SUPREME COURT OF QUEENSLAND

CITATION:	*Mortimer v Lusink & Ors* [2016] QSC 119
PARTIES:	**ANITA NARELLE MORTIMER (under Part 4 of the *Succession Act* 1981)** (applicant) **v** **CHRISTOPHER THEODORE GORDON LUSINK (as executor of the will of LOMA NARELLE GREEN deceased)** (first respondent) **CHRISTOPHER THEODORE GORDON LUSINK (in his personal capacity)** (second respondent) **VANESSA LUSINK (as beneficiary under the will of LOMA NARELLE GREEN deceased)** (third respondent) **GORDON THEODORE LUSINK (as beneficiary under the will of LOMA NARELLE GREEN)** (fourth respondent)
FILE NO/S:	Supreme Court No 3842 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2016
JUDGE:	Martin J
ORDER:	**The application is dismissed.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – GENERAL PRINCIPLES – where the applicant, the testator's daughter, sought to bring an application for further provision from the estate – where the application was brought nine days out of time – where the applicant contends that she has a sufficient explanation for the delay in that the late application was brought about solely through the actions of her solicitor – where the applicant contends that the strength of her case justifies the extension of time – whether the applicant has

demonstrated "a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time"

Succession Act 1981 (Qld), s 41(8)

Bird v Bird [2002] QSC 202, considered
Leahy v Trescowthick [1999] VSC 409, considered
Hills v Chalk[2009] 1 Qd R 409, considered
Re Salmon (deceased) [1981] Ch 167, followed
Singer v Berghouse (1994) 181 CLR 201, applied
Warren v McKnight [1996] 40 NSWLR 290, applied

COUNSEL:	D B Fraser QC for the applicant R M Treston QC for the respondents
SOLICITORS:	Dormer Stanhope for the applicant de Groots for the respondents

[1] **MARTIN J:** Loma Green died on 2 July 2015. On 14 April 2016 Anita Mortimer (her daughter) filed an application in which she seeks a direction that she be allowed to bring an application for further provision from her mother's estate and for ancillary orders. Such a direction is necessary because the application was filed nine days out of time.

[2] Part 4 of the *Succession Act* 1981 (Qld) (the Act) deals with family provision. Within that Part, s 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 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."

[3] The nine month period expired on 4 April 2016.

The relevant principles

[4] An applicant who seeks a dispensation by way of a direction that an application may be heard faces a substantial barrier. As White J said in *Bird v Bird*:[1]

> "Time limits in statutes are for good reason. Malcolm CJ in *Clayton v Aust* (1993) 9 WAR 364 quoted with approval the approach of Megarry VC in *Re Salmon (deceased)* [1981] Ch 170 at 175:
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> > "… the time limit is a substantive provision laid down in the Act itself, and it is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to

[1] [2002] QSC 202 at [22].

> procedural rules. The burden on the applicant is thus, I think, no triviality: **the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extent [sic] the time**.'" (emphasis added)

[5] Her Honour also referred to the reasons of Hodgson J in *Warren v McKnight* [2] where he set out four factors which can be relevant in an application like this:

(a) the sufficiency of the explanation of delay in making the claim;

(b) whether there would be any prejudice to the beneficiary/ies;

(c) whether there been any unconscionable conduct by the applicant; and

(d) the strength of the applicant's case.[3]

[6] The requirements of the fourth factor – the strength of the applicant's case – were given further consideration in *Hills v Chalk*.[4] Keane JA said:

> "[31] The appellants' submission was that the probability that an application for provision out of the estate will ultimately succeed is a necessary, though not sufficient, condition of the grant of an extension of time. There is support for that view. In *Re Terlier, deceased*, Townley J said: '**If it is improbable that the substantive application will succeed it seems idle to grant the extension**.' This statement was approved by Lush J in *Re Walker, deceased* where his Honour went on to add that the improbability of success 'may stem either from the condition of the estate … or from the facts relevant to the [claimant's] claim, or from both …'.
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> [32] Other decisions, such as *Ashhurst v Moss* and *Warren v McKnight*, do not suggest that these statements are erroneous in point of principle; but they follow a somewhat more flexible approach. That **more flexible approach is appropriate where facts material to the ultimate merits of the substantive application are unclear or disputed. In such cases, it will often not be possible to come to a clear view that ultimate success is improbable. In such cases, a balancing of the competing considerations may be necessary**." (citations omitted, emphasis added)

[7] His Honour then went on to consider the proposition that an application should be allowed to proceed where the claim may be recognised by the representatives of the estate of the deceased as having sufficient merit to warrant resolution by negotiation. He said:

> "[37] … at least in those cases where it is possible for a court to reach a clear view that a claim for further provision is unlikely to succeed, a court should not exercise the discretion conferred by s 41(8) of the Act to facilitate the pursuit of a stale claim on the basis that a negotiated settlement might ensue."

