SUPREME COURT OF QUEENSLAND

CITATION:	*AC v The Department of Children, Youth Justice & Multicultural Affairs & Ors* [2021] QSC 64
PARTIES:	**AC** (applicant) **v** **THE DEPARTMENT OF CHILDREN, YOUTH JUSTICE & MULTICULTURAL AFFAIRS** (first respondent) **XC as Executor of the Will of BM, deceased** (second respondent) **XC as the representative of the estate of AM, deceased** (third respondent) **XC as the representative of the estate of AF, deceased** (fourth respondent)
FILE NO/S:	BS No 11802 of 2020
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	26 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2021
JUDGE:	Williams J
ORDER:	**1. Paragraphs 2, 3 and 4 of the amended originating application dated 2 March 2021 are dismissed.** **2. In relation to costs:** **(a) if the parties agree on an appropriate order as to costs, a draft order should be provided to my Associate.** **(b) if costs cannot be agreed, then each party file and serve submissions in relation to costs within seven days.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – ADOPTION – DISCHARGE OF ORDER – where the applicant was adopted by his maternal grandparents in 1951 – where the applicant maintained a close relationship with his biological

mother for his entire life, until her death – where the applicant has not received any significant provision from his biological mother's estate – where the applicant seeks to discharge the adoption under s 219(1)(c) of the Adoption Act 2009 (Qld) (the Adoption Act) so that he is eligible to bring a family provision application in his biological mother's estate – where s 219(1)(c) of the Adoption Act allows the Court to discharge an adoption order if there are "exceptional circumstances" – whether the final adoption order made in August 1951 relating to the applicant be discharged

Adoption Act 2009 (Qld), s 5, s 6, s 9, s 214, s 219, s 220, s 221, s 222, s 223, s 224, s 225, s 226

Adoption of LVH [2014] NSWSC 1902, cited
AED v Registrar-General of Births, Deaths and Marriages; AED v GWK & Anor (2019) 2 QR 611; [2019] QSC 287, cited
MJD v Chief Executive, Department of Communities, Child Safety, and Disability Services, Adoption Services & others [2015] QSC 139, cited
Re B (Adoption Order: Jurisdiction to Set Aside) [1995] 3 All ER 333, cited
Re Gordon (a pseudonym) (No 2); Application to discharge adoption order [2020] NSWSC 673, cited
Re Susan [2009] NSWSC 592, cited

COUNSEL: C A Brewer for the applicant
C Diefenbach (sol) for the first respondent
A C Harding for the second, third and fourth respondents

SOLICITORS: McNamara Law for the applicant
Office of the Director of Child Protection Litigation for the respondents
Cockburn Legal for the second, third and fourth respondents

[1] The applicant has commenced proceedings by way of an amended originating application seeking various orders. This includes certain relief under the *Adoption Act* 2009 (Qld) (Adoption Act) and the *Status of Children Act* 1978 (Qld) (paragraphs 2, 3 and 4 of the amended originating application) and relief against the second respondent under the *Succession Act* 1981 (Qld) (Succession Act) (in paragraphs 5, 6 and 7).

[2] By orders made by consent on 13 January 2021, the hearing of paragraphs 2, 3 and 4 of the amended originating application was listed before me on 2 March 2021 with the hearing in respect of paragraphs 5, 6 and 7 of the amended originating application adjourned to a date to be fixed.

[3] The relief sought in paragraphs 2, 3 and 4 of the amended originating application is as follows:

"2. Pursuant to s225 of the *Adoption Act* 2009 (Qld), the final adoption order made on 23 August 1951 relating to the Applicant be discharged, on the grounds set out in s219(1)(c) of the *Adoption Act* 2009 (Qld).

3. Pursuant to s225(5)(b) of the *Adoption Act* 2009 (Qld), and s42 of the *Births, Deaths and Marriages Registration Act* 2003 (Qld), the Register of Births be corrected to identify [BM] as the mother of the Applicant.

4. Pursuant to s10 of the *Status of Children Act* 1978 (Qld), a declaration that [BM] was a parent of the Applicant."

Legislative scheme

[4] The relevant provisions of the Adoption Act are set out below.

[5] Section 5 states:

"**5 Main object of Act**

The main object of this Act is to provide for the adoption of children in Queensland, and for access to information about parties to adoptions in Queensland, in a way that—

(a) promotes the wellbeing and best interests of adopted persons throughout their lives; and

(b) supports efficient and accountable practice in the delivery of adoption services; and

(c) complies with Australia's obligations under the Hague convention."

[6] Section 6 states:

"**6 Guiding principles**

(1) This Act is to be administered under the principle that the wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life, are paramount.

(2) Subject to subsection (1), this Act is to be administered under the following principles—

(a) the purpose of an adoption is to provide for a child's long-term care, wellbeing and development by creating a permanent parent-child relationship between the child and the adoptive parents;

…

(d) a child should be kept informed of matters affecting the child in a way and to an extent that is appropriate, having regard to the child's age and ability to understand;

…

(g) a child's adoptive parents have the primary responsibility for the child's upbringing, protection and development;

(h) an adopted child should be cared for in a way that—

(i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's adoption; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;

…

(j) although a final adoption order changes legal relationships, it may be in an adopted child's best interests for—

(i) the child's emotional connections with members of the child's birth family to continue; or

(ii) the child to have ongoing contact with members of the child's birth family; or

(iii) the child or the child's adoptive parents to exchange information with members of the child's birth family."

[7] Section 9 states:

"**9 References to child's wellbeing or best interests**

Unless a contrary intention appears, a reference in this Act to a child's wellbeing or best interests is a reference to the child's wellbeing or best interests through both childhood and the rest of his or her life."

[8] Division 6 is headed "Effect of final adoption order". Section 214 states:

"**214 Effect on relationships**

(1) This section applies on the making of a final adoption order for the adoption of a child (the ***adopted child***) by a person (the ***adoptive parent***).

(2) The adopted child becomes a child of the adoptive parent and the adoptive parent becomes a parent of the adopted child.

