

SUPREME COURT OF QUEENSLAND

CITATION: *Lise v Boulton* [2026] QSC 176

PARTIES: **SUZANNE MAREE LISE**
(applicant)
v
**DAVID RICHARD BOULTON AS EXECUTOR OF
THE ESTATE OF ALAN RICHARD BOULTON
(DECEASED)**
(respondent)

FILE NO/S: BS742/26 & BS2163/26

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 22 July 2026

DELIVERED AT: Brisbane

HEARING DATE: 18 June 2026

JUDGE: Treston J

ORDER: **1. The answer to the separate question:**

“If, pursuant to ss 8 and 10 of the *Status of Children Act 1978*, the Court declared that Suzanne Maree Lise (applicant) is the biological child of the late Alan Richard Boulton, deceased, would the applicant be eligible to apply for provision from the deceased’s estate pursuant to ss 40 and 41 of the *Succession Act 1981*?”

is “Yes”.

2. The respondent’s application for summary judgment dated 17 February 2026 is dismissed.

3. I will hear the parties as to costs.

CATCHWORDS: SUCCESSION – ELIGIBLE APPLICANTS – CHILD – PROCEDURE – where applicant adopted shortly after birth under the *Adoption Act 1994* (WA) – where applicant later made contact with biological father after becoming aware of her adoption – where applicant, after the death of her biological father, applied for a discharge of the adoption order in the Supreme Court of Western Australia – where discharge order made – where applicant has brought an application pursuant to s 41 of the *Succession Act 1981* (Qld) for further provision from her biological father’s estate as a

child within the meaning of s 40 of the *Succession Act 1981* (Qld) – where respondent executor contends that the discharge of the adoption order does not operate to render the applicant an eligible child of the deceased, as at the time of death, the adoption order was in effect or because the discharge order has effect only under the law of Western Australia – whether the discharge order has effect *ab initio*, such as if it were never made – whether the discharge order has effect under Queensland law

SUCCESSION — FAMILY PROVISION AND MAINTENANCE — REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – DUTY OF TESTATOR – where applicant provisioned \$50,000 out the deceased’s will – where applicant asserts she was the deceased’s biological daughter, but only attained discharge of an adoption order after date of deceased’s death – where respondent applies to summarily dismiss the application for provision as a wise and just testator, in the position of the deceased, would not consider he had an obligation to provide for the applicant at date of death, the applicant having been adopted – where evidence demonstrates relationship with the deceased from 1989 onward, including the attendance of the deceased at applicant’s wedding – where a need for provision not contested – whether case so clearly untenable it could not possibly succeed

Adoption Act 2009 (Qld), s 226, s 291

Adoption Act 1994 (WA), s 77

Adoption Act 2000 (NSW), s 93(8)

Adoption Act 1993 (ACT), s 39L(8)

Adoption Act 1984 (Vic), s 19(8)

Adoption Act 1988 (SA), s 14(7)(8)

Adoption Act 1988 (Tas), s 28(8)

Adoption of Children Act 1994 (NT), s 44(5)

Births, Deaths and Marriages Registration Act 2023 (Qld), s 12

Status of Children Act 1978 (Qld), s 8, s 10

Succession Act 1981 (Qld), s 6, s 40, s 41

Uniform Civil Procedure Rules 1999 (Qld), r 171, r 367, r 658, r 681

Atthow v McElhone [2010] QSC 177, considered

Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, applied

ESA v Department of Child Safety, Youth and Women [2019] QSC 234, considered

General Steel Industries v Commissioner for Railways (NSW) (1964) 112 CLR 125, applied

Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield; Civeo Pty Ltd v Carey-Schofield [2025] QCA 161, applied
Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors [2014] QSC 55, cited
Re Gordon (a pseudonym) (No 2) [2020] NSWSC 673, applied
Re W (a Child) [2010] EWCA Civ 1535, applied
Spencer v The Commonwealth (2010) 241 CLR 118, applied
Thompson v Macdonald [2013] VSC 150, cited

COUNSEL: K J Kluss with CL Boddice for the applicant
 C A Brewer for the respondent

SOLICITORS: The Estate Lawyers for the applicant
 SPG Lawyers for the respondent

- [1] This is an application brought by the respondent executor of the estate of Alan Richard Boulton for determination of a separate question arising out the applicant's eligibility to make a family provision application pursuant to ss 40 and 41 of the *Succession Act 1981* (Qld).
- [2] The issue is whether the applicant is in fact eligible to bring a claim for provision against her father's estate, she having been adopted but later (after the deceased's death) obtained a discharge of that adoption by court order.
- [3] The separate question for determination is:

