SUPREME COURT OF QUEENSLAND

CITATION:	*Ryan v Harrison* [2020] QSC 267
PARTIES:	**THERESE MARY RYAN** (applicant) **v** **RAMPAI HARRISON** (respondent)
FILE NO:	BS No 7163 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2020
JUDGE:	Martin J
ORDER:	**1. Application dismissed.** **2. The affidavit of Therese Mary Ryan sworn 1 July 2020 be placed in a sealed envelope and marked "Not to be opened without an order of the court".**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – ELIGIBLE APPLICANTS – SPOUSE OR PARTNER – where the applicant filed an application seeking that adequate provision be made for her proper maintenance and support out of the estate of her late former husband – where the respondent seeks an order dismissing the application on the basis that the applicant is not an eligible applicant under the *Succession Act* 1981 – where an application for proper maintenance and support can be made by a "spouse" as defined in s 5AA of the *Succession Act* 1981 – where "spouse" means, *inter alia*, "the deceased's dependant former husband or wife", which includes a person who was, on the deceased's death, receiving, or entitled to receive, maintenance from the deceased – where, at the time of the deceased's death, there was no order from any court providing that the deceased was required to pay maintenance nor was there any contract or agreement between the deceased and the applicant for the provision of maintenance – whether the applicant was entitled to receive maintenance from the deceased, at the time of the deceased's death PROCEDURE – CIVIL PROCEEDINGS IN STATE AND

TERRITORY COURTS – FILING DOCUMENTS AND ACCESS THERETO – where substantial parts of the applicant's affidavit in support of the application contain hearsay, scandalous accusations and irrelevant material – where the respondent seeks for the applicant's affidavit to be sealed and marked "Not to be opened without an order of the court" – whether the affidavit should be sealed and marked "Not to be opened without an order of the court"

Succession Act 1981, s 5AA

Alagiah v Crouch [2015] QSC 281, cited
Chen v Australia and New Zealand Banking Group Limited [2001] QSC 43, distinguished
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, cited
Krause v Sinclair [1983] 1 VR 73, cited
Re Lack [1981] Qd R 112, cited
Re Prakash [1981] Qd R 189, cited
Sarich v Erceg [1984] WAR 11, applied

COUNSEL: RM Treston QC for the applicant/respondent
FG Forde for the respondent/applicant

SOLICITORS: Miller Harris Lawyer for applicant/respondent
Williams Roncolato Lawyers for the respondent/applicant

[1] Therese Ryan has applied for an order under Part 4 of the *Succession Act* 1981 that adequate provision be made for her proper maintenance and support out of the estate of the late Brian Harrison. Rampai Harrison, an executor of the estate, the widow of the deceased and the respondent to Ms Ryan's application, seeks an order dismissing the application on the basis that Ms Ryan is not an eligible applicant under the *Succession Act*.

Part 4 of the *Succession Act* 1981

[2] Part 4 of the *Succession Act* provides a means by which persons who come within defined categories may seek orders for provision from the estate of a deceased person.

[3] An application can be made by, among others, a spouse of the deceased. The word "spouse" is defined in s 5AA of the Act, so far as is relevant for this application, in the following way:

> "(2) However, a person is a ***spouse*** of a deceased person only if, on the deceased's death—
>
> …
>
> (c) for part 4, the person was—
>
> …

(ii) the deceased's dependant former husband or wife or civil partner."

[4] A "dependant former wife" of a deceased person is defined in s 5AA as a person who was, on the deceased's death, receiving, or entitled to receive, maintenance from the deceased.

The case for the executor

[5] Mrs Harrison argues that Ms Ryan was not, at the deceased's death, receiving, or entitled to receive, maintenance from the deceased. It is not contended by Ms Ryan that she was receiving maintenance at the relevant time, thus the question for determination is whether she was "entitled to receive maintenance" from the deceased at the time of his death.

What is the meaning of "entitled to receive"?

[6] This question has been considered on a number of occasions. In *Re Lack*,[1] Dunn J held that the "entitlement" was an entitlement enforceable either by contract or court order.[2] This reasoning was followed by Master Lee QC in *Re Prakash*[3] and A Lyons J in *Alagiah v Crouch*.[4]

[7] Similar legislation was considered in *Krause v Sinclair*,[5] where Tadgell J held that an entitlement to something ordinarily involves a rightful claim or title to it – an established claim as opposed merely to an asserted or alleged one. His Honour said:[6]

> "I return to the words 'entitled to receive'. It is very understandable that the extended definition of a 'widow' should comprehend a woman who otherwise fails to come within it only because an obligation to make payments to her is not being met. That is what I consider the words 'or entitled to receive' are intended to achieve. It is, on the other hand, difficult to discern a reason why the definition should have been intended to include a woman who at the deceased's death was not only not in receipt of payments of alimony or maintenance, but to whom no obligation was then owed to make such payments. It is even less understandable why, if there was such an intention, it was so obscurely expressed by the words 'or entitled to receive'. If it had been intended to include those who were entitled to make a claim for alimony or maintenance, as well as those who had a present title to it, one would expect that to have been clearly expressed. Furthermore, if a former wife who was merely entitled to make a claim for maintenance were included, there would appear to be very limited point in specifying, as has been done, the former wife who was in receipt of payments. Any former wife (at least if she had not remarried) could presumably

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1 [1981] Qd R 112.
2 *Re Lack* [1981] Qd R 112 at 114.
3 [1981] Qd R 189.
4 [2015] QSC 281.
5 [1983] 1 VR 73.
6 *Krause v Sinclair* [1983] 1 VR 73 at 76.

> qualify as one who might make a claim - whether in curial proceedings or not, for the payments envisaged by the definition are not limited to those made payable by the order of a court."

