SUPREME COURT OF QUEENSLAND

CITATION:	*Enoch v Public Trustee of Qld* [2005] QSC 194
PARTIES:	**SHAWN JOSEPH ENOCH** (applicant) v **THE PUBLIC TRUSTEE OF QUEENSLAND** (in his capacity as executor of the estate of **JOSEPH GEORGE ENOCH**) (respondent)
FILE NO:	SC3874 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	18 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 July 2005
JUDGE:	Wilson J
ORDER:	**That the substantive application be heard by the Court notwithstanding that the originating application was not filed within 9 months after the death of the deceased.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – where originating application was filed a few days outside limitation period - where applicant has a strong case – where delay attributable to oversight of solicitors – where delay has not occasioned prejudice to other beneficiary of estate - whether extension of time should be allowed *Succession Act* 1981 (Qld), s 41 *Bird v Bird* [2002] QSC 202, cited *In re Salmond decd* [1981] 1 Ch 167, applied *Singer v Berghouse* (1994) 181 CLR 201, applied *Warren v McKnight* (1996) 40 NSWLR 390, cited
COUNSEL:	DC Rangiah for the applicant DRM Murphy for the respondent
SOLICITORS:	Just Us Lawyers for the applicant Official Solicitor to the Public Trustee of Queensland for the respondent

[1] **Wilson J**: This is an application pursuant to s 41(8) of the *Succession Act* 1981 for an extension of time within which to bring a family provision application.

[2] Joseph George Enoch (the deceased) died on 6 August 2004. He was survived by his son Shawn Joseph Enoch (the applicant) and his de facto partner of 7 years Christinea Laing.

[3] The deceased left a will dated 24 June 2004. The respondent obtained an order to administer the estate in accordance with the will on 7 April 2005.

[4] The net value of the estate is $314,681-74, which includes cash of $194,663-74 and a house valued at $110,000-00. The will provided for –

- a legacy to the applicant in the sum of $50,000
- a life interest in the deceased's house at 6 Rabaul Street, Mt Isa and the household furniture and effects to Christinea Laing (subject to her keeping the property in a state of repair satisfactory to the trustee, insuring the property against loss, damage or other insurable risk and paying all rates, taxes and insurance premiums or other periodical outgoings payable on the property)
- upon the failure or termination of the life interest in the property at 6 Rabaul Street, Mt Isa, the property to be held for the applicant
- the residuary estate to Christinea Laing absolutely.

[5] By originating application filed on 13 May 2005 the applicant applied for an order under s 41(1) of the *Succession Act* for further provision out of the estate. That application was a few days outside the limitation period in s 41(8), which provides –

> "(8) 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 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."

[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.

See *Warren v McKnight* (1996) 40 NSWLR 390 at 394 and *Bird v Bird* [2002] QSC 202.

[7] On 13 October 2004 the applicant's solicitors wrote to the respondent advising that their client intended making a family provision application. Thereafter the applicant's solicitors proceeded diligently to brief counsel to advise on prospects and draw proceedings. Counsel's advice was received on 23 December 2004 and the next day the solicitors wrote to the applicant seeking instructions for drawing the necessary affidavit. Those instructions were received in late January 2005. On 3 February 2005 the solicitors wrote to the applicant enclosing a draft affidavit and asking for further information. Further instructions were received on 2 March 2005, and on 13 April 2005 the solicitors sent the draft affidavit to counsel to settle. On or about 22 April 2005 counsel requested more information, which the solicitors obtained from the applicant in a telephone conversation on or about 29 April 2005. On or about 4 May 2005 the solicitors sent the applicant a letter enclosing the affidavit for execution, but omitting to advise him of the impending expiration of the limitation period. The solicitors received the executed affidavit on 13 May 2005; on the same day they filed and served the originating application and the affidavit. Of course, the limitation period had expired between their sending the affidavit to the applicant for execution and then.

[8] It is the respondent's duty to uphold the will. He quickly took the point that the limitation period had expired and that it was for the applicant to apply for an extension of time. The respondent cannot be criticised for this.

[9] The failure to file the application within time is attributable to oversight on the part of the applicant's solicitors. The applicant's own conduct does not warrant criticism. In my view the explanation for the delay, which was quite short, is adequate.

[10] The delay has not occasioned any prejudice to the other beneficiary of the estate (Christinea Laing), as the estate has not been distributed.

[11] There has been no unconscionable conduct on the part of the applicant.

[12] For the purposes of this application it is relevant to make some preliminary assessment of the prospects of the applicant's substantive claim. In my view his case is quite a strong one.

[13] As the High Court explained in *Singer v Berghouse* (1994) 181 CLR 201 the determination of a family provision application involves a two stage process – first, a determination whether the applicant has been left without proper provision for his proper maintenance and support, and if so, then a determination of what provision ought to be made. The question at the first stage is one of fact, although value judgments have to be made. The applicant's financial position, the size and nature of the estate, the totality of the relationship between the deceased and the applicant and the deceased's relationships with others having legitimate claims on his bounty are all relevant to the determination of that question. The second stage requires an exercise of discretion.

[14] The applicant is the only surviving child of the deceased. He is presently aged 37 years, and is married with 2 children presently aged 9 and 5 years. They live in rented accommodation, and have been unable to save a deposit for their own home.

He is a mine worker in Mt Isa. The deceased and the applicant's mother were divorced in 1983. Thereafter the applicant and his brother were raised by the deceased. The applicant's brother died in 1993. The relationship between the applicant and his family and the deceased was a close one. The applicant helped the deceased with maintenance of his house and car, and from time to time the deceased lent him money (which was always repaid in full).

[15] The deceased clearly had a moral obligation to make provision for Ms Laing. She is aged 62 years. Her health is not good, and she is in receipt of social security payments. She and the deceased were de facto partners for about 7 years. It seems that she and the applicant did not get on.

[16] The deceased's estate was a modest one, and he had two competing claims on his bounty – the applicant and Ms Laing. I think that the applicant has quite strong prospects of persuading a Court that the provision the deceased made for him ($50,000-00 and a remainder interest in the house) was insufficient in all the circumstances.

[17] I am persuaded that this is a proper case in which to extend time. I direct that the substantive application be heard by the Court notwithstanding that the originating application was not filed within 9 months after the death of the deceased.