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2 [1996] 40 NSWLR 390.
3 Ibid at 394; see also *Enoch v Public Trustee of Queensland* [2006] 1 Qd R 144.
4 [2009] 1 Qd R 409.

[8] Further consideration was given to this issue by Muir JA. His Honour referred to the four factors (set out above) and said:

> "[76] The applicant's prospects of success on the substantive hearing are relevant to the exercise of the discretion to extend time. The following questions have been posed: whether the applicant has 'an arguable case on the merits;' 'a case fit to go to trial;' a case which is 'so weak that it should not be permitted to go to trial;' or 'an arguable case for relief'. In other cases there has been a general assessment of the strength of the applicant's case.
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> [77] Plainly, the existence or otherwise of an arguable case is a relevant consideration and it will often be unnecessary to give further consideration to the strengths or weaknesses of the applicant's case. **It may be doubted, however, that in considering all relevant circumstances the Court's sole consideration, in so far as the strength of the applicant's case is concerned, is confined to determining whether there is an arguable case.** It is against the trend of principle to fetter a discretion such as that conferred by s 41(8) of the Act by reference to inflexible principles or guidelines. When the circumstances relevant to an application are considered as a whole, as they must be, it may be that the finding of a strong case would influence the exercise of discretion in the applicants' favour more than would a finding that the case was marginal at best. In any such process there is a need to recognise the limitations of the material before the Court on the application for leave, which will be generally untested by cross-examination, in comparison with the more extensive material likely to be in evidence on the substantive hearing." (citations omitted, emphasis added)

[9] Finally, consideration must be given to the general purpose of a limitation period. This was also considered by Muir JA who summarised it in the following way:

> [78] The time limit imposed by s 41(8) of the Act has the obvious purpose of ensuring that an application for further provision from an estate does not unduly interfere with the estate's prompt administration. **There is also the consideration that persons named as beneficiaries in wills**, to adopt the language of McHugh J in relation to limitation periods in *Brisbane South Regional Health Authority v Taylor* '... **should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against [the estate]**.'
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> [79] His Honour's subsequent observations concerning the nature of limitation periods are also of relevance:
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> > "A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this

> background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case. **The purpose of a provision such as s 31 is 'to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced.' But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension**." (citations omitted, emphasis added)

The circumstances of this application

[10] With those principles in mind, I turn to the facts of this case.

[11] The respondents accept that there is no evidence that they would suffer any particular prejudice beyond:

(a) The (possible) return of the distributions already made to them; and

(b) The loss of the right to rely on the limitation period.

[12] As for the possible return of the distributions already made, the respondents have given an undertaking not to dispose of them until further order. In any event, the two types of prejudice referred to will be part of any application of this type.

[13] The respondents do not suggest that there has been any unconscionable conduct by the applicant.

[14] The two areas in which the respondents argue that the applicant cannot succeed are the explanation of the delay and the strength of the case.

Explanation of delay

[15] The applicant's solicitor (Ms Dormer) has said that she thought that the time limit for making an application expired nine months after probate was granted. Probate was granted on 8 September 2015. The solicitor is also the applicant's daughter. That was referred to many times by the respondents but I cannot see a logical connection between that relationship and the factors to be considered.

[16] Ms Dormer practises in New South Wales. She is not a practitioner experienced in this area of the law. The bulk of the property in the estate is in Victoria. In that State, the time limit for making an application of this kind is nine months but it is measured from the date of grant of probate.

[17] This is not a case in which an applicant has, while aware of the capacity to apply, done nothing and then applied for leave. The following matters demonstrate that the applicant – through her solicitor – did not "sit on her hands":

(a) The executor was formally notified of the intention to make an application in October 2015.

(b) Between November 2015 and January 2016 she collected material for use as evidence.

(c) Counsel was briefed to draw and settle the originating application.

(d) During November and December 2015, without prejudice negotiations took place between Ms Dormer and the executor's solicitor.

[18] In one of her affidavits, Ms Dormer gave evidence of a conversation with Ms Worsnop (an employee of the executor's solicitor) in which an assurance was given about not distributing the estate until nine months after probate. That was denied by Ms Worsnop and I cannot, in the absence of, at least, cross-examination, decide that issue.

[19] In any event, on 17 December 2015, immediately after a conversation with Ms Worsnop, Ms Dormer sent an email to her containing the following:

> "I refer to our conversation just now and confirm:
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> (1) You have advised your client of his obligations as executor, including not to distribute the estate until 9 months after probate.
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> (2) You have advised your client he would be in breach of the Succession Act of he made a distribution prior to expiry of the limitation period or absent an order of the Court."