(3) The adopted child stops being a child of a former parent and a former parent stops being a parent of the adopted child.

(4) Other relationships are determined in accordance with subsections (2) and (3).

(5) A former guardian stops being a guardian of the adopted child.

(6) A former adoption order stops having effect.

(7) Despite subsections (3) to (6), if the final adoption order is for the adopted child's adoption by the spouse of a parent of the adopted child, the relationship between the adopted child and that parent is not affected.

(8) Also despite subsections (3) to (6), for the purpose of a law relating to a sexual offence for which relationships are relevant, a former relationship continues, despite the final adoption order, in addition to other relationships created by the order.

(9) This section applies subject to another law that expressly distinguishes between adopted children and other children.

…"

[9] Division 7 is headed "Discharge of final adoption order". Sections 219 to 226 are relevant and state as follows:

"**219 Grounds for discharge**

(1) A final adoption order may be discharged on any of the following grounds—

(a) the order was made or something was done for the purpose of making the order—

(i) because of a false or misleading document or representation; or

(ii) because a person acted fraudulently or used undue influence on another person; or

(iii) in another improper way;

(b) a consent required for the adoption was not given freely and voluntarily by a person with capacity to give the consent;

(c) there are other exceptional circumstances that warrant the discharge.

(2) For this section, a person used ***undue influence*** on another person if the first person—

(a) used or threatened to use force or restraint against the other person; or

(b) caused or threatened to cause injury to the other person; or

(c) caused or threatened to cause any other detriment to the other person.

220 Who may apply

Any of the following persons may apply for a final adoption order to be discharged—

(a) the adopted person, if the adopted person is an adult;

(b) a birth parent of the adopted person;

(c) an adoptive parent of the adopted person;

(d) the chief executive.

221 How to apply

(1) An application for the discharge of a final adoption order must be made to the Supreme Court.

(2) The application must state the ground on which it is made.

(3) As soon as practicable after filing the application in the court, the applicant must serve a copy of it on each party to the adoption and, if the applicant is not the chief executive, on the chief executive.

(4) A served copy must state where and when the application is to be heard.

(5) A copy served on a person who is a party to the adoption, other than the adopted person, must also state that the application may be heard and decided even though the person does not appear in court.

(6) The court may dispense with the requirement to serve a copy of the application on a person who is a party to the

adoption, other than the adopted person, if the court is satisfied the applicant—

(a) can not establish the person's identity after making all reasonable enquiries; or

(b) can not locate the person after making all reasonable enquiries.

222 Respondent

(1) A person, other than the chief executive, served with a copy of the application is a respondent in the proceeding.

(2) If the chief executive is not the applicant, the chief executive may apply to the court to be included as a respondent in the proceeding.

223 Hearing not to be in public

(1) The hearing for the proceeding is not open to the public.

(2) However, the court may permit a person to be present during the hearing if the court is satisfied it is in the interests of justice.

224 Hearing of application in absence of party

(1) The court may not hear or decide the application unless the adopted person or a lawyer representing the adopted person appears in the proceeding.

(2) Otherwise, the court may hear and decide the application in the absence of a person who is a party to the adoption only if—

(a) the person has been given reasonable notice of the hearing and failed to attend or continue to attend the hearing; or

(b) the court dispenses with the requirement to serve a copy of the application on the person under section 221(6).

(3) Subsections (1) and (2) do not limit the court's jurisdiction to exclude a person from a proceeding.

225 Court orders

(1) The court may discharge the final adoption order only if satisfied of a ground mentioned in section 219.

(2) If the applicant is not the adopted person, the court must not discharge the order if it considers the discharge is likely

to be contrary to the adopted person's wellbeing and best interests.

(3) The order may be discharged even if the adopted person is an adult.

(4) If the adopted person is a child and has any views about the proposed discharge and is able to express the views, having regard to the child's age or ability to understand, the court must consider the views.

(5) If the court makes an order discharging the final adoption order, it may also make any other order it considers appropriate in the interests of justice or to ensure the adopted person's wellbeing and best interests including, for example, an order about—

(a) the ownership of property; or

(b) the adopted person's name; or

(c) if the adopted person is a child, custody or guardianship of the child.

226 Effect of discharge

(1) On the making of an order discharging the final adoption order (the ***discharge order***), the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the final adoption order had not been made.

(2) However, the making of the discharge order does not affect—

(a) anything lawfully done, or the consequences of anything lawfully done, while the final adoption order was in force; or

(b) a right, privilege or liability acquired, accrued or incurred while the final adoption order was in force.

(3) The discharge order does not affect a consent given to the child's adoption unless the court decides otherwise.

(4) For the purpose of a law relating to a sexual offence for which relationships are relevant, a relationship between a child and another person that existed immediately before the making of the discharge order continues, despite the discharge order, in addition to other relationships that exist because of the discharge order.

(5) This section applies subject to an order under section 225(5)."

Applicant's position

[10] The applicant (the adopted child, referred to in these reasons as AC or the applicant) expressly states that "the applicant seeks to discharge the adoption so that he is eligible to bring a family provision application in his biological mother's estate". Accordingly, the applicant seeks to have the relief in respect of his adoption decided prior to consideration of the part of the originating application under the Succession Act.

[11] The applicant relies on the power in s 219(1)(c) of the Adoption Act which allows the Court to discharge an adoption if there are "exceptional circumstances".

[12] Relevant background relied upon by the applicant includes:

(a) The applicant was adopted by his maternal grandparents in 1951 when "the [G]overnment policy of the day was that unwed single mothers were required, and often forced, to give up children born out of wedlock for adoption".

(b) The applicant maintained a close relationship with his biological mother for his entire life, until her death.

(c) The applicant's biological mother died in 2020. Her executor is the second respondent.

(d) Both adoptive parents are also deceased. The estates of the applicant's adoptive parents are the third and fourth respondents.

[13] The first respondent to the proceeding is the relevant Queensland Government Department, now titled the Department of Children, Youth Justice and Multicultural Affairs.

