APPLICATIONS FOR FAMILY PROVISION AND MAINTENANCE PURSUANT TO THE SUCCESSION ACT 1981(QLD)

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BARRISTER

A) INTRODUCTION

"Say not you know another entirely till you have divided an inheritance with him"

Johann Kasper Lavater

1. Mr Lavater was a Swiss poet born on the 15 November 1741. He lived to the ripe old age of 59. He probably saw more that his fair share of inheritance disputes as life expectancy back in the 1700's was under 40 years old. In Australia it is now 81.8 years. So the average Australian now how roughly twice as long not only to accumulate assets but also to accumulate dependants.

B) RELEVANT LAW

2. The starting point is that a person of sound mind, memory and understanding is entitled to leave his or her estate to whosoever he or she pleases subject only to the duty imposed by the Succession Act 1981 (Qld) ("the Act").

3. There are clearly defined principles upon which the court must act. There is no discretion merely to remake a deceased's will upon some abstract principles of fairness or justice.[1]

4. Section 6 of the Succession Act 1981 ("the Act") provides:

[1] *Worladge v Doddridge* (1957) 97 CLR at 20-21 per Kitto J

(1)Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

5. Family provision if governed by Part 4of the Act. Section 41 provides:

*"(1) If any person (the **deceased person)** dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.*

(1A)However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant."

C) POTENTIAL APPLICANTS

Spouse

6. A spouse is defined in section 5AA as the deceased person's:
   a) husband or wife ; or
   b) de facto partner, as defined in the Acts interpretation Act 1954 (the AIA), section 32DA; or
   c) civil partner as defined by section 36 of the AIA (registered under the Civil Partnerships Act 2011 ("the CPA"))

De Facto

7. The definition of de facto partner in the AIA mirrors the provisions of section 4AA of the Family Law Act 1975. A person qualifies to bring a claim if that person and the deceased had lived together as a couple on a genuine domestic basis for a continuous period of at least 2 years ending with the deceased's death.[2] Gender is not relevant. In deciding whether a couple are living together as a couple on a genuine domestic basis the court can have regard to any of their circumstances including:

   (a) the nature and extent of their common residence;
   (b) the length of their relationship;
   (c) whether or not a sexual relationship exists or existed;
   (d) the degree of financial dependence or interdependence, and any arrangement for financial support;
   (e) their ownership, use and acquisition of property;
   (f) the degree of mutual commitment to a shared life, including the care and support of each other;
   (g) the care and support of children;
   (h) the performance of household tasks;
   (i) the reputation and public aspects of their relationship.

8. With increasing life expectancy there are an increasing number of de facto relationships formed in twilight years. Often parties will have children from other relationships and may have good reason for keeping their finances separate. It is these second or third relationship which often lead to litigation.

9. If the couple does not live in the same residence there will be difficulty in establishing a de facto relationship for the purposes of the Act.

10. In KQ V HAE [2006] QCA 489, in respect of a claim brought under the provisions of part 19 of the Property Law Act 1974, the Court upheld the

[2] Section 5 AA2(b)(ii)

decision of the trial judge in finding there was no de facto relationship. At paragraph [16] the Court stated:

> "It can be seen that the legislation does not provide a precise test for the existence of a de facto relationship. None of the matters listed in s 32DA(2) of the *Acts Interpretation Act* is necessarily of decisive significance. Nevertheless, to the extent that those matters are identified as relevant considerations, the ultimate issue to which they are directed is whether the parties are "living together ... on a genuine domestic basis". This phrase necessarily draws attention to whether the parties are living, or have lived, together to maintain a household."

Further at paragraph [18]:

> "It is clear from s 32DA(4) of the *Acts Interpretation Act* that pt 19 of the PLA is not concerned with the relationship between people who merely live in the same household and share living expenses: the PLA is not concerned with the relationship between friends who share a household, or with that between carer and patient. Further, the fact that two people have a sexual relationship will not suffice to establish that they are "de facto partners". This is clearly so, by reason of the fundamental requirement that the parties must be "living together as a couple on a genuine domestic basis"

The Court went on to find that the fact that the parties had never lived together "must be acknowledged to be an indicator that they have not lived together as a couple on a genuine domestic basis."

11. Even where two people are living together there can be challenges to their status. They may also have reached an age where a sexual relationship is of less importance. They may prefer to have separate bedrooms and even separate living spaces. This can lead to difficulties in establishing a de facto relationship when challenged my disgruntled members of the deceased's family dispute that a de facto relationship existed. Consider obtaining affidavit evidence from a supportive member of the deceased's family before filing the originating application.