[20] There was no reply to that email. An undertaking was provided later that day that the executor would not distribute the estate until such time as any application filed pursuant to the Act, within the statutory time limit, is determined by agreement or order of the Court. Some submissions were made suggesting that there was some duty on the executor's solicitor to correct a misapprehension about the time limit. I do not accept that there is such a duty but I do not need to decide that. This material is evidence of Ms Dormer's error about the time limit.

[21] There is nothing to suggest that the applicant was dilatory in pursuing her claim. The mistake was not hers but her solicitor's. Although they are not determinative, there are other matters which can be considered in this category. For example, in *Leahy v*

Trescowthick[5] Warren J (as her Honour then was) considered the tests for extending time for bringing an application of this type. So far as the explanation for delay is concerned she identified the following as relevant factors:

> "[18] The relevant tests laid down for the exercise of the grant of an extension of time by the authorities are:
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> (1) The extension will be granted where the applicant had instructed solicitors in respect of a claim but no application had been made within time due to the inaction of the applicant's solicitor (see *Brown v Holt* (1961) VR 435, 437-438).
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> (2) An extension will be granted where bona fide negotiations to settle the applicant's claim for provision extended beyond the time limit (see *Amos v Amos* (1966) VR 442, 445).
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> …
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> (4) Where the delay in bringing the application is short the court is more disposed to granting an extension (see *Re Cruskett deceased* (1947) VLR 212).
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> (5) The courts will not grant an extension where there has been a lack of expedition on the part of the applicant and where the applicant knew of the time limitation (see *Re Barrot (deceased)* (1953) VLR 308, 314; *Amos v Amos*, supra, 445-6; *Re Walker (deceased)* (1967) VR 890, 891).
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> …"

[22] In this case, the solicitor knew that there was a time limit and, I accept, was mistaken. The reason for her being mistaken is not clearly established but that does not stop it being a mistake. Frequently, it is not possible to identify why someone misapprehends the true position. It may have been that Ms Dormer had proceeded on the assumption that time ran from the grant of probate because that is the situation in the jurisdiction in which the bulk of the estate is located. Or it may simply have been inattention to detail. But, most importantly, the fault was not that of the applicant. She gave the instructions to bring the application. She did not prevaricate and the delay is very short. In all the circumstances, I am satisfied by the explanation.

The strength of the applicant's case

[23] It must be acknowledged that, on an application of this type, the Court will not have the benefit of complete material and, where relevant, oral evidence to assist in the resolution of the issues. Nevertheless, the task for an applicant is to "make out a substantial case for

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5 [1999] VSC 409.

it being just and proper for the court to exercise its statutory discretion to extend the time".[6]

[24] Whether a substantial case has been made out should be assessed, at least, by reference to the criteria set out in *Singer v Berghouse*[7] including:

(a) The applicant's financial position;

(b) The size of the deceased's estate;

(c) The relationship between the applicant and the deceased; and

(d) The relationship between the deceased and other persons with legitimate claims.

[25] The decision in *Singer v Berghouse* established the two stage process for determination of a substantive application:

> "The first stage requires an objective determination of whether the applicant had been left without adequate provision for proper maintenance, education and advancement in life. The second stage, which arises only if the first is determined in favour of the applicant, requires the determination of "what provision ought to be made out of the deceased's estate for the applicant". The second stage involves similar considerations to the first. They are:
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> > "… 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."[8] (citations omitted)

[26] It is also appropriate to consider whether any provision which might be ordered would be so small as to be disproportionate to the costs which an application would generate. This reflects the concern that it be "just and proper" to allow the matter to proceed.

The applicant's financial position

[27] The applicant is:

(a) The eldest child of the deceased;

(b) 69 years old;

(c) The mother of two adult children (from her first marriage); and

(d) The older sister of Theodore Lusink, 63, the executor of the estate.

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6 *Re Salmon (deceased)* [1981] Ch 167 at 175.
7 (1994) 181 CLR 201.
8 *Hills v Chalk* [2009] 1 Qd R 409 at [131].

[28] The applicant and her husband:

(a) Own an unencumbered house worth between $500,000 and $525,000;

(b) Have no debts;

(c) Have a combined income of a little under $40,000 a year;

(d) Have a combined superannuation fund worth about $29,000; and

(e) Own a car worth about $30,000 together with household contents and personal effects.

[29] It was submitted that the applicant's position is uncertain as:

(a) Her husband is in poor health;

(b) The annual income is a Commonwealth old age pension;

(c) She has no earning capacity;

(d) The superannuation fund is small; and

(e) The house in which she lives is in need of substantial expenditure for repairs and replacements.