[14] In evidence before the Court is a copy of the applicant's original birth certificate which shows that he was born in December 1950 and his biological mother (referred to in these reasons as BM) was 19 at the time of his birth and was single.[1]

[15] Two years later when she was 21, BM married and subsequently adopted a child (referred to in these reasons as XC). XC is BM's executor and is the second respondent to this proceeding.

[16] In August 1951, the applicant was adopted by BM's parents (the adoptive father and adoptive mother are referred to in these reasons as AF and AM respectively).

[17] Both AF and AM are also deceased and XC acts as representative of their estates for the purposes of these proceedings.

[18] The applicant has provided an affidavit to the Court and deposes to the fact that as a child, the applicant considered AM and AF to be his mother and father and knew BM as his sister. During his childhood, BM lived close by and he had a close relationship with her.

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1 Affidavit of AC sworn 29 October 2020 at [27]-[28]; Exhibits 8-9.

[19] When the applicant was aged 13 or 14 years, he was told by AF, AM and BM that BM was actually his biological mother.

[20] The applicant also deposes that shortly after that time, the applicant started calling BM "mum" and did so for approximately 57 years.

[21] There were a number of objections to evidence filed on behalf of the applicant in respect of statements made by BM prior to her death.

[22] Ultimately, the majority of these statements were ruled to be admissible on the basis that they were evidence of the statement being made but not as to the truth of its contents. The applicant was relying on the statements being made to him for the purposes of making out "exceptional circumstances" rather than as to the truth of the contents of the statement.

[23] These statements include:

(a) BM adopted him out to her parents as that was her only option at the time.

(b) BM was "forced by the Government" to put him up for adoption given her youth and the fact she had a baby out of wedlock.

(c) BM wanted to keep him, but the Government of the day would not allow it.

(d) AM and AF met the criteria to qualify as adoptive parents so BM asked them if they would agree to adopting him as her "final attempt at being able to keep [the applicant]", to which they agreed.

(e) BM was young at the time and had no support from her partner.

[24] The affidavit of the applicant also provides evidence of further circumstances relied upon in support of the application, including:

(a) That the applicant and BM remained very close and as adults spent time together and shared "a very close mother/son relationship".

(b) In BM's later years, the applicant did gardening for her and regularly took her out for outings.

(c) He bought her gifts on Mother's Day, her birthday and Christmas, and spent time with her on these days and other special occasions.

(d) He visited her at least once a month and they spoke at least once a week on the telephone.

(e) As adults, his relationship with his mum was as close as XC's was with BM.

[25] The applicant further gives evidence that he was hurt by the fact that his biological mother left the majority share of her estate to XC when they were both her children and both shared a close relationship with her.

[26] Further, he gives evidence that he has not received any significant provision from his biological mother, nor from AF or AM (his adoptive parents). The applicant relies on evidence in relation to the estates of both AF and AM and also, his biological mother, BM.

[27] AM died in April 1975 and there is no evidence before the Court in relation to her estate. However, the applicant gives evidence that he did not receive any benefit from it.

[28] AF died in July 1999 and his will is in evidence before the Court. BM was the executor and the applicant received a $1,000 payment under the terms of the will. BM received the principal place of residence as a specific gift and the residue was shared equally between XC and four of AF's grandchildren. They received $2,168.35 each.

[29] Further, the applicant gives evidence that he did not bring a family provision application in respect of AF's estate as the major beneficiary was his biological mother, BM, and she was AF's only biological child.

[30] Subject to objection, the applicant also relies on a statement told to him by BM that "I will look after you" and that he understood from this that he would be provided for on his biological mother's death.

[31] Pursuant to BM's will, XC is appointed executor and BM's house is left to XC. The residue of the estate is left to the applicant, who BM describes in the will as "my son".

[32] There is also evidence that the house is worth between $640,000 and $900,000, but after payment of debts, there will be no residue.

[33] The adoption order was made in August 1951. Under the Adoption Act, the Supreme Court may discharge an adoption order under Part 9 Division 2 of the Adoption Act. The applicant relies upon s 219(1)(c) being "exceptional circumstances". The applicant is an eligible person to apply for a discharge of an adoption order pursuant to s 220(a) of the Adoption Act being the adopted person.

[34] As to the other formalities set out in s 221 of the Adoption Act the applicant submits that all formalities have been complied with.

[35] In relation to "exceptional circumstances", the applicant relies on the facts set out in paragraphs 1 to 42 of the applicant's affidavit (subject to any evidence rulings and objections) and the fact that the applicant was adopted in 1951 "when the policy of the Government of the day was to force unwed mothers to give up their children for adoption".

[36] The affidavit material on behalf of the applicant exhibits a copy of the Commonwealth Government's National Apology for Forced Adoptions delivered by Prime Minister Gillard on 21 March 2013 and the Leader of the Opposition Mr Abbott's response, together with the Queensland Government Apology for Forced Adoption Policies and Practices dated 27 November 2012. While both the Commonwealth and Queensland Apologies refer to a number of different circumstances in relation to what is described as "forced adoptions", there are no particular facts relied upon in relation to this case apart from the "general policy" that was in place in the 1950s.

[37] The applicant also relies on an affidavit of W1, the applicant's ex-wife. W1 deposes to conversations she had with BM where BM had stated words to the effect that she did what she did because of "something to do with the Government and their forced adoption practices and policies at the time".

[38] Further, W1 deposes to statements made by BM to W1 that the applicant's adoption took place several months after his birth rather than immediately at birth so she could have more time with him.

[39] Further, the applicant relies on an affidavit from W2, a close friend of BM for approximately 30 years. The affidavit refers to statements by BM that her parents adopted the applicant because at the time she gave birth to him, she was a single person and it was "frowned upon in those days to have a child out of wedlock".

[40] The applicant also relies on the will of BM which refers to the applicant as "my son". Further, the Memorandum of Wishes also refers to him as "my son".

[41] The applicant submits that s 6 of the Adoption Act identifies the overarching principle as "… that the wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life, are paramount".

[42] The applicant does recognise that adoption orders ought not be easily set aside and that an adoption order when made is meant to be final and establishes legal rights which have significance beyond just those of the adopted person. However, the applicant contends that "exceptional circumstances" have been made out to discharge the adoption.