“If, pursuant to ss 8 and 10 of the *Status of Children Act 1978*, the Court declared that Suzanne Maree Lise (**applicant**) is the biological child of the late Alan Richard Boulton, deceased, (**deceased**), would the applicant be eligible to apply for provision from the deceased's estate pursuant to ss 40 and 41 of the *Succession Act 1981*?”
- [4] For the reasons which follow, the separate question should be answered “yes”.
- [5] At the hearing of this application, the respondent executor also asked for the Court to determine whether, if the applicant was successful in respect of the separate question, the applicant's originating application ought to be struck out with summary judgment entered for the respondent.
- [6] The respondent's summary judgment application should also be dismissed.

Factual Background

- [7] The application in respect of both the separate question and summary judgment proceeds before me on the basis of an agreed set of facts, which were set out as follows:
 - (a) Suzanne Maree Lise (applicant) was born on 10 July 1966 in Perth, Western Australia.

- (b) Alan Richard Boulton (the deceased) is the biological father of the applicant.¹
 - (c) On 21 June 1967, the applicant was adopted by James Kevin Richards and Patricia Josephine Richards pursuant to an adoption order made on that date.
 - (d) On 28 January 2025, the deceased died in Indonesia, leaving an estate in Queensland.
 - (e) By the deceased's last will dated 4 May 2022 (**Will**), he gifted the sum of \$50,000.00 to the applicant. Probate with the Will was granted to the respondent on 12 June 2025.
 - (f) On 10 October 2025, the applicant applied to the Family Court of Western Australia at Perth to finally discharge the adoption order.
 - (g) On 15 October 2025, the Family Court made an order discharging the adoption order (discharge order) pursuant to s 77(1) of the *Adoption Act 1994* (WA) (the **WA Adoption Act**).
 - (h) On 23 October 2025, the applicant commenced an application for further provision from the deceased's estate (in BD 3011/25, which was subsequently transferred by agreement of the parties to BS 2163/26 on 20 February 2026).
- [8] On 20 February 2026, the applicant commenced a proceeding in this Court, being BS742/26, seeking a declaration of paternity.
- [9] There are therefore two proceedings on foot, the first being the application for further or adequate provision pursuant to s 41 of the *Succession Act* and the second, an application for a declaration of parentage pursuant to ss 8 and 10 of the *Status of Children Act 1978* (Qld).

The Separate Question – eligibility to apply

- [10] The resolution of the separate question requires consideration of the provisions of the WA Adoption Act, and the interplay of it with the equivalent act in Queensland, the *Adoption Act 2009* (Qld) (**the Qld Adoption Act**) and the *Succession Act*.
- [11] The effect of an adoption order under the WA Adoption Act, is set out at s 75:

“75. Effect of adoption order

- (1) Where an adoption order is made, for the purposes of the law of this State —
 - (a) the relationship between the adoptee and the adoptive parent is to be treated as being that of child and parent; and
 - (b) the relationship between the adoptee and —
 - (i) the adoptee's birth parents; or
 - (ii) if the adoptee was previously adopted, the previous adoptive parent,

¹ This issue is not conceded by the respondent executors outside the confines of the present applications.

is to be treated as not being that of child and parent;
and

- (c) if the adoptee had been previously adopted, whether under the law of this State or otherwise, the previous adoption ceases to have effect; and
 - (d) the relationships of all persons to the adoptee, the adoptive parent and the birth parent or previous adoptive parent are to be determined in accordance with this section.
- (2) Subsection (1)(b)(i) does not apply to the adoptee's birth parent who is married to, or in a de facto relationship with, the adoptive parent who adopts the adoptee in the capacity of step-parent.
 - (3) Subsection (1)(b)(ii) and (c) do not apply to a previous adoptive parent who is married to, or in a de facto relationship with, the adoptive parent who adopts the adoptee in the capacity of step-parent.
 - (4) If an adoption order is made in relation to an adoptee, an appointment, in a deed or will existing at the time the adoption order is made, of a person as the guardian of the adoptee, ceases to have effect.
 - (5) Despite subsections (1) to (4), for the purposes of the law of this State relating to sexual offences, being law for the purposes of which the relationship between persons is relevant, an adoption order, or the discharge of an adoption order, does not cause the cessation of any relationship that would have existed if the adoption order, or the discharging order (as the case may be) had not been made, and any such relationship is to be treated as existing in addition to any relationship that exists by virtue of the application of this section in relation to the adoption order or by virtue of the discharge of an adoption order.
 - [(6) deleted]*
 - (7) In this section a reference to child includes a reference to a person who is 18 or more years of age."