Former Spouse

12. For the purposes of Part 4 a former dependant husband or wife or civil partner can bring a claim if they were at the time of death divorced from the

deceased, had not remarried or entered into a civil partnership and were entitled to receive maintenance from the deceased. [3]

Child

13. Section 40 of the Act provides that a child means any child, stepchild or adopted child of the deceased person. [4]

14. Section 40A provides:

*(1) A person is a **stepchild** of a deceased person for this part if—*
(a) the person is the child of a spouse of the deceased person; and
(b) a relationship of stepchild and step-parent between the person and the deceased person did not stop under subsection (2).
(2) The relationship of stepchild and step-parent stops on the divorce of the deceased person and the stepchild's parent.
(3) To remove any doubt, it is declared that the relationship of stepchild and step-parent does not stop merely because—
(a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
(b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died.

15. For a helpful case on how the courts interpret section 40A see the judgment of Mullins J in *Freeman v Jaques* [2005] QSC 200 (22 July 2005). At paragraph [9]

"This raises the issue of whether a stepmother who has no established relationship with any of the stepchildren is under a moral obligation to those stepchildren by reason of the fact that her estate comprises some assets or funds sourced to some extent from the father of those children which may otherwise have found their way to them."

At paragraph [58]

"A wise and just stepmother in the deceased's position whose assets were contributed to some degree by Mr Freeman (although not the major extent when the division of matrimonial assets prior to Mr Freeman's death is taken into

[3] Section 5AA(4) of the Act.
[4] ***adopted child*** means, in relation to any person, a child that is adopted by such person or by such person and another person jointly, in accordance with the law of the State or Territory, or country, where the adoption takes place, as in force at the date of the adoption.

account) would be expected to consider making some provision for at least the children of Mr Freeman who remained in extremely modest and necessitous circumstances, despite benefiting their from father's estate."

16. Mullins J went on to find the jurisdictional issue was only satisfied in respect of 2 of the out of the 8 applicants on the basis of need.

Dependant

17. A dependant means any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being a:
    a) a parent of that deceased person; or
    b) the parent of a surviving child under the age of 18 years of that deceased person; or
    c) a person under the age of 18 years.[5]

D) TIME LIMITS

18. There are 2 issues to consider. First the liabilities and duties of personal representatives and second the jurisdiction of the court.

Personal representatives

19. Section 52 sets out the duties of personal representatives. These duties include duties to:
    a) collect and preserve the real and personal estate of the deceased and administer it according to law;
    b) when required to do so by the court provided a full inventory and account of the administration of the estate;

[5] Section 40 of the Act

c) distribute the estate, subject to the administration thereof, as soon as may be.

20. Section 44 protects personal representatives who from an action against them if they comply with the time limits dictated by the Act.

21. Section 44(3) of the Act provides no action will lie against the personal representative who distributes the estate "not earlier than 6 months after the deceased's death" if no notice of an intended application under part 4 has been given; or if notice has been given, after 9 months from the death, if the personal representative has not been served with a copy of the application or received written notice signed by the applicant or the applicant's solicitor that "the application has been commenced."

22. The established position in Queensland is that the court does not have power to make an order pursuant to S 41(1) of the Act after a final distribution to beneficiaries.[6]

23. However, if personal a representative neglects to perform his or her duties in accordance with Section 52 the court may make such order as it thinks fit including an order for damages, interest and costs in favour of any person aggrieved. [7]

24. Personal representatives who distribute the estate within 6 months of the death or whilst on notice of a pending application do so at their peril. In *Re Hill* (unreported, QSC, 17 June 1988); BC8802419 on an application under s 41(1), there was an application for relief under s 52(2) of the *Succession Act* on the ground that the executor had neglected to perform his duties in that he had distributed assets to himself within 6 months of death when he was on notice of a potential claim. Carter J said:

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[6] See Re Burgess {1984] 2 Qd R 379, Re McPherson [1987] 2 Qd R 394; Re Faulkner [1999] 2 Qd R 49.

[7] Section 52 of the Act. See also Sections 8 and 113 of the Trusts Act 1973.

"It is obvious that s 44 is a legislative constraint upon an executor who seeks to administer an estate with indecent haste and in order to render nugatory the rights given to an applicant under s 41 of the Act. I am satisfied that in this case the respondent effected distribution of the only assets in the estate well within the six months of death and within three months of his having knowledge of an intended application. He was in my view in breach of s 52(1)(a) of the Act and the applicant is entitled to relief under s 52. I am empowered to make such order as I think fit.

[…]

I therefore propose to order that the respondent transfer to the applicant a one-third interest in the property so that it be held by them as tenants-in-common."