[43] In relation to relevant authorities, the applicant submits there are no cases on similar facts to those in the current proceeding.

[44] Reference is made to the decision in *AED v Registrar-General of Births, Deaths and Marriages; AED v GWK & Anor*[2] where Davis J discharged an adoption order on the grounds of "exceptional circumstances". In that case, the applicant's adoptive father had sexually abused the applicant and was jailed for those offences. In those particular circumstances, "exceptional circumstances" were made out.

[45] Further, the applicant refers to the decision of *Re Susan*[3] where the Supreme Court of New South Wales discharged an adoption on the basis that there was "an exceptional reason" for doing so. Similarly in that case, the exceptional reason was found to be the applicant's sexual abuse at the hands of her adoptive father.

[46] The applicant relies on the decision in *Re Susan* as containing a useful review of the history of adoption legislation. In this regard, Palmer J stated in relation to "exceptional circumstances":

> "71. The phrase 'exceptional reason' in s 25(1)(c) seems to have come from the phrase 'exceptional circumstances' in s 13(1) of the *Adoption of Children Act* 1928 of Victoria. I do not think that there is any material difference in meaning between the two phrases.
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> …
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> 73. It is to be noted that under s 13(1) of the Victorian Act whether circumstances qualified as 'exceptional' was a question for the law

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2 [2019] QSC 287.

3 [2009] NSWSC 592.

officer contemplating an application, not for the Court. However, the Court would in due course have to take full account of those circumstances in dealing with the application. In *A v C-S (No 1)* [1955] VLR 340, at 368, Sholl J said:

> 'As to what are 'exceptional circumstances', it is unwise to attempt to limit the law officer's judgment by any definition of such circumstances, the variety of which may plainly be infinite. It is for him to decide what are exceptional circumstances, and not for the Court, once he has applied to it, to do so; though doubtless in exercising its own discretion the Court would later have regard to them in a different aspect. In this case the Attorney-General was so plainly right in applying to the Court that I do not suppose anyone would for a moment suggest otherwise; the circumstances were quite extraordinary. But there may be very many other types of cases in which the application might be expected to be made. I am attempting no limitation by definition, in defiance of my own precept, when I say that a few of the many cases which occur to me at the moment, are the death of an adoptive parent, or of one or two adoptive parents; the divorce of the adoptive parents, or even their separation; ill-treatment of the child by its adopter or adopters; a serious decline in the character of the adopter or adopters, as, e.g., through crime or drink; the discovery that at the time of the original adoption the true character of the adopter was not known; a serious mistake (even though not going to jurisdiction, and whether by reason of mis-statement of facts to the Court or not) by the Court which made the original order; the discovery of the whereabouts of, or recovery of capacity by, a person whose consent to the adoption was dispensed with under sec. 4(3); or a desire by the child itself (whether before or after majority) to restore itself in law to its natural family. I by no means, of course, say that all such cases would necessarily constitute exceptional circumstances, the whole circumstances in each case must be looked at. Still less do I say that there may not be innumerable other cases of exceptional circumstances'."

The first respondent's position

[47] The Department of Children, Youth Justice and Multicultural Affairs (formerly known as the "Department of Child Safety, Youth and Women"), opposes the application and orders sought by the applicant with respect to the discharge of his adoption order.

[48] The first respondent recognises that the applicant is seeking to set aside the adoption order for the purpose of seeking further provision from his biological mother's estate. In this regard, it is noted that the applicant has been provided for in BM's will as receiving the residue of her estate but claims he should be entitled to an equal share of the estate with XC. The applicant also deposes to poor financial circumstances.

[49] In respect of relevant background circumstances, the first respondent notes that the applicant does not depose to having experienced an unhappy childhood or having suffered from any form of neglect, trauma or abuse from his adoptive parents.

[50] The first respondent points to the objects of the Adoption Act set out in s 5(a) and also the guiding principles set out in s 6, principally subsection (1) and (2)(a), (g) and (h).

[51] In relation to the central issue in the current application as to whether there exists "exceptional circumstances" to warrant the discharge of the adoption, the first respondent submits that the Adoption Act provides no guidance as to what matters should be taken into account in determining whether circumstances are sufficiently exceptional so as to warrant a discharge of an existing order.

[52] Further, it is contended that the discharge of adoption orders have not been taken lightly by the courts and to discharge an adoption order is a "grave step".[4]

[53] The first respondent relies on a number of authorities in relation to principles which may assist in the identification of what amounts to "exceptional circumstances".

[54] In the case of *Re Susan*, Palmer J stated as follows:

> "The law equates, so far as is possible, the relationship between adoptive parent and adoptive child with the relationship between birth parent and child. The parental relationship is the most fundamental, enduring and significant of all human relationships. Severance of that relationship by the discharge of an adoption order can overturn the identity, family structure and legal relationships not only of the adopted person but of many others as well. While the Court has paramount regard to the interests of the child in exercising its discretion whether an adoption order should be discharged if the facts alleged have been established, the Court must, in satisfying itself that such facts have indeed been established, bear in mind the effect that the order may have on the interests of others."[5]

[55] Further, the first respondent refers to the decision of *Re B (Adoption Order: Jurisdiction to Set Aside)* in which Swinton Thomas LJ stated:

> "…to invalidate an otherwise properly made adoption order would, in my view, undermine the whole basis on which adoption orders are made, namely that they are final and for life as regards the adopters, the natural parents and the child."[6]

[56] In relation to the cases where "exceptional circumstances" have been considered by the Courts, the majority of these cases have included particular situations where the adopted child has suffered emotional, psychological or physical harm. Where this harm has been

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4 *ESA v Department of Children Safety, Youth and Women* [2019] QSC 234.

5 [2009] NSWSC 592 at [23].

6 [1995] 3 All ER 333 at 340-341.

inflicted by one or both of the adoptive parents, Courts have been satisfied that it demonstrates a failing of the objects and purposes of the Adoption Act.

