SUPREME COURT OF QUEENSLAND

CITATION:	*Re Mac* [2020] QSC 342
PARTIES:	**IN THE ESTATE OF PHUNG THANH MAC DECEASED**
FILE NO:	BS No 1314 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 November 2020
JUDGE:	Martin J
ORDER:	**1. Direct that the applicant is justified in:** **(a) transmitting to Nga Thi Vu, pursuant to s 39A(3)(b) and s 39C of the *Succession Act* 1981, the interest of Phung Thanh Mac in the property situated at 127 Crocus Street, Inala, more particularly described as Lot 291 on RP 78273, title reference 16075091 for $156,052.40 ("transfer value");** **(b) setting off the transfer value of $156,052.40 against the entitlement of Nga Thi Vu to the estate of Phung Thanh Mac, deceased.** **2. Order that the applicant's costs of this Application be paid from the estate of Phung Thanh Mac, deceased, on the indemnity basis.**
CATCHWORDS:	SUCCESSION – INTESTACY AND DISTRIBUTION ON INTESTACY – where the deceased died intestate leaving a relatively small estate – where the applicant has reason to believe that the deceased had four children from a marriage in Vietnam – where there is no clear evidence of how many, if any, of the deceased's children survived or predeceased him – where the deceased's de facto spouse seeks to acquire the deceased's interest in the home they owned as tenants-in-common – where the deceased's de facto spouse is entitled to have transferred to her the deceased's half share of their home on payment of the transfer value – where the deceased's de facto spouse does not have the funds to pay the transfer value – whether the deceased's de facto spouse can take advantage of the set off arrangement in s 39C(4) of the

Succession Act 1981

Succession Act 1981, s 39C

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, applied
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, cited
Lean as liquidator of Trison Australian Pty Ltd (in liq) v Commissioners of the Rural & Industries Bank Ltd (1991) 5 ACSR 455, cited
Perrin v Morgan [1943] AC 399, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, cited

COUNSEL: RT Whiteford for the applicant

SOLICITORS: The Estate Lawyers for the applicant

[1] Phung Thanh Mac died intestate in November 2019. He left a relatively small estate. This application concerns the ability of Nga Thi Vu (his de facto spouse) to acquire his interest in the home they owned as tenants in common.

[2] There are two matters which need to be considered:

(a) How should the possibility that the deceased was survived by more than one child be dealt with?

(b) How does s 39C(4) of the *Succession Act* 1981 apply in these circumstances?

[3] The applicant (the administrator of the deceased's estate) seeks an order under s 6 of the *Succession Act* that he is justified in:

(a) transmitting to Ms Vu, pursuant to s 39(3)(b) and s 39C of the *Succession Act,* the interest of the deceased in the home for $156,052.40 ("transfer value"), and

(b) setting off the transfer value against the entitlement of Ms Vu to the estate of the deceased.

The beneficiaries on intestacy

[4] Nga Vu and the deceased lived in a de facto relationship from September 1994. She is, therefore, a spouse within the meaning of s 5AA of the *Succession Act*.

[5] As Mr Mac died intestate, his estate falls to be distributed under Part 3 of the *Succession Act*. In this case, those who can take under the intestacy are:

(a) his spouse, and

(b) any children who have survived him.

[6] The applicant has engaged a private investigator to find any surviving children but, so far, without success. He does, though, have reason to believe the following:

(a) The deceased had four children from a marriage in Vietnam.

(b) He did not have contact with them during his de facto relationship with Nga Vu.

(c) Ms Vu does not know the names of the children or where they are.

(d) It is possible that any surviving children live in the United State of America. The applicant's solicitor has spoken to the deceased's nephew but, despite having said he would, the nephew has not provided any contact details for the children of the deceased.

[7] The applicant is justifiably concerned that there is no clear evidence of how many, if any, of the deceased's children survived him or predeceased him leaving children who survived him. The evidence is such that it is appropriate for the applicant to proceed on the basis that the deceased was survived by more than one child. That will allow the applicant to distribute the estate on that basis and to make further inquiries so that any surviving child can receive his or her entitlement.

