

SUPREME COURT OF QUEENSLAND

CITATION: *Frastika v Cosgrove as executor of the estate of Russell Walter O'Halloran (Deceased)* [2016] QSC 312

PARTIES: **NI LUH AYU EVI FRASTIKA**
(applicant)
v
BRIAN JOSEPH COSGROVE AS EXECUTOR OF THE ESTATE OF RUSSELL WALTER O'HALLORAN (DECEASED)
(respondent)

FILE NO/S: Brisbane No 7998 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 23 December 2016

DELIVERED AT: Brisbane

HEARING DATE: 8 December 2016

JUDGE: Boddice J

ORDER: **1. The application is dismissed.**
2. I shall hear the parties as to costs.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – GENERAL PRINCIPLES – where the applicant was the deceased's wife – where the deceased's estate has a net value of almost one million dollars – where the applicant received \$10,000 and two motor vehicles – where the applicant also received \$150,000 by way of binding death benefit nomination – where the primary beneficiary of the deceased estate is the deceased's disabled granddaughter – where the applicant has made a family provision application – where that application was made outside the statutory time limit – where the applicant explains that delay by reference to her lack of resources and limited understanding of her rights – where the applicant also delayed in prosecuting the application – where that delay is explained by factors unrelated to the applicant – where the applicant submits there is no prejudice to other beneficiaries because the estate is yet to be distributed – where the applicant argues she has good prospects of succeeding in a family provision application – where there is no suggestion the applicant has engaged in unconscionable conduct – where the

applicant applies for leave to proceed with her family provision application out of time – whether it is just and proper for the Court to exercise its statutory discretion to extend time

Bird v Bird [2002] QSC 202, cited
Enoch v The Public Trustee of Queensland [2006] 1 Qd R 144; [2005] QSC 194, applied
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, applied
Vigolo v Boston (2005) 221 CLR 191; [2005] HCA 11, cited

COUNSEL: L J Nevison for the applicant
R D William for the respondent

SOLICITORS: Quinn & Scattini Lawyers for the applicant
Merthyr Law for the respondent

- [1] The applicant makes application for leave to proceed with an application for family provision out of time. The family provision application relates to the estate of Russell Walter O’Halloran, deceased, who died on 12 September 2014 at the age of 70 years. The applicant was the deceased’s wife, having married him on 20 January 2014.
- [2] The application for leave is opposed by the respondent, as executor of the estate of the deceased. At issue is whether the applicant has established that it is just and proper for the Court to exercise its statutory discretion to extend time.¹

Background

- [3] The applicant was born on 20 October 1989. She is an Indonesian National. At the time of the deceased’s death, the applicant was aged 24. She is presently 27 years of age.
- [4] The deceased was born in 1944. He first married in or about 1967, aged 23 years. His first wife died in around 2003. They had two adopted children, a daughter aged 38 years and a son aged 30 years.
- [5] Prior to the death of his first wife, the deceased and his first wife had taken over the care of their adopted daughter’s child who was born on 8 October 2002. The deceased was granted sole parental responsibility for that granddaughter on 21 August 2006. The granddaughter has autism. There is also a suggestion she has been diagnosed with attention deficit hyperactivity disorder and intellectual impairment. She requires a fulltime carer and is likely to for the remainder of her life.
- [6] The applicant first met the deceased in May 2012. She was in Australia on a tourist visa from her homeland, Indonesia. The applicant had been visiting Australia regularly since 2006 as part of a travel agency business she operated from Indonesia. She has a diploma of hotel management in Indonesia, completed in 2010.
- [7] Initially, the applicant was engaged by the deceased to assist in the care of his granddaughter at the deceased’s home. She ceased acting in that role in January 2013.

¹ *Bird v Bird* [2002] QSC 202 at [22].

However, she remained living in the deceased's home. She later changed her tourist visa to the student visa. The deceased subsequently acted as the applicant's sponsor for immigration purposes so that she could obtain a partner visa.

- [8] The deceased was diagnosed with cancer in October 2013. The applicant and the deceased were married on 20 January 2014. At the time of the deceased's death, almost eight months later, they had been in a relationship for approximately 18 months.

The deceased's Will

- [9] The deceased's Will was dated 27 August 2014. It was prepared by solicitors. It revoked an earlier Will dated 13 January 2014. That earlier Will provided for a bequest of \$30,000 to the applicant. The deceased's home, chattels and cash were left to the trustees of a disability trust for the deceased's granddaughter. The residue was left to a testamentary trust.
- [10] Approximately one week prior to execution of the deceased's present Will, the deceased met with the respondent in his capacity as his longstanding accountant. The purpose of the meeting was to discuss estate planning, superannuation and the deceased's Will. At the time of the meeting, the deceased knew his diagnosis was terminal and he had only a short time to live. The applicant was present at this meeting, as was an employee of the respondent.
- [11] During this meeting, the deceased expressed concern that his granddaughter be adequately provided for after his death. The deceased wanted his granddaughter to be the main beneficiary of his estate. The deceased also wished the applicant to receive sufficient funds to complete her further education.
- [12] The deceased agreed to provide a sum to the applicant by way of a binding death benefit nomination from his superannuation. The applicant was also to receive \$20,000 from his estate to assist with set-up costs. He wanted his granddaughter to receive his residence, chattels and personal effects, and the balance of his estate.
- [13] The deceased's Will and the binding death benefit nomination were signed on the same date. The Will made provision for a gift of \$100,000 to a testamentary trust for the benefit of each of the deceased's adopted children. The will also made provision for a gift of \$10,000, held in a joint bank account with the applicant, and two motor vehicles, to the applicant. The rest and residue was left by way of testamentary trust for his granddaughter.