[8] Justice Tadgell noted that his conclusion was supported by the two cases of *Re Lack* and *Re Prakash* referred to above.

[9] A similar conclusion was reached by Wickham SPJ in *Sarich v Erceg*[7] where his Honour held that "entitled to receive" means "having a title to receive" as distinct from having merely a liberty to apply for an order or a liberty to try to negotiate an agreement.[8]

Does the applicant come within the definition?

[10] At the time of the deceased's death, there was no court order which was still operating and which provided that he was to pay maintenance to Ms Ryan. I was directed to an order of the Family Court of Australia made on 1 September 1992 in which, pursuant to the rules of that court, an order was made in the terms of a document entitled "Terms of Settlement". The "Terms of Settlement" recorded that it was the intention of the parties that the orders contained in it be made in "full and final settlement of any right of the husband and/or the wife to property settlement". It goes on to refer to the sale of the matrimonial home and the transfer of certain assets together with the following term:

> "That the husband will pay to the wife the sum of **SIX HUNDRED DOLLARS** ($600.00) per calendar month on the fifteenth day of the month commencing on the fifteenth day of September, 1992 by way of maintenance of the wife.
>
> That the husband will make the payments referred to in the preceding paragraph until the child of the marriage, Siobhan Bridie Harrison, commences school, or until the wife commences full time employment, or until the wife remarries or enters into a permanent relationship whichever first occurs."

[11] Siobhan Harrison commenced school many years ago and the requirement under the order to pay maintenance ceased then.

[12] Ms Ryan also contended that the final term of the settlement assisted her. It provides:

> "That the parties have liberty to apply for further or other orders upon giving fourteen (14) days' written notice to the other."

[13] It is unnecessary to consider whether or not the term "liberty to apply" can properly be taken to allow for applications of a substantive nature or only applications necessary for the working out of an order[9] because it falls within the exclusion from the meaning of "entitled to receive" referred to by Wickham SPJ in *Sarich*.

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7 [1984] WAR 11.
8 *Sarich v Erceg* [1984] WAR 11 at 12.
9 See *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 at 598.

[14] There is no material which suggests that there was any contract or agreement between Ms Ryan and the late Mr Harrison which would bring her within the definition.

Should the application under the *Succession Act* be dismissed?

[15] On the evidence before the court, there is nothing to support a conclusion that Ms Ryan comes within the definition of "spouse" which would allow her to make the application. It was argued on her behalf that her application should not be dismissed and that she ought not be denied the opportunity to improve her position by filing supplementary affidavits addressing the entitlement issue more clearly. Reliance was placed upon the decision of Atkinson J in *Chen v Australia and New Zealand Banking Group Limited*,[10] where her Honour said, with respect to an application to strike out a statement of claim, that the jurisdiction to do so should only be exercised where the plaintiff cannot improve its position by a proper amendment of the pleading. That is not the case here.

[16] Before commencing this litigation, Ms Ryan's solicitors wrote to the solicitors for the deceased's estate in which they claimed an entitlement for Ms Ryan as a former wife of the deceased. In the exchange of correspondence which followed, Ms Ryan was advised, no later than 4 December 2019, that the executor's view was that she was not a "spouse" as defined by s 5AA of the *Succession Act*. This was so, she was told, because she was not entitled to receive maintenance from the deceased. She was further advised that the issue of "entitlement" had been considered in the decisions of *Re Lack*[11] and *Alagiah v Crouch*.[12] In other words, Ms Ryan had been made aware soon after December last year that the executor denied her entitlement to make the application and of the detailed basis for that denial.

[17] Notwithstanding that clear notice, there is no reference in Ms Ryan's lengthy affidavit, either explicitly or implicitly, to any contract or agreement for the provision of maintenance

[18] On her behalf it was also argued that she ought to be afforded the opportunity to investigate the consequences that flow from her assertions that it was the conduct of the deceased that prevented her from applying for maintenance. The affidavit contains many allegations of quite serious misbehaviour and violence, and some assertions that she was unable to apply because of her high levels of fearfulness of the deceased while he was alive.

[19] In her affidavit, Ms Ryan says that she was advised by her treating psychiatrist not to bring applications at certain times. She also swears to having had an intention to make an application to the Family Court of Australia for maintenance in 2018 but that she was unable to do so because of her health. None of that, though, assists her. The mere making of an application would not have brought her within the definition.

[20] She does say that there were times when the late Mr Harrison did provide some maintenance to her outside the terms of the Family Court order. She said this

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10 [2001] QSC 43.
11 [1981] Qd R 112.
12 [2015] QSC 281.

"depended on my financial needs at these times" but, at no time, does she say that any such payment of maintenance was pursuant to any contract or agreement.

[21] Ms Ryan is not a person entitled to bring an application under Part 4 of the *Succession Act* and her application must be dismissed.

Should Ms Ryan's affidavit be sealed up?

[22] Mrs Harrison also seeks an order that the affidavit of Ms Ryan be placed in a sealed envelope and marked "Not to be opened without an order of the court".

[23] The affidavit consists of 210 paragraphs and about 100 pages of exhibits. Substantial parts of it are irrelevant. They relate, in part, to accusations made about persons other than the late Mr Harrison and there are many paragraphs which are no more than distant hearsay. It is not possible to accurately extract any part of it which might have been relevant had the application been able to continue. Of the many scandalous accusations made against the deceased and other unnamed persons, there is an admixture of argument, invention based on hindsight and wishful thinking. Had this matter otherwise been able to proceed, large parts of this affidavit would have been struck out. Given the nature of the accusations against, or reflections upon, persons who are unrelated to a properly constituted application for provision, it is appropriate that the affidavit be sealed up.