25. The court granted relief under s 52(2) without allowing relief section 41(1). However, there have been obiter statements suggesting that in a proper case the court could grant relief conjointly under section 41 and 52 by ordering the executor to restore assets to the estate and then making orders for provision under section 41.[8] The divergent views as to the proper operation of section 44 of the Act does not appear to have been resolved by subsequent case law.[9] Clearly where the distribution has been mad to someone other than the executor difficulties will arise. I would suggest that until there is some authority to the contrary the established view as stated by McMurdo P JJA in *Curran & Ors v McMgrath & Anor* [2010] QCA 308 "that property which has ceased to be an asset of a testator's estate cannot be affected by an order under the Act" will prevail.

Limitation

26. Section 41(8) provides:

" Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death

[8] *cf Ernst v Mowbray* [2004] NSWSC 1140; BC200408563 per Young CJ in Eq (as he was) at [63]; *Re McPherson* [1987] 2 Qd R 394 at 398.

[9] For a helpful discussion of this issue see the paper of Charles Wilson in issue 55 of Hearsay

of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made"[10]

27. The court may, in its discretion hear and determine and application notwithstanding that it is out of time. The principles that are applicable in applications for leave to proceed are well established and are set out in a number of cases. In *Enoch v Public Trustee of Queensland* [2005] QSC 194 Wilson J said:

> "[6] The court has an unfettered discretion whether to extend the time for making such an application. As Sir Robert Megarry VC observed of similar legislation in England in In re Salmond decd [1981] 1 Ch 167, the onus lies on the applicant to establish sufficient grounds for taking the case outside what is not merely a procedural time limit but a substantive one imposed by the Act. Four factors which can be relevant to the exercise of the discretion are –
> a) whether there is an adequate explanation for the delay;
> b) whether there would be any prejudice to the beneficiaries;
> c) whether there has been any unconscionable conduct by the applicant; and
> d) the strength of the applicant's case."

28. It will be a tactical decision as to whether you seek to have the limitation issues dealt with at a preliminary hearing. As the court has to determine the strengths of the case in any event is often dealt with as part of the substantive hearing. Where you have a strong case on the merits is can be advantageous to have the limitation issue dealt with early as it strengthens an applicant's negotiating position.

29. I commend to you the judgment A Lyons J in *Frey & Anor v Frey & Anor (as personal representatives of the Estate of HW Frey, dec'd) & Anor* [2009] QSC 43. The facts are complex. In brief the deceased died on 5 February 2004. The estate was valued in excess of $6.5 million and included houses, grazing properties, livestock, water licenses and farm machinery. The will left the family in dispute. Applications were brought by his wife and the youngest of

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[10] However, note the piggyback provisions of section 42(6), which provides that where an application has been filed by any person it shall be deemed for the purposes of limitation to be an application on behalf of all eligible applicants.

their 3 sons. The applications were lodged on 13 June 2007. The application was made some three years and five months after the death. Both the applicants in the case were aware of the requirement to bring an application within nine months of the death of the deceased.[11] Both the applicants had received legal advice.[12]

30. Mullins J found the majority of the delay on the part of both applicants had been adequately explained primarily as there had been ongoing negotiations over several years. The remainder of the delay was explained with reference to sick relatives and the distraction of the drought.

31. Ultimately her honour refused leave in respect of the wife, despite having made out the first 3 of the 4 limbs of the test, on the basis that ultimately the application was likely to fail as the applicant was unlikely to establish the provision made for her in the will was inadequate. Her honour referred to the judgment of Keane JA in *Hills v Chalk and Ors* [2008] QCA 159 at paragraph [35]:

> "It is difficult to see that there is any good reason why a claim for provision out of an estate which is clearly unlikely to succeed should attract the grant of an extension of time where the delay has been, as it is here, very long indeed."

32. Leave was granted in respect of the application by the son Edward. Relative to the size of the estate he had been left a small legacy in the sum of $25,000. In the testator's previous two wills he had ben gifted a substantial property. Mullins J said at paragraph [165] "Given the decades of work on the properties and Henry's unreasonable behaviour in my view Edward has a very strong moral claim"

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[11] Frey & Anor v Frey & Anor (as personal representatives of the Estate of HW Frey, dec'd) & Anor [2009] QSC 43 at paragraph [71.

[12] Ibid at paragraph [29].

E) MERITS

33. The concepts of "adequate provision" and "proper maintenance and support" are essentially relative and will vary with each case.