Subsequent events

- [14] After the deceased's death, orders were made in the Federal Circuit Court for the applicant and the deceased's sister to have equal shared parental responsibility for the deceased's granddaughter. Those orders were made as a result of an application filed by the deceased, the applicant and the deceased's sister prior to the deceased's death. The deceased's granddaughter moved to the sister's home. However, his sister was unable to manage and the granddaughter was subsequently placed in foster care.
- [15] On or around 16 October 2014, the applicant received approximately \$150,000 from the deceased's superannuation in accordance with the binding death benefit nomination. The applicant did not use the proceeds for the purpose of funding further study or to set herself

up in Brisbane. The applicant sent the \$150,000 to Indonesia. The applicant alleges the money was used to repay a debt owed by her parents.

- [16] The applicant received \$10,000 from a joint bank account she held with the deceased. Whilst that sum was referred to in the Will, the applicant was entitled to it by survivorship. The applicant also received the two motor vehicles but claims one had been purchased using her funds in any event.
- [17] The applicant later left Queensland. She currently resides in Western Australia.
- [18] The estate has been realised by the respondent. It is yet to be distributed. Its current assets over liabilities value is slightly in excess of \$900,000.

The application

- [19] The applicant filed the application for further provision out of the estate on 14 August 2015, some 63 days after the expiry of the statutory limitation period. The respondent was notified of the intention to make the application one day prior to the filing of that application. The application was not served on the respondent until 21 June 2016, more than 12 months after the expiry of that limitation period.
- [20] The applicant's legal representatives corresponded with the respondent in the weeks following notification of the application. However, there was no correspondence between 8 September 2015 and 20 June 2016. The applicant only filed her supporting affidavit on 6 July 2016.

Applicable principles

- [21] This Court has an unfettered discretion whether to extend the time for making the application. The onus lies on the applicant to establish sufficient grounds. Relevant factors include:
- (a) whether there is an adequate explanation for the delay;
 - (b) whether there would be any prejudice to the beneficiaries;
 - (c) whether there has been any unconscionable conduct by the applicant; and
 - (d) the strength of the applicant's case.²

Applicant's submissions

- [22] The applicant submits there is an adequate explanation for her delay. The applicant says she was initially in shock after the deceased passed away. She subsequently was required to leave the family home. She was concerned about the risk of deportation. Whilst she obtained legal advice she had little understanding of her legal requirements. She also lacked financial resources. She was required to obtain new employment. She later moved interstate.

² *Enoch v The Public Trustee of Queensland* [2006] 1 Qd R 144 at 145 [6]; *Bird v Bird* [2002] QSC 202 at [22]-[25].

- [23] The applicant submits there is no prejudice to any beneficiary. The estate remains in administration and has not been distributed. The substantive beneficiary of the estate is not presently in need of substantial support. The gift for her benefit is held in any event in a special disability trust.
- [24] The applicant submits there has not been any unconscionable conduct on her part and she has strong prospects of success on the substantive application. The applicant is the spouse of the deceased and she had assisted the deceased with his care and the care of his granddaughter. She received little benefit under the terms of the deceased's Will. Whilst she received \$150,000 as a consequence of a superannuation nomination, the whole of that sum has been used to retire debt. She is now impecunious with no contingency funds in circumstances where the deceased wanted to provide for her.
- [25] The applicant submits the estate is not insubstantial. It has a capacity to meet the competing needs without detracting from adequate provision for the primary beneficiary, the deceased's granddaughter. Indeed, the current benefit for the granddaughter exceeds the prescribed Centrelink asset exemption.
- [26] The applicant concedes the granddaughter has a need, although there is no evidence of her long term need, and that the deceased intended his granddaughter to be the primary beneficiary of his estate. However, it is not appropriate to determine those competing entitlements in the present application; they may be resolved at a mediation or trial. The fact the granddaughter has a need is not a reason to deny the applicant her right to proceed with her claim.

Respondent's submissions

- [27] The respondent submits the deceased has not provided an adequate explanation for the delay in instituting the family provision application. Contrary to her assertion that she had limited funds, the applicant received a significant amount of money from the deceased's superannuation within the statutory time period for filing any application for family provision. The applicant could also have availed herself of legal advice within that statutory time period.
- [28] The respondent submits there is prejudice to the primary beneficiary, the deceased's granddaughter. Whilst the estate has not been distributed, if the applicant were granted leave to proceed there is a risk the deceased's adopted children would also make application for further provision out of the estate.
- [29] Finally, the respondent submits the applicant's case lacks strength. The applicant's relationship with the deceased was short and her marriage even shorter. She received a significant financial benefit from the deceased's superannuation. The applicant chose to apply that money to repay debts rather than apply it for her maintenance and support. By contrast, the deceased's granddaughter has significant lifelong disabilities, is under the age of 18 years and is now in foster care. She has a strong competing claim for ongoing maintenance in the context of an estate worth approximately \$900,000.