[30] On the other hand, the respondent identifies these matters as relevant:

(a) The applicant retired at 50 and has not worked since then;

(b) Her health is relatively good for her age;

(c) She wants to buy a house elsewhere in Victoria at a cost of about $600,000;

(d) Alternatively, she wants to engage in substantial work on the house in which she lives;

(e) Her combined fortnightly income with her husband exceeds their fortnightly expenses by about $250; and

(f) Her claim that she needs to spend $7,000 on dental work is not supported by evidence.

[31] The applicant has exhibited a quotation from a builder for repairs and improvements to her home. She also sets out a number of matters which she says require almost immediate attention. Together, all those matters add up to about $170,000 in capital amounts with some sort of allowance for recurrent expenses of about $20,000 a year. I have not included the separate "claim" for house painting as that was in the builder's quotation. While those amounts are large for a couple on an aged pension the need for all of them was not substantiated. The "house renovations" appeared to be more in the nature of a "wish list" than anything else. Similarly, and by way of example, apart from the applicant's assertions, there was nothing to support either the need for, or the cost of, a mattress and pillows ($6,000) or furniture ($3,000 to $7,000).

What provision was made for the applicant?

[32] The deceased provided the applicant with a gift of $20,000 in her will. She referred to that in her will:

> "I have made only limited provision in this my Will for my daughter as I consider she has adequate financial means and as it is my belief that she will be adequately provided for by her father and my former husband Theodore Lusink."

[33] The deceased made one other gift of $50,000 to a friend and left the balance of the estate to Theodore Lusink and his two children as tenants in common in equal shares.

[34] The estate was valued, for the purposes of obtaining probate, at approximately $1,200,000.

[35] The applicant submitted that the deceased was mistaken in her assumptions as to the applicant's means and the likely provision by Theodore Lusink.

[36] As to first assumption – that the applicant had "adequate financial means" – it is difficult to assess its merit. In these circumstances "adequate" should be assessed by reference to the circumstances of both the testator and the applicant and "adequate" will mean little more than sufficient or satisfactory.

[37] As to the second assumption – that the applicant's father would provide for her – there is little useful evidence. Her father is still alive but is suffering from dementia. The applicant says she believes that she is not provided for in his will on the basis of a conversation she had with his wife. That conversation was, to say the least, equivocal so far as the contents of his will are concerned. There is no evidence upon which I would be willing to conclude that the applicant is not provided for in her father's will.

Estrangement?

[38] The relationship between the applicant and the deceased was not close. She denies that they were estranged[9] and refers to some isolated instances when she would send cards and they would talk on the telephone. The deceased lived in a different State for many years but, even so, the applicant could only identify one occasion on which she visited her mother in over 50 years. Similarly, the applicant did not provide any evidence of any contribution she made to her mother's estate or the provision of any care or assistance. In contrast, the first respondent had a close and loving relationship with his mother.

[39] In any event, mere estrangement is not a disqualification for an applicant. But it does provide the background to the family relationships and can serve to explain the manner in which an estate is distributed. The same might be said where the relationship is distant and where communication is infrequent. In *Burke v Burke*[10] Ward JA analysed a number

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[9] The respondent did not contend that there was estrangement.

[10] [2015] NSWCA 195.

of authorities on estrangement and, while that situation is not asserted here, the reasoning can help in considering a case where the connection is limited. Her Honour concluded:

(a) That, while the mere fact of estrangement should not ordinarily result in a child not being able to satisfy the jurisdictional requirement, it does not follow that there is a prima facie entitlement to provision in circumstances where there is financial need on the part of an estranged adult child;[11]

(b) It is for the primary judge "to evaluate all the relevant circumstances, including, where there has been a period of estrangement, the circumstances of that estrangement and whether there has been any attempt at reconciliation; and that there may be no one right answer: reasonable minds may differ";[12] and

(c) The fact of estrangement is a matter to be taken into account but it is not necessarily determinative.[13]

Conclusions

[40] In an application of this kind, the applicant is assumed to have "put her best foot forward".[14] Her best case, then, is one in which the applicant:

(a) Has not established that the deceased was mistaken in her assumptions about the applicant's position;

(b) Has been shown to have been emotionally removed from the deceased and to have had little contact with her for over half a century;

(c) Has no entitlement to provision as of right; and

(d) Is living in modest, but not straitened, financial circumstances.

[41] The applicant must do more than show that she might succeed. She has to demonstrate "a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time". This she has not done. The factors in her favour are too weak to justify the order sought. Further, even if the application were allowed to proceed and the applicant were to succeed, I am satisfied that any order that might be made in the applicant's favour would be so limited that it would be disproportionate to the costs involved.

[42] The application is dismissed.

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[11] Op cit at [89].
[12] Op cit at [93].
[13] Op cit at [95].
[14] *Higgins v Higgins* [2005] 2 Qd R 502 at [46].