34. In *Singer v Berghouse* [1994] HCA 40, Mason CJ, Deane and McHugh JJ explained the process involved in the determination of an application for provision under the Act. At paragraph [42]

> "The first question is, was the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life?' The difference between 'adequate' and 'proper' and the interrelationship which exists between 'adequate provision' and 'proper maintenance' etc were explained in Bosch v Perpetual Trustee Co Ltd ([1938] AC at 476). The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
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> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance; and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like Ellis v Leeder ((1951) [1951] HCA 44; 82 CLR 645), where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors."

35. The courts have adopted this two-stage process for determining the applications. First the court will determine the jurisdictional issue, that is, the jurisdiction of the court only arises if and when the applicant satisfies the court that adequate provision has not been made for him or her. If the jurisdictional hurdle is overcome the court move onto the second stage and consider whether on order will be made.

36. In conducting the assessment the court will consider all the relevant circumstances but will have particular regard to:
    a) the applicant's financial position;
    b) the size and nature of the deceased's estate;
    c) the totality of the relationship between the applicant and the deceased; and
    d) the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

37. The determination as the whether adequate provision has been made for proper maintenance will be made with reference to "the postulate of a wise and just testator or testatrix."[13] The point in time for that determination is with reference to the circumstances as they existed date of the testator's death "But advantage may be taken of hindsight so long as the occurrences fall within the range of reasonable foresight". [14]

A Recent Example

38. *Dawson v Joyner* [2011] QSC 385 was decided last year in the Supreme Court at Rockhampton. Justice McMeekin considered issues of an application by an adult son who was estranged from the deceased.

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[13] *Hills v Chalk and Ors* [2008] QCA 159 Keane JA at paragrapgh [40]:

[14] *Hills v Chalk and Ors* [2008] QCA 159 Muir JA at paragraph [61]:

39. The short facts of the matter were the testator died in 2009 aged 79 years. He was married but that ended in divorce. The applicant was the eldest son, aged 49 years. He fell out with his father at the time of his parent's divorce and remained estranged for 22 years. The other beneficiary was the applicant's younger brother, was aged 48 years. Both the applicant and his brother were in employment and both had children.

40. The estate comprising of mainly grazing property had a value of approximately $2,650,000. The younger brother stayed on the family property and worked with his father until his father became incapacitated and, at the time of the case, continued to live and work on the properties. He had done so all his life and fulltime since he left school at age 15.

41. There was an area of debate involving the relationship between the applicant and his father. There were some difficulties between the applicant and his father at the time of the divorce and property settlement with the applicant's mother. The applicant swore that the relationship was "reformed" in 2007 when he commenced to visit his father in a nursing home. The applicant did visit his father on about a dozen or so occasions over a two year period. However, the uncontested medical evidence was that the testator was suffering from dementia long before any visit by the applicant. The medical evidence established that the testator lacked the capacity to form or maintain relationships from January 2007.

42. McMeekin J found no meaningful reconciliation had taken place. While he preserved his faculties, the testator displayed no wish or intention that he be reconciled with his son, nor did the applicant attempt to be reconciled.

43. In respect of the applicant's financial position; the size and nature of the estate; the totality of the relationship between the applicant and the deceased; and the relationship between the deceased and other persons who have legitimate claims upon his bounty; 3 out of the 4 factors were against the applicant.

44. McMeekin J also noted that the applicant was in no sense in need, stating he had secure employment, and whether or not he divorced from his spouse, he would have sufficient assets to provide a comfortable home. His Honour further stated that the simple fact was that at the date of death, the applicant had no present or foreseeable need. His Honour referred to the decision of Collicoat & Ors v McMillan & Anor [1999] 3VR 803. In that case, Justice Ormiston stated as follows:

> "It follows that those who are capable of supporting themselves comfortably, and are likely to be able to do so for the rest of their lives, will find it difficult to show any breach of moral obligation to make adequate provision for proper maintenance and support".

Disentitling Conduct

45. Under section 41(2)(c) an applicant who otherwise qualifies may, nevertheless, be denied further provision if his or her conduct is or has been such as to disentitle him or her to the benefit of an order. It could include misconduct towards the testator "or character or conduct which shows that any need which and an applicant may have for maintenance is due to his or her own fault."[15]

46. In Hughes v National Trustees Executors & Agency Co of Australasia Ltd (1979) 143 CLR 134, Gibbs J, with whom Mason and Aiken JJ agreed, said (at 156):

> "The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also, to some extent, on the strength of his need or claim to provision from the estate of the testatrix. The stronger the applicant's case for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision."

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[15] As per Jordan CJ in *Gilbert* (1946) SR (NSW) 318 at 321

47. *Hughes* was applied by White J in *Hastings v Hastings* [2008] NSWSC 1310. The applicant was the younger son of the deceased who died on 29 February 2008. He sought further provision pursuant to section 7 of the *Family Provision Act 1982* (NSW). The deceased was survived by 2 sons. The estate of approximately $650,000 had been left to the elder son and the children of a third son who predeceased the testatrix. None of her wills provided for the applicant.

