from clear that any relationship was "reformed". The uncontested medical evidence is that the testator was suffering from dementia long before any visit by Garry. Dr Tan treated the testator for 40 years. He recorded in his notes a reference to dementia on 3 March 2006. The testator was admitted to the Biloela Hospital in late March 2006 where he was formally assessed as suffering from the onset of dementia. Dr Tan swore that the testator "slipped into dementia quite rapidly"[16] and in January 2007 was admitted to the Secure Dementia Unit at the Biloela Hospital. He was there assessed by a psychiatrist who diagnosed senile dementia and determined that the testator needed "high permanent and respite care". In February 2007 he was admitted to the home at Yeppoon and in October of that year to the home at Biloela.

[34] Dr Tan's uncontested evidence is that the testator lacked the capacity to form or maintain relationships from January 2007. That is consistent with Mr Joyner's evidence. Apart from the period that the testator resided in Yeppoon Dr Tan treated the testator until his death.

[35] Nothing that Garry said about his visits to his father gave me any reason to think that Dr Tan was in error in his assessment of the patient that he had known for so long. To talk to a man suffering dementia about things that made up his daily life for 70 or more years such as the goings on on the property and cattle prices and the like does not show that the testator recognised his son, recalled their conflict, or was in any way reconciled with him.

[36] From the description that both Garry and Ross gave of their father it seems to me that it would be out of character for him to forgive and forget. He had sworn a declaration in August 1992, explaining his decision to make no provision for Garry in his will prepared then, where he said that he considered that in the Family Court proceedings Garry had obtained benefits that "far exceeded" his then entitlement and that the manner in which the proceedings had been conducted against him by

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14 See cl 7 of the Deed at p168 of exhibits to the respondent's affidavit (Ecourt doc no 22)

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

16 Affidavit of Dr Tan filed 21 July 2011 para 7

his wife and Garry was "malicious, vexatious and partly fraudulently".[17] He had not included Garry in any of his three wills, the last being made on 20 October 2005.

[37] No meaningful reconciliation took place. While he preserved his faculties the testator displayed no wish or intention that he be reconciled with Garry, nor did Garry attempt to be reconciled with the testator.

Garry's Financial Position

[38] Garry works as a drag line operator at the Curragh mine. His earnings depend on the overtime that he does. In the year just completed he earned about $150,000 before tax[18] or about $2050 after tax per week. Despite saying that he enjoys the work and that it is a challenging job he says that he will not stay in the work for "the rest of his life" as he finds night shift work physically demanding and mentally draining. If he does give up that work he would look for a position with a Port Authority, but there was no evidence of the income that he could earn there.

[39] Wendy works as an administrative officer (AO2) with the Department of Employment Economic Development and Innovation and earns $1250 per fortnight. In his first affidavit Garry related that Wendy then worked as a part time librarian earning $350 net per week, that she had so worked for an extended period, and was in good health. I assume that was her situation at the date of death.

[40] Garry estimates his net asset position to be about $740,000. The assessment is complicated by two things. Because of the separation from Wendy, Garry has halved his interest in their jointly owned assets. He assumes that, eventually, there will be a division of property pursuant to the provisions of the *Family Law Act* 1975 (Cth). The respondent submitted that I should not assume that the separation is necessarily permanent pointing out that despite 20 months passing since their separation neither party has taken any step towards resolving property issues, even to the extent of consulting a lawyer. They maintain their joint interest in a partnership in a small herd of cattle. I note that each said that they remained amicable and Wendy retains access to a joint bank account and credit card. I note too that in his evidence the applicant, when pressed about the chances of reconciliation, said "I don't think so"[19] which may suggest some indefiniteness.

[41] The second complicating issue is the value put on the principal asset – a cane farm located at Sharon Road Bundaberg valued a year ago at $960,000. Garry and Wendy have it on the market at $1.4M. So far, there have been no interested buyers.

[42] The parties were content to argue the case on the valuations performed a year ago. I will assume that Garry's net asset position is now at around $800,000, assuming the couple will eventually divorce and divide their assets and allowing some small amount of movement in values over the last year reflecting Garry's evident optimism that the valuer has underestimated the true value of the block. A significant part of Garry's wealth is in his superannuation fund which, of course, he cannot access until he retires. I acknowledge the prospect that Wendy might seek and obtain a greater share of their joint wealth than I have anticipated by reason of

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17 See Ex LJJ3 of the respondent's affidavit filed 30 November 2011 (Ecourt doc no 21)

18 T1-16/57. A gross income of $120,000 is referred to in the first affidavit.

19 T1-15/18

her continuing health problems and poorer earning capacity however she gave no evidence that she intended to do so.