[57] For example, in *Re Susan*,[7] Palmer J concluded that severance of the applicant's parental bond with her abuser provided an "alleviation of the trauma". In the particular circumstances of that case, the Court was satisfied that it constituted an "exceptional reason" for the adoption order to be discharged.

[58] Another example referred to is the case of *Adoption of LVH*[8] where the applicant suffered post-traumatic stress disorder as the result of severe corporal punishment, physical maltreatment and malnutrition inflicted by adoptive parents. In those circumstances, Brereton J held that it constituted "exceptional circumstances" warranting the discharge of the adoption.

[59] In particular, the first respondent refers to the comments of Brereton J at paragraph [65] as follows:

> "The treatment that the plaintiff received as a child, as I have found it to be, is such as would plainly have justified his removal from them as parents were they his natural parents, and the termination of their parental responsibility. In that way, it falls within the concept of exceptional reason referred to in s 94(3)(b). The discretion to discharge the adoption order is therefore enlivened."

[60] Reliance is also placed on the decision of *MJD v Chief Executive, Department of Communities, Child Safety, and Disability Services, Adoption Services & others.*[9] In that case, Atkinson J discharged an adoption order on the grounds of exceptional circumstances where the applicant was subjected to "horrific mental and physical abuse" at the hands of his adoptive father.[10]

[61] Relevantly, her Honour stated as follows:

> "If the aim of adoption today is to ensure the best interests of the child, then those aims were clearly not met by this adoption. Even the Act under which it was made required that the welfare and interests of the child concerned in an adoption should be paramount, but they were manifestly not treated as paramount in this case.[11] The applicant has suffered exceptionally from physical and emotional abuse which made him vulnerable to further damage during his adulthood and has now rendered him in a pitiable state. Unfortunately, while it cannot be said that it is exceptional for children to be treated badly, the extent of the abuse in this case does fulfil the criterion of exceptional circumstances.

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7 [2009] NSWSC 592.

8 [2014] NSWSC 1902.

9 [2015] QSC 139.

10 At [10].

11 See former *Adoption of Children Act* 1964 (Qld) s 10.

> The order sought is not an order that should be made lightly. The impact of discharging the adoption order will be not only on the applicant but also on his siblings and his natural and adoptive parents. Nevertheless, he has satisfied me that circumstances which provide grounds for discharge of the adoption order have been made out. Considering that the Act quite properly requires me to apply the paramount principle that the Act is to be administered so that the wellbeing and best interests of an adopted child both through childhood and the rest of his life are met, I am satisfied that the order discharging the adoption order finalised on 22 November 1974 should be made."[12]

[62] The first respondent contends that the onus of satisfying the Court of the existence of facts sufficient to warrant a discharge of the adoption is on the applicant. Reliance is placed on the decision of *Re Susan* to establish this proposition:

> "Accordingly, in an application for discharge of an adoption order by an adopted child, the Court cannot, on the ground of advancing the child's best interests, give the child the benefit of the evidentiary doubt in the exercise of finding whether the facts supporting the application have been proved to its satisfaction. The Court must be satisfied to the appropriate standard that the facts calling into play the exercise of the discretion have been proved."[13]

[63] The first respondent contends that the current case can be distinguished from the cases identified given the absence of any evidence that the applicant has suffered psychologically as a consequence of neglect, sexual abuse, physical abuse or some other detrimental act or omission by his adoptive parents.

[64] In this regard, the first respondent notes that the evidence of the applicant is that he was able to choose where he would live upon being told about his adoption, they had family lunches and dinners at AF/AM's house or BM's house and he has fond memories spending time with BM before being aware of his adoption and as well as after, and was disciplined by both BM and AF/AM. The applicant describes himself as being raised by all three persons.

[65] The first respondent also responds to the applicant's submissions in respect of the "forced adoption practices". In this regard, the first respondent notes that reliance is placed on various Government documents in relation to policies and practices from the 1950s to 1970s and also, "equivocal conversations held between the applicant and his mother and between his mother and her friends". These conversations are of a general nature and refer to BM not being happy with having the applicant adopted and felt pressured to do so.

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12 At [16]-[17].

13 At [24] per Palmer J.

[66] The first respondent contends that while in the period between the 1950s to 1970s there were forced adoption practices, the Senate Report identifies that there was a "great diversity of experiences of birth mothers".[14]

[67] The Senate Report recounts a number of different experiences in Australia at that time as evidenced by people who made submissions to the inquiry.

[68] The first respondent concedes that while it was likely that there would have been pressure and social stigma experienced by BM at the time the applicant was born, there is no current evidence to confirm that forced adoption practices were experienced by BM to the level for the Court to be satisfied that there are "exceptional circumstances" to warrant the discharge of the adoption.

[69] The evidence that is before the Court includes that for the period between 3 December 1950 to 2 July 1951 BM raised the applicant with assistance from her parents before the applicant was formally adopted by his grandparents. Further, there is evidence that BM breastfed the applicant during those months.

[70] Further, BM provided her consent to the adoption approximately seven months after the applicant was born. The adoption order was made in August 1951, being 52 days after consent by BM was given.

[71] The applicant lived with his mother and grandparents (being his adoptive parents) from the time of his birth until he was approximately four years of age.

[72] Other than the general statements about having "no other option", there is no evidence and no suggestion by the applicant that BM's consent to the adoption was improperly obtained.

[73] The first respondent contends that in the absence of evidence of what effect alleged adoption policies had specifically on BM and the applicant, it would be difficult for the Court to conclude that "exceptional circumstances" exist.

[74] The Departmental records in relation to the adoption are before the Court and do not provide any evidence that the applicant's adoption was forced. However, it was conceded that in most forced adoption cases, there is a distinct absence of clear evidence in Departmental records.

[75] Given that BM is now deceased, it is impossible for any evidence to be obtained from BM in respect of the actual circumstances of the adoption.

[76] The first respondent also refers to and relies upon a number of comments by Brereton J in the matter of *Adoption of LVH*.[15]

[77] It is submitted that the case of *Adoption of LVH* is analogous to the current circumstances to the extent that the adoption order in that case was made in December 1964. It is

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14 Affidavit of R Sanfuentes sworn 21 January 2021; Exhibit RTS-8 at p 96 [3.1].