48. The applicant had left Australia in 1969 when he was 18. He was involved in serious drug related crime in America, was arrested in Mexico and Fiji and eventually extradited to the USA where he was imprisoned. All of his assets were seized by drug enforcement agencies and forfeited.

49. The applicant had little contact with his mother after 1969 until 2007 when he was advised his mother had been diagnosed with cancer. He returned to Australia and in the next eight months spent approximately two and half with his mother. He was living in his mother's house when she died. Evidence from the deceased's solicitor made it clear the deceased did not consider the applicant was worthy of any inheritance. White J found the applicant had considerable financial needs and significant health problems but concluded at paragraph 43:

> "The deceased was well able to judge the relative desserts of her children. The defendant had substantial claims on her as she recognised. The plaintiff's character and conduct, the fact that his financial needs are due to his own fault, the shame his conduct brought on the deceased and the family, and the very slight contact he had with his mother during his adult life, indicate that he does not have a legitimate claim on his mother's property. That is so notwithstanding his impecuniosity; his health problems and his belated care for his mother at the very end of her life. I do not think sensible members of the community would feel that in circumstances the plaintiff should have been provided for in the will even had the testatrix known of the plaintiff's current financial circumstances and his current state of health."

50. The applicant appealed. The appeal was dismissed with costs.[16]

51. In general there has been reluctance by the courts in Queensland to characterise conduct as being sufficiently serious to disentitle an applicant. The was the approach taken by Mullins J in *Pizzino v Pizzino* [2010] QSC 35 The deceased was the applicant's mother. She died on 10 May 2007. Her estate was valued at approximately $4 million. In her will made shortly before her death she left half to the applicant's sister and the remaining half share to the applicant and his three sons in equal shares as tenants in common. The applicant had a significant gambling problem and became dependent on illicit drugs. He was forced to borrow money off his children. At a time when the deceased was experiencing serious health problems the applicant cuts his wrists whilst his mother was nearby. At paragraph 64 Mullins J said this:

> "The respondents submit that the applicant's behaviour towards his parents was poor, culminating in the self-harm incident on Boxing Day 2006. This proceeding is concerned with disentitling conduct that is relevant to the applicant's claim against his mother's estate. Although it is no excuse for the worry that the applicant caused his mother, his conduct from 2001 onwards has to be understood in the context that he was suffering emotional problems and the stresses of a gambling addiction and substance abuse problem. Although involvement with illicit substances itself may, in some circumstances, amount to disentitling conduct (such as in Hastings v Hastings [2008] NSWSC 1310), the applicant's circumstances and behaviour, as I have found them to be, are not sufficiently serious to be characterised as disentitling conduct."

F) PROCEDURE

52. When first approached ascertain the date of death. Do not rely upon your clients for this information. Ascertain whether they are eligible under the

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[16] *Hastings v Hastings* [2010] NSWCA 197)

Act. Consider the applicable time limits. Write to the personal representatives and put them on notice pursuant to section 44(3). Ask for

a) a certified copy of the death certificate;
b) a copy of the all wills of the deceased;[17]
c) an account of the estate's assets and liabilities.

53. Once you are aware of the size of the estate, the provision (if any) for your client and the competing beneficiaries you will be in a better position to advise as to the merits of an application.

54. The application is brought by originating application with a supporting affidavit

Jurisdiction

55. The District court has specific jurisdiction to determine application pursuant to section 40-43 on the Act by virtue of section 61(1)(b)(x) of the District Court Act 1967. There will relatively few cases where the applicant has reasonable prospects of being awarded further provision with a value in excess of the new District Court monetary limit of $750,00. For applications to the Supreme Court the practice direction requires the supporting affidavit to contain material showing that the matter is not within the monetary jurisdiction of the District Court.

Practice Direction

56. The relevant practice direction is No.8 of 2001. The objects of the Practice Direction are to reduce cost and delay by –

a) making information available at the earliest practicable date so that a realistic assessment of prospects can be made by all parties;

[17] Section 33Z provides that a potential applicant under s 41 is entitled to such disclosure. Note that "will" includes a purported will or revoked will"

b) encouraging the early consensual resolution of applications;
c) minimising the number of appearances necessary to dispose of Family Provision applications.