[12] Expressly, s 75(1) of the WA Adoption Act provides that where an adoption order is made, the relationship between the adopted child and the adoptive parent is treated as being that of child and parent whilst the relationship between the birth parent and the child is to be treated "as not being that of child and parent".

[13] The adoption order therefore ceases the parental relationship between the birth parent and the child, and creates a parental relationship between the adoptive parent and the adopted child.

[14] The discharge of an adoption order under the WA Adoption Act is then set out at s 77:

“77. Discharge of adoption order

- (1) The following persons may apply to the Court for an order to discharge an adoption order —
 - (a) the Attorney General;
 - (b) the CEO;
 - (c) an adult adoptee who has notified the CEO of the adoptee’s intention to so apply.
- (2) On an application under subsection (1), the Court may make an order to discharge an adoption order if it is satisfied that —
 - (a) the adoption order was obtained by fraud, duress or other improper means; or
 - (b) a consent relied on for the making of the adoption order was not an effective consent because it was obtained by fraud, duress or material inducement; or
 - (c) there is some exceptional reason why the order should be made.
- (3) The Court is not to make an order under subsection (2) —
 - (a) if to do so would not be for the welfare and in the best interests of the adoptee; and
 - (b) unless the Court is satisfied that reasonable efforts have been made to notify all the parties to the adoption of the application.
- (3a) Any person may apply for leave to intervene in an application under subsection (1) and the Court may make an order entitling the person to intervene in the application.
- (3b) A person who, under subsection (3a), intervenes in an application under subsection (1), is to be treated as a party to the application with all the rights, duties and liabilities of a party, unless the Court orders otherwise.
- (4) Where an order is made under subsection (2) in relation to an adoption in which the adoptive parent was not specified in the forms of consent to the adoption, the consents to the adoption continue to have effect unless the Court orders otherwise.
- (5) Where an order is made under subsection (2), the Court may make such consequential or ancillary orders as it thinks fit in the interests of justice or the welfare and best interests of the adoptee, including orders relating to —
 - (a) the name of the adoptee; or
 - (b) the ownership or possession of property; or

- (c) any matter affecting parental responsibility for the adoptee; or
 - (d) the domicile of the adoptee.
- (6) Where an order is made under subsection (2), the rights, duties, liabilities and relationships of persons under the law of the State are to be as if the adoption order had not been made.
- (7) Subsection (6) —
 - (a) is subject to orders made under subsection (5) and to section 75(5); and
 - (b) does not otherwise affect —
 - (i) anything lawfully done; or
 - (ii) the consequences of anything lawfully done; or
 - (iii) any proprietary right or interest that became vested in any person while the adoption order was in force.
- (8) An adoption order cannot be appealed against, reviewed, called in question or affected by any court on any account, except —
 - (a) under this section; or
 - (b) under section 211(3) of the *Family Court Act 1997*.

[15] Importantly, s 77(6) provides that where a discharge of an adoption order is made under s 77(2): (emphasis added)

“the rights, duties, liabilities and relationships of persons under the law of the State are to be as if the adoption order had not been made.”

[16] It is these words in s 77(6) that are at the heart of the question regarding the applicant’s eligibility to bring a claim against the deceased estate. The applicant accepts that, absent the discharge of the adoption order, the applicant would not be eligible to apply for provision under the *Succession Act*.

[17] That concession is appropriately made. Eligibility to apply for provision is limited to a “spouse, child or dependant” within s 41 of the *Succession Act*:

“41 Estate of deceased person liable for maintenance

- (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.”

(emphasis added)

- [18] A “child” is defined with s 40 of the *Succession Act*:

“40 Definitions for pt 4

In this part—

child means, in relation to a deceased person, any child, stepchild or adopted child of that person.

...”

- [19] The applicant would not be a “child” within the definition of s 40 of the *Succession Act* because, absent a discharge order, the parental relationship ceased on the making of the adoption order.
- [20] It is the effect of the discharge order under s 77(6) of the WA Adoption Act which the applicant relies upon to submit she has been restored to the legal position which she would have occupied had she never been adopted, effectively, restoring the legal relationship of child and parent between the applicant and the deceased.
- [21] The respondent contends that s 77(6) ought to be read to deny eligibility to the applicant to apply for provision, for two principal reasons.