15 [2014] NSWSC 1902.

submitted that this was the same social and economic environment as the applicant's adoption.

[78] In that case, Brereton J had to consider whether the adoption order and/or the mother's consent was procured by fraud, duress or other improper means. In this regard, his Honour noted:

> "The correspondence and social worker's notes to which I have referred demonstrate that, like many unmarried mothers of that era, JH found herself in a socially, economically and emotionally very difficult position. The references to the requirement for food parcels and the like demonstrate some of the economic pressures that were involved. The idea that Mrs W was somehow involved in manipulating her into an adoption against her will is rebutted by Mrs W offers to explore the possibility of keeping the child. To me it is very plain on the documentary evidence that JH was distressed at the thought of giving up her child, but at the same time did not want to foist on Mrs W the responsibility of caring for him. That led her to make a decision which I think she fully understood and was voluntary in the legal sense, although one that she was not happy to have to make."[16]

[79] In that case, the biological mother also filed an affidavit in which she expressed that she felt pressure at the time to sign the consent forms and was told words to the effect of "it would be better for your child". Further, the biological mother gave evidence that she wanted to keep the baby but did not know how she was going to support the baby. This is to be contrasted with the current matter where there are statements which are in evidence which do not go to the truth of the contents of the statement as to the circumstances in which the applicant was adopted.

[80] Brereton J in *Adoption of LVH* was not satisfied that the adoption had been obtained by fraud, duress or other improper means. In this regard, his Honour stated:

> "What is expressed in that affidavit seems to me to very much reflect the tension in JH's mind in the months culminating in November 1964, but does not establish, and does not begin to establish, fraud or duress or other improper means. As I said earlier, not all pressure is illegitimate, and the pressures imposed by the economic and social circumstances in which JH then found herself were not illegitimate pressures. They were pressures nonetheless, which drove her to make the decision she did. Accordingly, I am not satisfied that any ground under s 93(4)(a) has been made out."[17]

[81] The first respondent acknowledges that the applicant's adoption order occurred at a time when there was significant pressure on unwed mothers. However, the first respondent ultimately contends that in the absence of any particular evidence in this case the Court is

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16 At [50].

17 At [59].

restricted in its capacity to make a finding of "exceptional circumstances" within the meaning contemplated by s 219(1)(c) of the Adoption Act.

[82] The first respondent also makes submissions in relation to two particular factors relied upon by the applicant, namely:

(a) that the applicant will be legally recognised as his mother's son again; and

(b) the discharge of the adoption order will enable the applicant to make an application for further provision from his biological mother's estate.

[83] In relation to the first of these factors, the first respondent relies on the authority of *Re Gordon (a pseudonym) (No 2); Application to discharge adoption order* in which Hallen J observed:

> "Similarly, on the basis of the language as it now appears in the *Adoption Act* and the public policy considerations to which reference is made below, it could not be said that 'a desire by the child itself (whether before or after majority) to restore itself in law to its natural family' could, of itself, constitute an 'exceptional reason'."[18]

[84] Further, reference is also made to a further statement by Hallen J as follows:

> "There are sound public policy reasons why adoption orders ought not easily be set aside. Indeed, public policy considerations ordinarily militate against revoking an adoption order that has been properly made. (This is not to say that instances can and do arise where it is appropriate so to do.) As stated earlier, an adoption order, when made, is meant to be final and establishes legal rights which have significance beyond just those of the adopted person…"[19]

[85] In relation to the second factor of further provision from BM's estate, reliance is placed on the decision of Boddice J of this Court in *ESA v Department of Child Safety, Youth and Women.*[20]

[86] In that case, the applicant alleged abuse by her adoptive parents including that the adoption had caused her emotional harm and that she had struggled with mental health issues. In the course of the hearing of the application, an additional reason for the application also became apparent. The applicant in that matter had built a relationship with her father throughout her adult life and described a particularly close relationship. An additional reason for the application for the discharge of the adoption order was identified as being the administration of her biological father's estate.

[87] Relevantly, Boddice J in that matter held that the applicant had not established a ground for making an order discharging the adoption order. His Honour stated:

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18 [2020] NSWSC 673 at [227].

19 At [230].

20 [2019] QSC 234.

> "To discharge an adoption order is a grave step. Upon the making of such an order, 'the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the final adoption order had not been made.'[21] Such an order thereby dismantles a family unit in the eyes of the law.
>
> The applicant has undoubtedly experienced great pain throughout her life. The deep unhappiness she feels in respect of her adoption largely arises because of the disruption caused to the development of her identity, her sense of belonging and connection to others, from the social stigma of being an adopted child. The applicant's disappointment is compounded by the knowledge that the estate of her biological father was inherited by his brother.
>
> Although difficult and disappointing for the applicant, these circumstances fall short of exceptional circumstances warranting the discharging an adoption order.
>
> The evidence now before me does not support a conclusion that the objects and purpose of the Act failed in the present case. The applicant was adopted by a couple who took care of, and raised her, as their own child.
>
> Any inadequacies in undertaking that role are no more than shown by many biological parents. Those inadequacies do not warrant overturning the final relationship intended to be created by an adoption order."[22]

[88] Reliance is also placed on the decision of *Re Gordon (a pseudonym) (No 2); Application to discharge adoption order.*[23] In that case, the New South Wales Supreme Court also considered the effect a discharge order may have for a family provision claim in Queensland. Similarly, in that case the plaintiff sought the discharge of an adoption order on the ground of exceptional circumstances which appeared to be motivated by a claim on his biological father's estate.

[89] The application was dismissed on the basis that "exceptional circumstances" had not been made out. Hallen J relevantly stated:

> "Of course, a discharge order may enable Gordon to continue with his application for a family provision order in Queensland. However, I accept the submission made by the executors that 'the prospect that a discharge order will result in a financial benefit to the applicant can never outweigh the importance of maintaining the permanence of adoptions. Thus, the prospect that [Gordon] would obtain a financial windfall from [the

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21 *Adoption Act 2009* (Qld) s 226.