57. If you are having difficulties with disclosure referring the other side to the practice direction is usually all that is necessary to ensure cooperation. Note there is no automatic right to disclosure as there is with a proceeding started by a claim. If you continue to have difficulties you can apply for an Order for Disclosure under UCPR rule 209(1)(c)

58. The applicant's supporting affidavit and a draft directions order must be served with the originating application.

Applicant's affidavit

59. The practice direction provides:

"The applicant's supporting affidavit shall –

a) show a prima facie case that the applicant is a person who is entitled to apply, that adequate provision has not been made and that the applicant is otherwise entitled to bring the application;
b) provide details of the applicant's assets and liabilities and sources of income;
c) show the identity of all persons who fall within the definitions of "spouse", "child" or "dependant" in section 41(1);
d) contain material identifying persons having an interest in the estate, who should be served;
e) if the application is brought out of time, contain material relevant to an application that the matter be heard and determined notwithstanding that fact;
f) if there is no grant of representation, contain material relevant to an application that the matter be heard and determined despite the absence of a grant; (eg those facts then known to the applicant which may make a grant unnecessary in all the circumstances);

g) contain particulars of any bequest which the applicant seeks to have exonerated from the burden and incidence of any order of the court (eg specific bequests, pecuniary legacies, bequests of personal effects, etc) so that the executors can distribute them in the normal course of administration regardless of the application. If bequests of personal effects or small bequests are not to be exonerated, some justification for that is to be provided;

h) contain material showing that the matter is within the monetary jurisdiction of the District Court pursuant to section 68(1)(b)(x) of the District Court Act 1967 (ie, show that the applicant is not seeking to be awarded further provision with a value in excess of $750,000 or as the jurisdiction may be defined from time to time);

i) include, so far as known to the applicant, information and material as to the assets and liabilities in the estate from which further provision might be made for the applicant;

j) contain the applicant's best estimate of the applicant's costs through to and inclusive of final hearing;

k) contain such other material as may be necessary to support the application."

60. Ensure that affidavit complies with the UCPR in particular rule 431.

61. Do not delay making the application in order to resolve other matters such as capacity or whilst waiting for disclosure. The directions order anticipates that the applicant will file further affidavit material. However, the better the evidence at the outset the better the likelihood an early favourable settlement.

62. In addition to the requirements of the practice direction it is good practice to:

a) exhibit the Will;

b) be reasonable in exonerate specific bequests - it will reduce the number of interested parties in the estate and will mitigate any prejudice

resulting in a delay in the distribution of the estate caused by the application;

c) exhibit valuations of substantial assets of the estate;

d) obtain medical reports relevant to need, the ability of the applicant to provide for himself or herself, including costs of treatment and prognosis. Medical reports can also be effective in an appropriate case in explaining a delay if limitation is an issue.

63. If the applicant is a spouse, the following matters would have to be considered:

a) length and history of marriage;

b) particulars of any periods of separation;

c) details of children including ages, health, disabilities;

d) details of any other children (who may not be related) but who are part of the family household;

e) was there any Financial Agreement entered into by the parties and are the contents of such agreement relevant to the client's application. [18]

64. If the applicant is an infant child, particulars of the child would include:

a) age;

b) health difficulties;

c) school history and current education arrangements, special classes being attended;

d) future education and medical expenses;

e) child care costs including food, clothing, sporting interests. How the child is being currently maintained;

f) who will be the litigation guardian.

65. If the applicant is an adult child include:

a) health, qualifications, current circumstances;

b) the ability of the applicant to support himself and his dependants;

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[18] See *Hills v Chalk and Ors* [2008] QCA 159

c) the nature of the relationship between the deceased and the adult child;
d) whether the applicant assisted in building up the estate of the deceased, either in financial or non-financial ways;
e) whether that gave rise the a legitimate expectation, eg the family farm;
f) whether the adult child cared for his or her parent and that has that had an adverse effect on the applicant's own financial and possible emotional circumstances;
g) whether the applicant need to pursue any further education to support himself;
h) details of any financial assistance which may have been rendered by the deceased to the applicant during their lifetime such education expenses, rent-free accommodation, providing childcare for grandchildren.;
i) whether any declaration or affidavit has been signed by the deceased as to reasons why the applicant has been left out of the will in the first place;
j) any issues of estrangement.

66. In *Mark Joseph O' Donnell v Colleen Mary Gillespie & Anor* [2010] QSC 22 McMurdo J considered an application by an adult son who had been disinherited by his father. The testator died on 30 May 2007 approximately one year after his wife. They had seven children. The applicant was the oldest, then there were five daughters and another son. The estate had a net value of $9.3 million. The testator left his estate to his five daughters.

67. The applicant had worked on his parent's farms for 25 years until 1995 when he had a falling out with the testator. Thereafter he lost contact with his parents. He visited his mother only once before her death in 2006 which it appears his father could not forgive him for. The testator had told him that he would inherit the farms. McMurdo J found that whilst the applicant may have had that expectation he had been adequately remunerated.