[43] That is Garry's present net asset position. However Garry's net wealth, in the sense of assets to which he had access, at the time of death, was in the order of $1.5M. There is no evidence that at the date of the testator's death the relationship between Garry and Wendy was likely to come to an end. Indeed there is no hint of that in the early affidavit filed by the applicant. That seems to me to be of relevance. The jurisdictional question is to be decided as at the date of death with the notional "wise and just testator" bringing into account all relevant facts and those that are within "the range of reasonable foresight."[20]

[44] The most that can be said is that all marriages might end in divorce but here Garry and Wendy had been married for over 25 years at the date of death and there was no indication that the marriage would not continue. At the highest the prospect that Garry's access to his assets would be halved by reason of divorce was no more than a remote contingency. While contingent events can properly be brought into account, the more remote the less the impact.

Ross' Financial Position

[45] Ross and Marcia are now comfortably off by any standards. It is not necessary to make precise findings. Their net asset position is probably in excess of $9M. The most significant asset they posses is the property "Spotswood" effectively[21] gifted to them by the testator during his lifetime, worth between $6.3M and $7.3M.

[46] Another significant asset is their two thirds interest in the grazing partnership that I have already mentioned, established in 1993 between Ross and Marcia and the testator, the "Spotswood Grazing Company" valued at between about $600,000 and $1M.

[47] They also own the Moura Newsagency which they have on the market. It is probably worth more than $1M.

[48] Their tax returns show a taxable income of about $60,000 each in the financial year ended 30 June 2009 and substantial losses of about $53,000 each in the next year. They plainly conduct their affairs in a tax effective way. It is clear that their businesses are profitable ones albeit that their primary production income will depend on external factors such as cattle prices and seasonal conditions.

Contribution to the Estate

[49] It is common ground that Garry made no contribution to the estate at least since he left in 1985. To that time the highest that it can be put is that his contribution equalled his brother's. Even that may not be right as Garry went away to College for two years and Ross did not.

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20 *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494 per Dixon CJ

21 A 9/50th interest was transferred in 1987. Payments were made on a loan of $100,000 for four or five years thereafter. The balance of the testator's interest was gifted, subject to a life interest in favour of the testator, in February 1993.

[50] In 1985, at age 23, Garry took with him, unencumbered, the Sunset property to which he had made no financial contribution.

[51] Ross on the other hand has made a substantial contribution. Ross has lived and worked on Spotswood and Punchbowl all of his life. He is the third generation of his family to work this land. Whilst he cannot claim to have assisted in their acquisition, there can be no doubt that he has worked daily for over 30 years to preserve and improve these properties. Marcia and their children too have made a contribution. I did not understand these matters to be contested.

[52] In relation to Punchbowl and the grazing partnership, which are the principal assets of the estate, Ross swore that he had made particular contributions which he identified in his affidavit filed 30 November 2011. Again I did not understand these claims to be contested. He and his wife contributed cattle and monies, in the form of a loan of $146,000, to the grazing partnership. Despite Punchbowl being held in the name of the testator the assets of the partnership were applied to the operations there and without charge, for 16 years at least until these proceedings were brought. As he put it "numerous hours" were worked on Punchbowl by him and his family members without charge over in excess of 16 years. The estate was directly advantaged by the testator's cattle being allowed to agist on Spotswood at no charge and by the payment by the partnership of a taxation liability incurred by the testator in the sum of over $36,000.

[53] It needs to be noted as well that in the last several years of his life the testator was not contributing to the work on the property due to the standard of his health.

[54] It is not possible to make any definitive finding as to the contribution made to the existing assets of the estate by Ross and his family in money terms. It was plainly very substantial and would be measured in the hundreds of thousands of dollars.

The Jurisdictional Issue

[55] I turn then to the first question that I must address. Has "inadequate provision" been made from the estate for the "proper maintenance and support" of Garry? In accordance with *Singer* I must have regard, amongst other things, to Garry's financial position, the size and nature of the deceased's estate, the totality of the relationship between Garry and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his bounty.