Discussion

Delay

- [30] There is no doubt the applicant delayed in making the application. Her explanation that she lacked resources and had little understanding of her rights lacks cogency. She was able to avail herself of legal services shortly after expiry of the statutory time period. There is no satisfactory explanation of why she did not avail herself of legal advice within the statutory time period.
- [31] The applicant also failed to prosecute the application diligently. There has been substantial delay between the filing of the application and its service and the provision of affidavit material in support of the application. There is an explanation for that lack of prosecution of the application. Affidavit material filed on behalf of the applicant's solicitors indicates that delay is predominantly due to factors unrelated to the applicant.
- [32] In any event, there is substance in the applicant's submission that the relevant delay to be explained by the applicant is the delay in filing the application. That delay was some 63 days. Whilst that delay was not inordinate or due to deliberately unreasonable conduct on the part of the applicant, the lack of cogency in her explanation for the delay is a factor to be considered in the exercise of the discretion to extend time.

Prejudice

- [33] The estate is yet to be distributed by the respondent. To that extent, there is no prejudice to any beneficiary in granting the applicant an extension of time within which to bring the application. An extension of time would, however, prejudice the primary beneficiary, the deceased's granddaughter. In practical terms, any further provision out of the estate will reduce the funds available for the special purpose trust established by the deceased's Will for her benefit.

Unconscionable conduct

- [34] There is no suggestion the applicant has engaged in unconscionable conduct.

Prospects

- [35] A determination of a family provision claim involves a two stage process.³ The first stage requires a determination of whether the applicant has been left without adequate provision for her proper maintenance. The second stage requires the Court to decide, in that event, what provision ought to be made out of the deceased's estate for the applicant.⁴
- [36] In *Singer*, the process was further enunciated:

“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

³ *Singer v Berghouse* (1994) 181 CLR 201 at 208; *Vigolo v Boston* (2005) 221 CLR 191 at 197 [5] (Gleeson CJ), 212 [56] (Gummow and Hayne JJ).

⁴ *Singer v Berghouse* (1994) 181 CLR 201 at 208.

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 bounty.

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.”⁵

- [37] A consideration of the deceased’s Will, alone, would suggest inadequate provision was made for the applicant, his wife, having regard to the bequests of \$10,000 (which came from a joint account and was therefore the applicant’s in any event) and two motor vehicles (one of which was allegedly purchased using her own funds). However, such a consideration fails to have regard to the applicant’s overall financial position, the totality of her relationship with the deceased, and the size and nature of the deceased’s estate.
- [38] The deceased, as part of the preparation of his Will, expressly provided for the applicant through the execution, at the same time, of the binding death benefit nomination. That nomination provided the applicant with \$150,000. But for that nomination, that sum would have formed part of the deceased’s estate. That amount represented slightly more than 10% of the deceased’s overall net assets.
- [39] In making that financial provision for the applicant, the deceased had specific regard to the applicant’s needs for further education and separate set-up costs in Australia. Whilst the applicant chose to use those funds to settle debts owed by her parents, in determining her application for family provision regard would have to be had to her financial position, including that provision by the deceased.
- [40] In the context of an overall net asset position of slightly more than \$1 million, and a relationship of approximately 18 months duration with a marriage of approximately 8 months duration, the applicant would have difficulty in establishing that the limited provision made for her in the deceased’s Will was inadequate, having regard to the sizable provision made for her through the binding death benefit nomination.
- [41] Such a conclusion is reinforced by a consideration of the competing claims on the deceased’s estate. The primary claim is that of the deceased’s disabled granddaughter for whom the deceased was the primary carer for much of her life and at the time of his death. There is no suggestion the deceased’s granddaughter has a limited lifespan. Her needs, although not identified specifically, are plainly significant. The special trust fund established for her benefit, whilst over the Centrelink exemption value, could not be said to be excessive.
- [42] Balancing those matters there is a real risk the applicant would ultimately fail in satisfying the first stage of the two stage process should an extension of time be granted. In that event, there would be significant legal costs incurred by the estate which the estate has little prospect of recovering from the applicant.

⁵ *Singer v Berghouse* (1994) 181 CLR 201 at 209-210.

Conclusions

- [43] The applicant has not discharged the onus placed upon her of establishing a substantial case for it being just and proper for this Court to exercise its discretion in her favour to extend the time for the bringing of the application for family provision.
- [44] The applicant's explanation for the delay in bringing the application is inadequate. That application has poor prospects of success. That application will result in significant legal costs being incurred by the estate, to the detriment of the estate's primary beneficiary.
- [45] In all of the circumstances I decline, in the exercise of my discretion, to extend the time for the bringing by the applicant of an application for further provision out of the estate of the deceased.

Orders

- [46] The application is dismissed. I shall hear the parties as to costs.