[8] Under Part 3 of the *Succession Act*, Ms Vu is entitled to $150,000 together with any household chattels and, on the basis that more than one child of the deceased survived him, one third of the residue.

[9] The estate consists of the home which the deceased and Ms Vu owned as tenants in common (valued at $310,000) and funds in a trust account to the value of approximately $80,000.

Acquiring an interest in a "shared home"

[10] Sections 39A to 39D constitute Division 3 of Part 3 of the *Succession Act.* They deal with the acquisition of a "shared home". These sections were inserted by the *Succession Act Amendment Act* 1997.

[11] Section 34B defines a "shared home" as meaning a building, or part of a building, designed to be used solely or principally as a separate residence for one family or person.

[12] The "transfer value" of an intestate's interest in a shared home, is defined as the market value of the interest at the date of the intestate's death, less the amount (if any) needed to discharge any mortgage, charge, encumbrance or lien to which the interest may be subject at the time of transfer.

[13] The section which requires examination is s 39C:

> "(1) This section applies if a spouse (the ***resident***) makes an election under section 39A to acquire an intestate's interest in a shared home at transfer value.
>
> (2) On payment of the transfer value adjusted on an equitable basis to apportion any outgoings paid or payable, or rent or other amount received, that are ordinarily adjusted on sale, the resident is entitled to transfer of the intestate's interest.
>
> (3) However—

(a) before payment of the transfer value, the transfer documentation must be properly stamped under the *Duties Act 2001* at the resident's expense; and

(b) the resident is not entitled to a discharge of any mortgage, charge, encumbrance or lien over the intestate's interest in the shared home.

(3A) Subsection (3)(a) has effect despite the *Duties Act 2001*, section 17(2).

(4) **At the resident's option, money that may at the time of transfer be distributed to the resident from the deceased's estate (whether under a will or on intestacy) may be set off to reduce the amount of the transfer value.**

(5) A resident may acquire an intestate's interest in a shared home under this section even if the resident is a personal representative of the intestate.

(6) If production of a document or other assistance by a person (other than the resident or personal representative) is necessary to effect the acquisition, the person must, at the personal representative's request, give the assistance on payment of the person's reasonable costs and outlays by the personal representative." (emphasis added)

[14] Ms Vu:

(a) was the intestate's spouse at the time of his death,

(b) is, under s 39A(1)(b)the "resident", and

(c) has complied with the notice requirements of s 39A.

[15] It follows that she is entitled to have transferred to her the deceased's half share of the "shared home" on payment of the transfer value (approximately $156,000).

The application of s 39C(4)

[16] Ms Vu does not have the funds to pay the transfer value and wishes to take advantage of the set off arrangement in s 39C(4). She wishes to do that by setting off her interest in the deceased's estate against the transfer value.

[17] If s 39C(4) is read so that a person in Ms Vu's situation is required to provide the transfer value without being able to set off the amount to which she is entitled then she cannot do it as she does not have the funds. This is not unique in the case of small estates.

[18] What, then, does s 39C(4) allow?

[19] Section 39C(4) emerged from the amendments made in 1997 which, in turn, arose from the report of the Queensland Law Reform Commission about "Intestacy

Rules"[1]. In the Explanatory Notes to the amending Act it is stated that: "This Bill is based on a number of the Commission recommendations". It goes on to say that, as a result of consultation with various bodies:

> "*Clause 12*, Division 3 was added to the Bill as a result of the consultation. It gives a spouse or de facto spouse an election to acquire the matrimonial home, effectively market value, if they ordinarily resided in it at the time of the intestate's death. This scenario would arise if the title to the matrimonial home was held by the intestate solely in the intestate's name or as a tenant-in-common with the spouse or de facto spouse."

[20] The QLRC recommendations were more generous than the provisions which were inserted into the Act. The Commission recommended that the surviving spouse should receive, among other things, a statutory legacy of $100,000, the matrimonial home, and a sum of money, not exceeding $150,000, sufficient to discharge the capital and interest owing at the date of the death on any mortgage of the matrimonial home. Nevertheless, the intention was that a surviving spouse should be able to have the matrimonial home registered in his or her name.