[56] The respondent argued that each of those matters, save for the size of the estate, were against and not for the applicant. I agree. The respondent submitted[22] that Garry has failed to cross the jurisdictional threshold because:-

(a) he is in a good financial position, is clearly able to meet his financial responsibilities, and has failed to demonstrate any need;

(b) he will continue to maintain a comfortable standard of living if no provision is made;

(c) while the size of the Deceased's estate is not insubstantial, the nature of it is such that it forms part of the agricultural enterprise which the Deceased conducted with Ross since the departure of Garry over 26

22 Para 56 of Ex 4

years ago, and it should not be disturbed when all other factors are considered;

(d) arguably, there was no relationship between the Deceased and Garry;

(e) the relationship between the Deceased and Ross, as his sole beneficiary, was one of years of mutual support;

(f) the very clear agreement reached between the Deceased and Garry was to permanently separate their personal and commercial affairs;

(g) the Deceased was clear as to why he was making no provision for Garry;

(h) Ross and Marcia have made substantial contributions to the build up of the Estate of the Deceased, and Garry has made none.

[57] As will be seen I agree with that submission.

[58] The applicant's submission was that "[i]t cannot be seriously suggested that the Applicant has not satisfied the jurisdictional question or first stage for (*sic*) the process, clearly, in a large Estate, no provision at all is inadequate."[23]

[59] I do not agree that the jurisdictional question is satisfied, where there is a large estate, merely by showing that there is no provision at all, if that was the intent of the submission. No authority was cited for the proposition and it seems to me to run counter to the whole purpose of the legislation.

[60] Consideration of what might be an appropriate provision can be relevant at this stage. The applicant submitted that the following factors were the principal ones that the Court should consider in determining the proper award:-

(i) The considerable wealth of Ross Hamilton Dawson;

(ii) The large Estate;

(iii) The estrangement and reconciliation with Applicant;

(iv) Estrangement with Ross;

(v) The modest financial circumstances of the Applicant.

[61] What this submission assumes, and that I reject, is the supposed "reconciliation" between Garry and the testator and the so called estrangement between Ross and the testator. Conversely, what the submission overlooks is the "the totality of the relationship between Garry and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his bounty". Further it ignores entirely the contribution that Ross has made over his lifetime to the testator's well being and the estate that he left.[24]

[62] The issue for the testator was whether he ought to make provision for a son who had chosen to lead a life separate from him, to whom he had gifted a substantial asset when aged 24 years, each expecting that would end the obligations of a father to a son, the son having done reasonably well in life having assets as at the date of death, jointly with his wife of 25 years, approximating $1.5M in value and a well paid and apparently secure position with a mine grossing around $2,300 per week. His wife, too, was in good health, and in apparently reasonably secure employment. This decision had to be made against a background that the testator had been supported in his business enterprises by his only other son and that what assets he had to leave

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23 Para 1.7 of Ex 3

24 See *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494 at 510 per Dixon CJ; *Goodman v Windeyer* (1980) 54 ALJR 470 per Gibbs J at 473

had been substantially contributed to by that other son over 30 years of effort. As well what domestic life he had came from the comfort provided by that son and his family.

[63] Mr Crow of Senior Counsel, who appeared with Mr Arnold for the applicant, stressed two things. First, he submitted that what is of importance in this case was the implications of the word "proper" in the phrase "proper maintenance and support." Secondly, due regard ought to be had to the concept of the testator having a duty to bear in mind the "advancement of life" of the applicant. He referred me to the well known passage in the judgement of Dixon CJ and Williams J in *McCosker v McCosker*:[25]

> "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". (underlining added)

[64] So far as that passage is concerned I consider that there is no relevant urgency shown. In no sense is Garry in need. Whether he divorces or not he will have sufficient assets to provide a comfortable home. He has secure employment. And the "competing claims upon the bounty of the testator" are significant.

[65] Reference could also usefully be made to the judgement of Callinan and Heydon JJ in *Vigolo v Bostin* (2005) 221 CLR 191 at [114]:

> "The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the 'station in life' of the parties and the expectations to which that has given rise, in other words reciprocal claims and duties based upon how the parties lived and might reasonably expect to have lived in the future."