22 At [41]-[45].

23 [2020] NSWSC 673.

> deceased's] estate is not a 'reason' to make a discharge order for the purposes of s 93(4)(b)'."[24]

[90] In these circumstances, the first respondent submits that the applicant's intention to seek further provision from his biological mother's estate does not constitute an "exceptional circumstance" to warrant the discharge of the adoption order.

[91] Overall, the first respondent's submission is that the onus is on the applicant to satisfy the Court of the existence of facts sufficient to warrant a discharge and in the circumstances of this case, "exceptional circumstances" have not been demonstrated.

Second, third and fourth respondents' position

[92] Submissions were also made on behalf of the second, third and fourth respondents. These respondents are XC as executor of the will of BM, XC as the representative of the estate of AM and XC as the representative of the estate of AF.

[93] The position of the second, third and fourth respondents is to also oppose the making of the orders on the basis that "exceptional circumstances" have not been made out.

[94] In particular, in oral submissions, counsel for the second, third and fourth respondents referred to ss 5 and 6 of the Adoption Act and submitted that the meaning of "exceptional circumstances" had to be read to meet the harmonious goals of the legislation.

[95] Section 6(h) was particularly relevant in the circumstances where there was evidence that the applicant had a good relationship with his adoptive parents and his biological mother, and his adoptive parents had equal input into parenting after he was made aware that he was adopted. Reliance is placed on the evidence that supports that his adoptive parents conducted themselves as his parents and cared for him in accordance with them being his parents.

[96] Reliance is also placed on the decision of Boddice J in *ESA* and the decision in *Re Gordon* for the principles in relation to the interpretation of "exceptional circumstances".

[97] In undertaking the construction of "exceptional circumstances" as it is used in s 219(1)(c) of the Adoption Act, the second, third and fourth respondents contend that s 6(j) is part of the context and is to be taken into account in the construction of the phrase "exceptional circumstances".

[98] In relation to the applicant's submission that the New South Wales legislation which uses "exceptional reason" is narrower than the Queensland legislation which uses "exceptional circumstances", the second, third and fourth respondents contend that there is nothing in the phrase or the context of the legislation to suggest there was anything different in intent in relation to the operation of the Queensland provision.

[99] The second, third and fourth respondents ultimately submit that there is nothing in the applicant's circumstances to make it exceptional so to bring it within the provision of the legislation.

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[24] At [274].

[100] The second, third and fourth respondents objected to a number of the hearsay statements contained in the affidavit material sought to be relied upon by the applicant. As identified previously, a number of the statements were allowed in evidence but the issue of the weight to be given to them was left for submissions.

[101] Where the statements could only be admissible as to the fact that the statement was made rather than for truth of the contents of the statement, there was some debate as to what use the statements could serve in relation to the application.

[102] The second, third and fourth respondents contend that the Court has before it direct evidence in the Memorandum of Wishes which evidences how BM, the applicant's biological mother, saw her relationship with the applicant. It is submitted that this is to be given more weight than the statements referred to in the affidavit material which is hearsay evidence but is admitted for the purposes of showing that the statements were made.

[103] The applicant contends that part of the "exceptional circumstances" is that the applicant believed those statements to be true. However, as the Court cannot rely on the statements for the truth of their contents, the second, third and fourth respondents' position is that regard should be had to, and proper weight given to, the Memorandum of Wishes which is in evidence before the Court.

[104] The Memorandum of Wishes is exhibit A to the affidavit of XC sworn 19 November 2020.

[105] The Memorandum of Wishes was prepared by solicitors acting on behalf of BM and the relevant documents from the solicitor's file leading up to the execution of the document are also in evidence. The Memorandum of Wishes states:

> "I [BM] wish to state the following in relation to my Will-:
>
> 1. [XC] is my adopted daughter. [XC] was raised by me as my daughter and was a dependant of mine.
>
> 2. [The applicant] is my biological son who was adopted by my parents after his birth. Although [the applicant] is referred to as my son in my Will, [the applicant] was not raised by me as my son and has never been a dependant of mine.
>
> 3. Although I maintain a good relationship with my son [the applicant], it is my wish that [XC] receive the majority of my estate as provided in clause 3 of my Will.
>
> 4. I have provided for [the applicant] in clause 4 of my Will."

[106] The Memorandum of Wishes is signed and dated by BM and was witnessed by a solicitor.

[107] The background circumstances to this document being prepared is shown in the documents from the solicitor's file which are exhibited and in evidence before this Court. It is submitted that the document shows an express testamentary intention and the Court should have regard to this as far as it is relevant in relation to the application for revocation of the adoption.

[108] Otherwise the submissions on behalf of the second, third and fourth respondents are largely consistent with the submissions made by the first respondent.

[109] In particular, the second, third and fourth respondents rely on the applicant bearing the onus of proving facts persuading the Court that it is appropriate to discharge the adoption order made nearly 70 years ago.

[110] The second, third and fourth respondents urge caution when considering uncorroborated and otherwise unsupported events which are said to have occurred after the adoption order as a basis for discharging the adoption order. In this regard, reference is made to the statements of Palmer J in *Re Susan* that the Court must be satisfied to the appropriate standard that the facts have been proved.

[111] The second, third and fourth respondents seek to distinguish the cases in relation to a discharge of an adoption order where there has been physical or mental abuse. It is submitted that unlike in those cases, there is no suggestion here that a discharge order is needed to alleviate an adverse effect on the applicant's mental state brought about by the adoption.

[112] While the applicant seeks to distinguish the case of *Re Gordon* on the basis that the inheritance received in this case by the applicant was a smaller sum, the second, third and fourth respondents seek to rely on that case in support of their submission. It is contended that a relevant consideration is that the applicant received financial benefits from his adoptive parents, and he should not be granted a discharge of the adoption order that founded the relationship which gave rise to that benefit. In this regard the second, third and fourth respondents also point to other evidence which tends to support other financial benefits having been received from the applicant's adoptive parents, directly or through their estates.