What is the effect of the discharge order?

- [22] First, the respondent submits that the question of eligibility should be determined by reference to the applicant’s eligibility to apply for provision out of the deceased estate at the date of the deceased’s death.² Accordingly, the respondent submits that as at 28 January 2025 (date of death), the adoption order was still in place and had not been discharged. Accordingly, the respondent submits, the applicant was not the child of the deceased at the date of death but was the child of her adoptive parents.
- [23] Against that, the applicant contends that the discharge of the adoption order, notwithstanding that it post-dated the deceased’s death, has the effect that the order is discharged *ab initio*. That is, using the words of s 77(6), the legal position is “as if the adoption order had not been made.”
- [24] In my view, the respondent’s construction is not open on the proper construction of the wording of s 77(6) of the WA Adoption Act.
- [25] In *Hays Specialist Recruitment (Australia) Pty Ltd v Carey- Schofield; Civeo Pty Ltd v Carey-Schofield*,³ the plurality observed:

“The key elements in determining the proper construction of a written law are the statutory text, context and purpose. The text is the starting and end point. It provides the ‘surest guide’ to Parliament’s intent.

² *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 507-508.

³ [2025] QCA 161 (Bond and Brown JJA and Vaughan AJA).

However, the text must be read in its context, including the general purpose and policy of the statutory provision.”

- [26] The construction for which the respondent contends ignores the text of s 77(6) “as if the adoption order had not been made”. Expressly, the effect of the discharge order is not merely setting aside the adoption order from the date of the discharge order, it is setting it aside for all times and purposes (save for the sexual offence exception in s 75(5)).
- [27] The meaning of the text is to treat the adoption as if it had never taken place. It is not to restore the adopted person as at the date of the discharge order to their former legal status; it is to restore that status for all times and all purposes. The text permits no other reading. Once the discharge order is made, as a question of law, the applicant was not, at date of death, the subject of an adoption order. Upon the making of the discharge order, as a matter of law, the applicant had never ceased to be the child of the deceased.
- [28] In support of the submission that the discharge order takes effect only from the date of the order, the respondent relied heavily upon authority for the proposition that the rights of an applicant for provision out of a deceased’s estate crystallise on death.
- [29] By way of example the respondent relied upon the following statements from *Coates*:
 - (a) by Webb J, at 516:

“...Then, in my opinion, it follows that the claim in this case is to be determined in the light of the moral duty of the testatrix as revealed by what she knew or ought to have known as to the claimant’s means and deserts, that is to say, that the claim is to be determined as at the date of her death and not as at the date of the application some ten years later. In *Bosch’s Case* their Lordships appear to have stated the rule applicable in all cases under the kind of statute then in question, and in question here, and not a general rule subject to exceptions. No exceptions were specified or even suggested by their Lordships. The test then in all such cases is the moral duty of the testator, the actual testator, not a hypothetical testator, at all events not a hypothetical testator with a supernatural gift of foreseeing strokes of good or bad fortune occurring after his death and improving or impairing the financial position of possible claimants on his bounty. As I understand their Lordships they had in mind the moral duty of the particular testator whose testamentary dispositions were being reviewed in the light of a claimant's means and deserts at the date of the testator’s death; and I cannot suppose that in making moral duty the test they contemplated any but normal testators employing the knowledge they possessed or should have possessed.”
 - (b) by Kitto J, at 526:

“The jurisdiction is subject to a condition expressed in the words: “If any person...dies...leaving a will and without making therein adequate provision for the proper maintenance and support of the testator’s widow widower or children”. In a case in which that condition is satisfied the court is empowered to order that such

provision as it thinks fit shall be made out of the estate of the testator for such widow widower or children.