[66] My statement that Garry is not in need is not intended by me to be an attempt to re-instate the view of the law espoused by Fullager J in *Re Sinnott* [1948] VLR 279 at 280 where his Honour said, "No special principle is to be applied in the case of an adult son. But the approach of the Court must be different ... an adult son is, I think, prima facie able to 'maintain and support' himself, and some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act." There is no requirement in the legislation that an adult son show some special need or claim before becoming eligible to apply. But that is not the same as saying that the fact that an applicant is an adult son and well able to care for and provide for himself is irrelevant.

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[25] (1957) 97 CLR 566 at 571-2

[67] The law was explained by Gibbs J, with whom Mason and Aickin, JJ agreed, in *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, where his Honour said that the general principles "apply to the case of an adult son as well as to other cases. The age of an applicant is however material and if a son is mature, able-bodied and capable of supporting himself he may in those circumstances be in no need of maintenance or support." Gibbs J went on:

> "In some cases a special claim may be found to exist because the applicant has contributed to building up the testator's estate or has helped him in other ways. In other cases a son who has done nothing for his parents may have a special need. This may be because he suffers from some physical or mental infirmity, but it is not necessary for an adult son to show that his earning powers have been impaired by some disability before he can establish a special need for maintenance or support. He may have suffered a financial disaster; he may be unable to obtain employment; he may have a number of dependants who rely on him for support which he cannot adequately provide from his own resources. There are no rigid rules: the question whether adequate provision has been made for the proper maintenance and support of the adult son must depend on all the circumstances ...."

[68] While Gibbs J was not endeavoring to make an exhaustive list of relevant matters I note that none of the factors he mentions apply to Garry's situation. Quite apart from the long estrangement and the circumstance that the applicant was favoured when young and very much against his father's wishes, and the great contribution made by Ross, the simple fact is that as at the date of death Garry had no present or foreseeable need. As Ormiston J said in *Collicoat and Ors v McMillan and Anor* [1999] 3 VR 803, after discussing the acceptance by the majority in *Singer* of a statement by Sheller JA in the Court below that he found it "extraordinary" that the appellant had presented no or scant evidence of what amount would be needed to meet her claims or needs:

> "It follows that those who are capable of supporting themselves comfortably, and are likely to be able to do so for the rest of their lives, will find it difficult to show any breach of moral obligation to make adequate provision for proper maintenance and support."

[69] That, it seems to me, is Garry's precise position. While it is true that applicants who have sufficient means to live comfortably can still succeed in demonstrating a failure of a testator's obligation to them, as was pointed out by Callinan and Heydon JJ in *Vigolo v Bostin* (2005) 221 CLR 191 at [122], such applicants still have to point to evidence demonstrating the basis for the obligation. I see no such evidence here.

[70] Conscious that Garry was adequately set up for what might be termed the necessities of life, the submissions made on his behalf concentrated on the testator's alleged duty to provide for Garry's "advancement of life". There was reference made to the well known comment in *Blore v Lang* (1961) 105 CLR 124, in the reasons of Fullager and Menzies JJ, that the adult daughter's need there was "not for the bread and butter of life but for a little of the cheese and jam."[26] The submission was put that the following matters were "of utmost importance":-

(a) on any reckoning, the estate, the subject of the application, is considerable;

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[26] At 135

(b) that there are only two persons with a claim on the testator's bounty (in the face of a considerable estate);
(c) that his brother, the principal beneficiary, is a man of considerable means;
(d) that he is in modest financial circumstances; and
(e) that the Court should not confine itself simply to making adequate provision for the proper maintenance of the Applicant but, rather, must also very carefully consider in all the circumstances of the case the proper award to provide the proper advancement of life of the applicant.[27]

[71] Essentially what this submission amounts to is an assertion that this was a reasonably large estate, Ross is not in need, there is a great discrepancy in the financial position of the two sons, and the applicant could do with more money. While each point is factually accurate, the last being the attitude of most in the community, these matters, in my opinion, do not enliven the jurisdiction of the Court.

[72] I was taken to many cases where the Court has intervened in estates. I mean no disrespect to the detailed submissions of counsel but the comparison of one factual situation to another is rarely of great assistance. No case to which I was referred matched the precise set of circumstances here. The closest was probably the factual situation in *Vigolo* where the application was dismissed. There the applicant had worked on the family property for many years, fell out with the testator, came to a compromise as to his property claims and entered into a Deed of Settlement whereby he received a significant payment. All this matches Garry's situation in 1986. As Callinan and Heydon JJ observed: "Why it may be asked should he now get more?"[28] The answer that the applicant advances here is that his brother has so much more than he. In my view that is no answer at all.