[21] The QLRC identified a problem which arises with respect to a matrimonial home:

> "Those framing intestacy rules have found difficult the question of what should be done about the matrimonial home. One of the difficulties is that in Australia the matrimonial home is very often vested in the spouse is as joint tenants so that the title passes automatically to the surviving spouse on the death of the first spouse to die. That may have contributed to the omission of the matrimonial home from intestacy schemes. But most intestacy schemes provide that the surviving spouse is given the right to <u>purchase</u> the matrimonial home.
>
> There is some suggestion that the amount of the statutory legacy reflects the cost of a modest home in the jurisdiction. These provisions appear to be based on the assumption that the matrimonial home has not passed by survivorship to the surviving spouse, which ignores the fact that the matrimonial home is often held in joint tenancy.
>
> In any case if the purpose of the statutory legacy is merely to enable the surviving spouse to acquire the family home, and that legacy will be exhausted by the purchase, the spouse is left with the home but without the means to remain living in it." (emphasis in original, citations omitted)

[22] The generosity recommended by the QLRC did not find its way into the *Succession Act.* The "statutory legacy" became $150,000 (s 35 and Schedule 2) but the interest in the matrimonial home or "shared home" had to be acquired.

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1 Queensland Law Reform Commission, *Intestacy Rules* (Report No 42, June 1993).

[23] At common law, any material relevant to context may be considered when construing a statute. Similarly, s 14B of the *Acts Interpretation Act* 1954 allows reference to particular material in defined circumstances.

[24] The position at common law was described in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[2] where Brennan CJ, Dawson, Toohey and Gummow JJ said:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act* 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, **if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.**"[3] (emphasis added, citations omitted)

[25] To somewhat similar effect is s 14B(1) of the *Acts Interpretation Act*:

> "(1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—
>
> …
>
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result;"

[26] How then, in the light of QLRC report and the Explanatory Note, should s 39C(4) be read?

[27] The words "money that may at the time of the transfer be distributed to the resident" should not be construed as being confined to money or cash that is in the hands of the resident. The word "may" should be construed in its permissive sense, that is, it identifies money which is able to be distributed to the resident at the relevant time

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2 (1997) 187 CLR 384.

3 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. This approach has been repeated many times by the High Court, eg, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519, [39] and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368, [14].

but need not be distributed if it is used as a set off against the amount of the transfer value.

[28] This construction is further informed by the word "money". The term "money" itself is commonly regarded as being one which does not bear a single precise meaning in the eyes of the law. The meaning of the term depends on the context in which it is used.[4] For example, in the context of testamentary instruments (not this context) the term can take on a number of possible meanings to include all the testator's personal property and sometimes, even all real and personal property.[5]

[29] In the light of the QLRC Report and the Explanatory Note it would be inconvenient, let alone improbable, if Ms Vu could not obtain sole ownership of the shared home by setting off the statutory legacy due to her. The only way for her to generate the funds necessary to pay the transfer value would be to sell the house. That would be a nonsense. The construction proposed by the applicant avoids the inconvenience or improbability of result which a strict construction might impose.

Orders

[30] The applicant, therefore, is entitled to the direction he seeks under s 6 of the *Succession Act*:

> "The applicant is justified in:
>
> (a) transmitting to Nga Thi Vu, pursuant to s 39A(3)(b) and s 39C of the *Succession Act* 1981, the interest of Phung Thanh Mac in the property situated at 127 Crocus Street, Inala, more particularly described as Lot 291 on RP 78273, title reference 16075091 for $156,052.40 ("transfer value");
>
> (b) setting off the transfer value of $156,052.40 against the entitlement of Nga Thi Vu to the estate of Phung Thanh Mac, deceased."

[31] I order that the applicant's costs of this Application be paid from the estate of Phung Thanh Mac, deceased on the indemnity basis.

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4 *Lean as liquidator of Trison Australian Pty Ltd (in liq) v Commissioners of the Rural & Industries Bank Ltd* (1991) 5 ACSR 455 at 459.

5 *Perrin v Morgan* [1943] AC 399.