

SUPREME COURT OF QUEENSLAND

CITATION: *Alagiah v Crouch as administrator of the estate of Ratnam Alagiah (deceased)* [2015] QSC 313

PARTIES: **SHANTHA DEVI ALAGIAH**
(applicant)
v
TIMOTHY MICHAEL HENRY CROUCH as administrator of the estate of Ratnam Alagiah (Deceased)
(respondent)

FILE NO/S: SC No 3095 of 2015

DIVISION: Trial Division

PROCEEDING: Application – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 November 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Ann Lyons J

ORDERS: **1. The originating application filed on 26 March 2015 is refused.**

2. The respondent is to pay the applicant’s costs of the originating application filed on 26 March 2015 and the application filed on 17 September 2015 from the estate of Ratnam Alagiah on the standard basis.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – PROCEDURE – ORDERS AND OTHER PROCEDURAL MATTERS – COSTS – GENERALLY – where the applicant was unsuccessful in her application for an order extending the time to make a claim for family provision from her former husband’s estate made pursuant to s 41(8) of the *Succession Act* 1981 (Qld) – whether the applicant should pay the respondent’s costs on the standard basis – whether the respondent should pay the applicant’s costs from the estate

Succession Act 1981 (Qld), s 5AA, s 41
Uniform Civil Procedure Rules 1999 (Qld), r 658, r 700A

Fox v Burvill (1955) 92 CLR 334; [1955] HCA 50, followed
Higgins v Higgins [2005] 2 Qd R 502; [2005] QSC 110, cited
Re Lack [1981] Qd R 112, cited
Re Prakash [1981] Qd R 189, cited

Russell v Rindfleish [2002] NSWSC 910, cited
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40,
 cited
Underwood v Underwood [2009] QSC 107, cited

COUNSEL: S M Gerber for the applicant
 R Whiteford for the respondent

SOLICITORS: Speakman Lawyers for the applicant
 Crouch & Co Solicitors for the respondent

Background

- [1] On 1 October 2015, the applicant, Shantha Alagiah, applied pursuant to s 41(8) of the *Succession Act* 1981 (Qld) for an order extending the time to make a claim for family provision from the estate of her former husband, Dr Ratnam Alagiah.
- [2] On 8 October 2015, I refused her application. Counsel provided me with their submissions on costs on 12 October 2015, which were heard on the papers.

Submissions on costs

- [3] The applicant seeks costs for the originating application filed on 26 March 2015 and the application filed on 17 September 2015 from the estate of Dr Alagiah on the basis that the point argued by the applicant, which was that the definition of “maintenance” in s 5AA of the *Succession Act* 1981 (Qld) should be interpreted as a reference to maintenance in s 41 of that Act rather than a reference to the *Family Law Act* 1975 (Cth), was fairly arguable and had not previously been argued or dealt with in the decisions relied upon by the respondent.¹
- [4] In reliance on r 658 and r 700A(2)(b)(iii) of the *Uniform Civil Procedure Rules* 1999 (Qld) and the Court’s inherent jurisdiction,² the respondent seeks an order that the applicant pay its costs of both applications on the standard basis. The respondent argues that the applicant ought to have known from the outset that she was not entitled to commence these proceedings. It is further argued by the respondent that nothing in the *Succession Act* 1981 (Qld) precludes the making of a costs order against an unsuccessful applicant³ and that the estate should not be burdened with the costs of defending a claim which was misconceived and doomed to fail.

What costs order should be made?

- [5] Despite the fact that the applicant was unsuccessful in her application, I am satisfied that this is a case where her costs should be paid from her late husband’s estate.
- [6] In this regard, I note the analogous decision of *Fox v Burvill*⁴ where the High Court held that the unsuccessful applicant, who was the divorced wife of the deceased, was still entitled to her costs from the estate.

¹ *Re Lack* [1981] Qd R 112; *Re Prakash* [1981] Qd R 189.

² *Higgins v Higgins* [2005] 2 Qd R 502, [15].

³ *Singer v Berghouse* (1994) 181 CLR 201, 214; *Underwood v Underwood* [2009] QSC 107, [32].

⁴ (1955) 92 CLR 334, 341.

- [7] I am satisfied that the applicant is in dire financial need as a result of circumstances which are not entirely of her making. It is clear that after she and her husband separated, she resided in India for a protracted period caring for her elderly mother and that contact with her was difficult. Whilst the divorce was finalised through the Family Court process, the applicant was using an informal negotiation process through her solicitors to try and come to appropriate property and financial arrangements.
- [8] I am satisfied that there was an adequate explanation for the delay in bringing the application, as it was made clear that the applicant currently has no permanent place of residence in India, is unable to afford to return from India to Australia and does not have reliable or timely access to telephone and internet services as well as electricity. I am also satisfied that the applicant's solicitors made various attempts to reach a concluded settlement prior to the death of Dr Alagiah. It is also clear to me that the persons acting on behalf of the Bahá'í Faith did not assist in any way in having this matter dealt with expeditiously and, in my view, they were quite a hindrance to the applicant who was endeavouring to pursue her rights.
- [9] Although the applicant does not have a claim under the *Succession Act* 1981 (Qld), the determination by this Court of that application makes it clear that other options now need to be pursued to enforce her property rights and claims against Dr Alagiah's estate. Ultimately, Dr Alagiah's failure to leave a valid will or put appropriate financial and property arrangements in place for his ex-wife caused this application to be made.
- [10] If she had been successful in her application under the *Succession Act* 1981 (Qld), that would have been a fairly straightforward claim. A claim for the loss of an opportunity to make a claim, equitable estoppel or an application for a declaration of a constructive trust are more complicated both factually and legally.⁵ I consider that, in the unusual circumstances of this case, the applicant was justified in adopting the course that she did.
- [11] In all of the circumstances, I am satisfied that the respondent should pay the applicant's costs of the originating application filed on 26 March 2015 and the application filed on 17 September 2015 from the estate of Ratnam Alagiah on the standard basis.
- [12] I also agree that I should make an order striking out the originating application in this matter.

Orders

- [13] The orders of the Court are as follows:
1. The originating application filed on 26 March 2015 is refused.
 2. The respondent is to pay the applicant's costs of the originating application filed on 26 March 2015 and the application filed on 17 September 2015 from the estate of Ratnam Alagiah on the standard basis.

⁵ See *Russell v Rindfleish* [2002] NSWSC 910.