The words of condition refer to the manner in which a person exercises his power of testamentary disposition, and in their natural meaning they would seem to require a judgment upon his disposition to be formed as at the time when his death makes it effective. The condition is not that the applicant is found to be inadequately provided for notwithstanding any provision made for him by the testator's will. It is that there has been an omission by the testator to make adequate provision for him by his will; and the question whether such an omission has occurred can hardly be intended to admit of a different answer at an interval after the death from that which would have been given to it immediately upon the death."

and at 528:

"The only question involved in the words of condition which appear in the Act is one of objective fact: was the applicant left, by the testamentary disposition which the testator made, without adequate provision for his proper maintenance and support. If the question were whether the testator was morally at fault in not leaving the applicant better provided for, there would have to be left out of account, not only circumstances which at his death had yet to come into existence, but also any circumstances existing at his death which were unknown to him and which he could not fairly be blamed for not having ascertained. This cannot be right. The truth is that, although it is often sufficient for the purposes of a case to speak of the moral duty of the testator as a test of the adequacy of the provision needed by a widow or child for proper maintenance and support, the standard is more accurately stated by reference to the moral duty which would have lain upon a hypothetical testator engaged in making his will at the moment of the actual testator's death, not only surrounded by the very circumstances which surrounded the actual testator at that time, but fully alive to all those circumstances, including all the possibilities for the future to which it was reasonable that he should attend."

- [30] Similar statements made elsewhere were also relied upon.⁴
- [31] Each of these statements goes to the jurisdictional question at date of death, but they do not go to the question of eligibility.
- [32] I accept, as the respondent submits, that adoption orders are not easily set aside, and there are good public policy reasons for that to be so. But once the order is in fact discharged, it is discharged for all purposes (save for the sexual offence exception: s 75(5) of the WA Adoption Act). The discharge order in fact has entirely the retrospective effect which the respondent submits it does not.

⁴ *Thompson v Macdonald* [2013] VSC 150, [53].

Does s 77 only have effect for the purposes of Western Australian law?

- [33] Second, the respondent contends that even if the discharge order has the effect that the adoption order was never made, it nevertheless only has that effect for the purposes of the law of Western Australia, and not for the purposes of the *Succession Act* in Queensland, or under the law of any other state or territory other than Western Australia. That submission places emphasis upon the words “under the law of the state”, as they appear in s 77(6) of the WA Adoption Act, being “where an order is made under subsection (2), the rights, duties, liabilities and relationships of persons under the law of the State are to be as if the adoption order had not been made.”
- [34] That submission must also be rejected.
- [35] The respondent’s construction would lead to the odd conclusion that the discharge order is effective in Western Australia, but in every other Australian jurisdiction the adoption order would remain in force. That cannot possibly be the proper interpretation of the words “under the law of the State” as they appear in s 77(6). Such an outcome would compel every applicant for discharge of an adoption order to apply to discharge that order in each individual State and territory of the country.
- [36] Cross-recognition of interstate and trans-Tasman adoption orders is given effect in s 291 of the Qld Adoption Act:

“291 Recognition of Australian and New Zealand adoptions

- (1) For the purposes of the laws of Queensland, the adoption of a person in another State under the law of that State, that has not been rescinded under the law of that State, has the same effect as an adoption order made in Queensland under this Act, and has no other effect.
- (2) Subsection (1) applies to an adoption whether it happened before or after the commencement of this Act.
- (3) In this section—
State includes New Zealand.”

- [37] By s 291, a valid adoption order made in another State is recognised in Queensland. But once that adoption order has been discharged validly in another State (here, in Western Australia) there is no longer an adoption order in another State that has not been rescinded; rather it being as if the adoption order had never been made. There is therefore no adoption order to be recognised under Queensland law.
- [38] By the Qld Adoption Act recognising that adoption orders may be “rescinded”, it would also be an odd conclusion, as a matter of statutory interpretation for the Qld Adoption Act to recognise the making of an adoption order, but not likewise recognise the discharge of that order. It would also be strange were that discharge not recognised on the terms as set out in s 77(6), where such terms are not meaningfully different from the effect of discharge provided under the Qld Adoption Act.
- [39] The equivalent provision to s 77 of the WA Adoption Act in Queensland, is s 226 of the Qld Adoption Act:

“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.”

(emphasis added)

- [40] The terms of s 77(6) are therefore directly comparable to s 226 of the Qld Adoption Act, each describing the effect of the order in the same terms, for it be “as if the adoption order had not been made”.
- [41] Equivalent statutory provisions to s 77(6) of the WA Adoption Act and s 226(1) of the Qld Adoption Act are contained in the respective legislative provisions of each other state and territory in Australia: *Adoption Act 2000* (NSW), s 93(8); *Adoption Act 1993* (ACT), s 39L(8); *Adoption Act 1984* (Vic), s 19(8); *Adoption Act 1988* (SA), s 14(7)(8); *Adoption Act 1988* (Tas), s 28(8); *Adoption of Children Act 1994* (NT), s 44(5).
- [42] These conclusions are supported by s 12 of the *Births, Deaths and Marriages Registration Act 2023* (Qld) which provides, for the purposes of the registration of parentage details of a child, that a relevant event, for a child, includes:

“(c) the child’s transfer of parentage under—

...