[73] I should observe that I accept the applicant's submission that the mere fact of the estrangement between Garry and the testator is not the end of the matter. In *Palmer v Dolman* [2005] NSWCA 361 Ipp JA said: "The mere fact of estrangement between parent and child should not ordinarily result, on its own, in the child not being able to satisfy the jurisdictional requirement under the Act."[29] I accept that as an accurate exposition of the law.

[74] In an illuminating discussion in *Collicoat* of the relevant principles in applications under legislation cognate to that which I am considering here[30] Ormiston J said:

> "[43] In my opinion the expression "moral claim" has always been treated as a convenient shorthand expression referring to the right correlative to the duty imposed on testators to make adequate provision for the proper maintenance and support of persons within the class specified. That "moral obligation", as described in *Re Allen* and many later cases, reflects a duty resting on a testator to make not merely adequate

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27 See para 1.6 of Ex 3

28 (2005) 221 CLR 191 at [123]

29 At [110]. I have been referred as well to *Wheatley v Wheatley* [2006] NSWCA 262 at [22]-[23] per Bryson JA; *Channell v Channell* [2011] NSWSC 1144 at[44] per Macready AJ; and *Kay v Archibald* [2008] NSWCA 254 at [94]-[96] per White J

30 Referred to by Young J in *Walker v. Walker* (unreported, NSWSC, 17 May 1996) as "a masterly exposition"

> or sufficient financial provision for members of his or her family in the specified class but also the obligation to measure that adequacy or sufficiency by reference to what is right and proper according to accepted community standards. What is right and proper, and thus what the wise and just testator must do, is not determined by the "character and conduct" of each applicant but by what the testator ought to have felt in duty bound to provide notwithstanding any defects in character or conduct but nevertheless having due regard to the nature of their relationship with and their treatment (whether morally reprehensible or the opposite) of the testator during his or her lifetime. It is only when that behaviour has affected, or (arguably) is perceived to have affected, the testator that he or she is in good conscience entitled to make lesser or greater provision for an applicant than that to which the applicant would have been entitled having regard only to the bare bones of his or her financial needs and circumstances. Taking a practical example, a testator is obliged by reason of the legislation to make greater provision for a daughter who has spent many years at home with the testator than for a daughter who has left home early and thereafter for no good reason has had little or no contact with their parent. Compare Scales' case, above. Even in the case of conduct disentitling the alleged behaviour must be looked at from the viewpoint of the testator and the test has been stated as requiring proof of defects in character or conduct of such a nature "as would ordinarily move a just spouse or father to take them into consideration when making his testamentary disposition": see *Wenn v Howard* [1967] V.R. 91 at 95." (underlining added)

[75] I make no finding here that Garry had any defect of character. He chose to dismiss his father from his life. It is not possible now to determine the rights or wrongs of that decision nor is it necessary to do so. But I have no doubt here that the testator had every right to bring into account the behaviour of Garry towards him, and of his behaviour towards Garry in providing him with a unencumbered property at a very young age that could not but have helped him significantly in life. That he was advanced, and significantly so, by the gift cannot be doubted.

[76] No one factor predominates necessarily in these applications. Here it is not just the fact of the estrangement over so long a time that is relevant. As well there is the taking of a significant advantage early in life from the testator, the acceptance that it was intended that Garry have no further claim on his parent[31], the lack of any reasonably foreseeable need as at the date of death, and Ross' significant contribution to the testator's life and assets that combine to make the testator's decision in my judgement a sound and fair one.

[77] In *Walker v Walker* (unreported, NSWSC, 17 May 1996) Young J said:[32]

> "… Although it is not much mentioned in recent decisions, the older authorities often mention the fact that the Act did not intend to affect freedom of testation except in so far as that freedom had to be abridged in order to ensure that people made proper provision for those who were dependent on them financially or morally…"

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31 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* (1979) 143 CLR 134 at p 148 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.

32 BC9602381- at 31

[78] I can see no reason in justice why the Court should intervene here to abridge the testator's "freedom of testation". In my view the applicant has failed to demonstrate that the jurisdiction of the Court is enlivened.

[79] The application is dismissed. I will hear from counsel as to costs.