Consideration

[113] The applicant's primary contention is that exceptional circumstances that warrant the discharge of the adoption order are to be found from the following circumstances:

(a) The Government policies of the day (as part of the factual matrix as opposed to reliance on any particular application of a particular policy).

(b) Statements made to the applicant about the reasons for the adoption (but not relying on them for the truth of their contents).

(c) The statements being made in circumstances where it was not a "stranger adoption", but the biological mother of the applicant who stayed very much in the applicant's life and had a close relationship with him. It is submitted that this was, in effect, acting inconsistently with severing the parent/child relationship.

(d) The applicant received only $1,000 from his adoptive father's estate and it was not an equal share. Reliance is placed on the fact that the grandchildren received more than him.

[114] It is clear from the authorities that the onus is on the applicant to establish "exceptional circumstances" to justify a discharge of the adoption and there must be sufficient evidence to satisfy the Court that "exceptional circumstances" exist.

[115] The question is then, are the circumstances relied upon by the applicant sufficient to make out "exceptional circumstances"?

[116] Palmer J in *Re Susan*[25] made the following helpful comments in respect of what amounts to "exceptional circumstances":

> "81. In my opinion, the principle upon which the Court should act in an application for discharge under s 93(4)(b) can be stated no more precisely than it was by McInerney J in *Re S* at 495:
>
> > 'I am disposed to think that under s 16 [now s 93(4)(b) of the NSW Act] the Court, in considering whether there is some exceptional reason why the adoption order should be discharged, must have regard to the question whether the order if allowed to continue would fulfil or defeat the essential objects of an adoption order, as collected from the provisions of the Act.'
>
> 82. The *'essential objects'* of an adoption order to which his Honour refers are to advance the best interests of the child *'both in childhood and in later life'* (s 7(a), s 8(1)(a)) by means of establishing a secure and permanent relationship between adoptive parents and adopted child which will enable the child '*for the full and harmonious development of his or her personality, (to) grow up in a family environment, in an atmosphere of happiness, love and understanding'*. These last quoted words are taken from the preamble to the Hague Convention on *Protection of Children and Co-operation in Respect of Intercountry Adoption* 1993, to which Australia is a signatory and which is adopted by s 210 of the New South Wales *Adoption Act*."

[117] The evidence on this application does not establish that the objects and purposes of the Adoption Act have failed: if anything, it establishes the opposite. The applicant's adoption by his grandparents resulted in him being raised and cared for by them as his parents. Even though he became aware of BM being his biological mother, his adoptive parents remained in that role. BM had a role in the applicant's life in addition to that of his adoptive parents.

[118] Further, there is no evidence that the applicant has suffered neglect, sexual abuse, physical abuse or some other act or omission by his adoptive parents. There is no evidence of any circumstances that would justify removal of the applicant's adoptive parents as his parents.

[119] The applicant also contends that the close and long-term relationship between the applicant and BM was inconsistent with the severing of the parent/child relationship. However, the application to discharge the adoption is to be considered under the current Adoption Act. Section 219(1)(c) is to be construed in the context of the Adoption Act as a whole. Part of that context is s 6(j) which envisages connections and contact with a child's

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25 [2009] NSWSC 592.

birth family. Section 6(h)(ii) also includes the promotion of "openness and honesty about the child's adoption".

[120] In this context, "exceptional circumstances" could not be established on the basis of knowledge about the adoption and/or a close relationship between a child and a biological parent as being inconsistent with the objects and purposes of the Adoption Act. The applicant's experience is in fact largely consistent with the current objects and purposes of the Adoption Act.

[121] The particular circumstances of the applicant and the relationship he had with his adoptive parents and his biological mother may have had an effect on the way he has been provided for in their respective estates. BM's express statement in the Memorandum of Wishes does provide some assistance in this regard. The applicant may be disappointed with and hurt by that provision. However, adoption orders are intended to be final and establish legal rights that are to be disturbed only in "exceptional circumstances". The applicant wanting to seek further provision from his biological mother's estate is insufficient to establish "exceptional circumstances".

[122] Whilst the inheritance received from the applicant's adoptive father's estate is a factor, I do not consider it (or the size of the gift) is determinative by itself. However, there is evidence that the applicant did receive financial benefits from his adoptive parents, through AF's estate and directly during AF and AM's lifetimes. There is no evidence to suggest that these benefits were founded on anything other than the relationship of a parent and child. This tends to support the conclusion that the relationship was consistent with the objects and purposes of the Adoption Act, rather than contrary to or inconsistent with those objectives.

[123] Whilst acknowledging that BM is likely to have experienced pressure and social stigma at the time of the applicant's birth, there is no evidence that BM was subject to any particular forced adoption practices. Further, there is no evidence or suggestion that BM's consent was improperly obtained. Similar to the considerations in *Adoption of LVH*, it is understandable that BM was unhappy with the decision she was faced with having to make but there is no evidence that it was a decision that was other than voluntary.

[124] The circumstances in this case of Government policies generally, the statements made by BM during her lifetime, the relationship the applicant had with his biological mother and the limited inheritance from his adoptive father fall short of constituting "exceptional circumstances" warranting the discharge of the adoption order.

[125] Accordingly, in respect of paragraphs 2, 3 and 4 of the amended originating application, the application for the relief sought is not made out.

[126] In respect of costs:

(a) the first respondent does not seek costs.

(b) the second, third and fourth respondents seek costs of the application.

[127] I will hear further from the parties in respect of the appropriate costs order.

[128] The parties should confer in relation to costs and if they are able to agree, a draft order should be provided to my Associate. If the parties are unable to agree on costs, then the submissions in respect of their positions on costs should be provided within seven days.

[129] Accordingly, I order that:

1. Paragraphs 2, 3 and 4 of the amended originating application dated 2 March 2021 are dismissed.

2. In relation to costs:

    a. if the parties agree on an appropriate order as to costs, a draft order should be provided to my Associate.

    b. if costs cannot be agreed, then each party file and serve submissions in relation to costs within seven days.