68. At the time of death the applicant and his wife had a net wealt of $1.4 million. However, McMurdo J said at paragraph [71]

"It is necessary to consider also the prospect that they could have decades beyond their working lives for which their savings would have to suffice. It was necessary for the testator to consider such possibilities"

69. McMurdo J relied upon Vigolo v Bostini[19] where Callinan and Heydon JJ said in assessing whether adequate provision had been made that it was not enough to simply look at whether the "applicant has enough upon which to survive or live comfortably" but that the answer will depend upon all the relevant circumstances, including "any promise which the testator made to the applicant, the circumstances in which it was made, and . . changes in arrangements between the parties after it was made"

70. His honour was persuaded that adequate provision had not been made and ordered further provision in the sum of $500,000. The principal reasons for the decision were the applicant's substantial contribution to the estate on the expectation that some of it would be left to him and the risk that the applicant would be deprived of his economic independence if he was forced to resort to his savings in order to support his family.

The Respondent's affidavit

71. The practice direction provides the affidavit of the respondent referred to in paragraph 5 of the draft directions order herein shall include –
    a) a list of estate assets and liabilities, and estimates of value, specifying the date of estimation/valuation;
    b) the respondent's best estimate of the costs of the administration of the estate through to completion of executorial duties; and the costs of and incidental to the application through to trial and judgment;
    c) all facts and matters relevant to any material in the applicant's affidavit concerning exoneration of any bequest from the burden or incidence of an order, and the respondent's responses;
    d) any information the respondent has about the assets and liabilities and

[19] [2005] HCA 11; (2005) 221 CLR 191 at 230-231

sources of income of beneficiaries who are natural persons having a competing claim on the bounty of the testator;

e) material relevant to all matters in issue on the application".

72. The draft order provides that it is for the respondent to serve all interested parties with the originating application and accompanying documentation.

73. The executor is under a duty to make distributions, which the applicant has specifically exonerated from the action. It must also be remembered that the executor is under a duty to preserve the estate which gives rise to an obligation to defend the action. The executor owes a duty to the beneficiaries to mount a proper defence by in particular:

a) obtaining affidavits relevant to the issues;

b) presenting evidence about material matters, including the needs and financial circumstances of the beneficiaries.

H) COSTS

74. Justice Gaudron considered the question of costs in of Singer v Berghouse [1993] 67 ALJR 708. It was noted by that in most cases costs follow the event unless there were special or extraordinary circumstances.

75. However, her honour further noted that decisions in family provision matters involved a discretionary judgment of a very broad kind made by reference to the circumstances of the particular case and not by reference to a rule or rules which direct the decision one way or the other. She stated that costs in family provision cases generally depend on the overall justice of the case and that it was not uncommon in the case of unsuccessful applications for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. There may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate.

76. This has led some practitioners or applicants to be fairly robust in their approach. Certainly in my experience when these matter are mediated the practice is often that both sides costs are paid by the estate and the pool is reduced accordingly. If the matter does not settle there are risks particularly when the estate is relatively small and the claim is tenuous. The courts can get quite cranky when matters pertaining to small estates are litigated and particularly if the applicant's claim is veneer thin. Your client should be fully advised as to the question of costs and the risks involved.

77. In the case of Manly v The Public Trustee of Queensland [2007] QSC 388 a widow made an application for family provision. Three adult sons from an earlier marriage were other interested beneficiaries. The deceased's will left his widow and three children a number of specific gifts of low value and the residuary in equal shares. The widow, in her application, claimed the whole of the residuary estate which comprised cash of just over $100,000 and a residence valued at approximately $370,000. The residence was a result of the deceased receiving over $300,000 from his late brother's estate. Also from the brother's estate, two of the children received $100,000 and a third son received just over $120,000.

McMeekin J found that the provisions of the will were not inadequate for the applicant's proper level of maintenance and support and dismissed the application on the following basis:

a) the estate was relatively small;
b) the marriage was of short duration, some 42 months.
c) the applicant had made no contribution to the residence;
d) the children had a legitimate claim.

In respect to the costs, which were approximately $180,000, his Honour said at paragraph 7 :

"I note in passing that if all costs were allowed out of the estate approximately 40 percent of the estate has been expended on legal costs associated with these proceedings."

He went on to say at paragraph [114]:

"Firstly, they are out of proportion to the work and difficulty involved in this case. Secondly, there is little point to litigation in these modest estates. The executor is entitled, and save perhaps in a clear case, duty bound to uphold the Will. Parties and their legal advisors should be well advised to bear this firmly in mind before embarking on litigation in such circumstances."

78. His Honour further stated that, in his view, the beneficiaries and the respondent had a strong case for their costs to be met by the applicant and that her failure in the application, the modest size of the estate, her rejection of an offer, which his Honour found to be plainly reasonable, and her lack of candour in conducting the application all provided powerful reasons as to why he should consider the overall justice of the case should result in her bearing the burden of costs. However, his Honour stopped short of making an order that the applicant pay the beneficiary's costs. He felt that such an order would effectively take away the entire benefit that she would have otherwise received, and that when the offer was made a substantial amount of the costs had already been incurred. He felt in the circumstances it was not just to expose the applicant to the whole of the burden of costs. However, because the beneficiary's costs were paid from the estate, the applicant was in effect, bearing 25% of those costs.

79. Surprisingly this case went on appeal to the Court of Appeal[20] and the applicant was unsuccessful. The respondents were the Public Trustee as executor, and the three sons as beneficiaries under the Will. Daubney J stated at paragraph [41]:

"As to the question of costs, there is, in my view, no reason why the unsuccessful appellant should not pay the respondents' costs of the appeal. The respondents were the Public Trustee, as executor and trustee of the will, and Ronald, Dennis and Gary Manly as beneficiaries under the will. I would respectfully adopt the following

[20] *Manly v The Public Trustee of Queensland & Anor* [2008] QCA 198

observation by Thomas J (as he then was) with whom McPherson ACJ and Byrne J agreed, in Re McIntyre:[21]

> 'It is in my view essential that a distinction should be maintained in the approach to costs at first instance and on appeal. Applicants and their advisors should not think that they can bring appeals confident in the knowledge that the estate will in all probability be obliged to pay for the exercise. What I have called the indulgent attitude of judges of first instance to unsuccessful applicants has no place in the appeal process. A litigant has a right under the rules of court to test a judgment by bringing an appeal, but he has no similar right to do so at the expense of the other party or estate.'

Those observations have particular relevance in a case such as the present in which the value of this modest estate has already been significantly diminished by reason of the costs properly incurred in the challenge at first instance. It would, in my view, be quite unjust for this appellant to be relieved from the usual consequence of paying the successful respondents' costs of this appeal, particularly if that were to be accompanied by an order which had the effect of even further diminishing the value of the estate."

80. Another example can be found in *Atthow v McElhone* [2010] QSC 177. The deceased died in April 2009 and she was survived by 3 children. The eldest child, Kay, aged 66 was the applicant. The estate had a value of slightly less than $300,000 before deducting the costs of selling its real property which was worth $220,000. The Will provided for the whole of the estate to go to the youngest daughter Dianne. The other child, Lance, made no application for provision from the estate and did not intend to do so.

81. The applicant had assets of approximately $2,300,000. She earned income by working as a nurse for Queensland Health and received income from two rental properties and dividends from shares.

[21] RE: *McIntyre* [1993] 2 QDR 383

82. The applicant was estranged from her mother, although there was conflicting evidence about the original source of strains in the relationship.

83. Dianne, the beneficiary, made an application for summary judgment against her sister's application for family provision.

84. Applegarth J noted that as in any application for summary dismissal of the proceeding, he should proceed with caution and not grant summary judgment unless it is clear that the application cannot possibly succeed. He further noted that it would be inappropriate to grant summary judgment on the basis of disputed facts, the determination of which at trial in Kay's favour would support her claim. His Honour stated that in a case such as this, an adult claimant is in the position of needing to show some basis to allow intervention by the Court under the Act. The Court does not exercise jurisdiction under the Act to build up out of the estate of the testator the capital assets of a person who has built up enough assets for their proper maintenance.

85. His Honour concluded:

"Even assuming relevant factual disputes would be resolved in Kay's favour at any trial, it is extremely hard to see any basis to conclude that the deceased at any time of her death in fact had an obligation to make provision for the proper maintenance and support of Kay. Her claim for provision to be made in her favour out of her mother's estate seems practically hopeless. However, exercising the extreme caution that is appropriate to applications for summary judgment, I decline to exercise my discretion to summarily terminate the proceeding".

The matter was remitted to the District Court. Dianne's costs of about $50,000 were ordered to be paid out of the estate on an indemnity basis. He declined to make an order for costs in favour of Kay in respect to the application for summary judgment and her costs of her application for family provision were reserved.

86. His Honour made a comment that if Kay's case for provision out of the estate

> "proves to be as weak as I presently assess it to be, there would be good reason for Kay to bear her own costs rather than have the value of the estate diminished by legal costs associated with an "unmeritorious application."

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