(ii) a final adoption discharge order; or

...

A “**final adoption discharge order**”, is defined to mean:

- (a) an order for the discharge of a final adoption order under the *Adoption Act 2009*; or
- (b) an order of another Australian jurisdiction that corresponds to an order mentioned in paragraph (a).”

- [43] The reference to “an order of another Australian jurisdiction that corresponds to an order” under the Qld Adoption Act, clearly demonstrates the intention that Parliament held, being to allow for cross-recognition of the discharge of adoption orders in Queensland of other Australian jurisdictions. An order of another Australian

jurisdiction that corresponds to an order for the discharge of the final adoption order in Queensland can clearly be seen to be s 77(6) of the WA Adoption Act.

[44] As submitted by the applicant, the combination of these sections leads to the conclusion that the effect of the discharge order is that:

- (a) when the applicant was adopted in Western Australia in 1967, the adoption was recognised as valid in Queensland;⁵
- (b) the effect of the discharge order in Western Australia is as if the applicant had never been adopted;⁶
- (c) the discharge order is recognised as valid in Queensland;⁷ and
- (d) the effect of the discharge order in Queensland is as if the applicant had never been adopted.⁸

[45] The common law also supports the conclusion which I have reached.

[46] In *Re W (a Child)*,⁹ the England and Wales Court of Appeal observed that “the consequence of setting aside an adoption order seems to me self-evidently a reversion in law to the status quo ante...”. That was followed by Hallen J in *Re Gordon (a pseudonym) (No 2)*.¹⁰ His Honour remarked (at [208]) that, were the discharge order made, then the applicant and his biological parents, in that case:

“[would be] deemed, for all purposes, to be restored to the same position, *inter se*, as existed immediately before the order of adoption was made.”

[47] I agree.

[48] It can be accepted that the significant effect of a discharge order means that such orders are not lightly made. In *ESA v Department of Child Safety, Youth and Women*,¹¹ Boddice J (as his Honour then was) observed that the making of a discharge order was a “grave step” which “dismantles a family unit in the eyes of law”.

[49] As such, even if I accepted the argument that the effect of s 77(6) of the WA Adoption Act is confined to Western Australia, and further accepted that the provisions of the Qld Adoption Act did not operate to recognise the discharge order, neither of which I find, the common law would nevertheless support the conclusion that the effect of the discharge order would be that the order is set aside in its entirety, and the applicant would be in the position as existed immediately before the order of adoption was made.

[50] The consequence of these findings is that the applicant satisfies the definition of “child” under the *Succession Act* and would be eligible to apply for provision from

⁵ Qld Adoption Act, s 291.

⁶ WA Adoption Act, s 77(6).

⁷ Qld Adoption Act, s 291.

⁸ Qld Adoption Act, s 226.

⁹ [2010] EWCA Civ 1535, [12] (per Thorpe L.J, Munby L.J and Coleridge J agreeing).

¹⁰ [2020] NSWSC 673, [181].

¹¹ [2019] QSC 234.

the deceased estate if, pursuant to ss 8 and 10 of the *Status of Children Act 1978*, the Court declared that the applicant is the biological child of the deceased

Summary Judgment Application

- [51] The application for summary judgment was originally sought under either r 171 or r 367 of the UCPR, or in the Court's inherent jurisdiction. At the hearing of the application, the respondent sought leave to amend the application so as to strike out r 171 and r 367, and to seek such relief pursuant to r 658 of the UCPR, or s 6 of the *Succession Act*. The applicant did not oppose such leave being granted, and I did so grant leave, and proceeded to hear the application for summary judgement.
- [52] The discretion to enter summary judgment, as it arises in the Court's inherent jurisdiction, is to be exercised sparingly because "the exercise of powers to summarily terminate proceedings...must always be attended with caution".¹² The jurisdiction is invoked in those cases where "the case of the plaintiff [or defendant as the case may be] is so clearly untenable it could not possibly succeed".¹³ The respondent contended that the applicant's claim for provision out of the deceased's estate was so clearly untenable.
- [53] First, the respondent contended that the applicant's eligibility to bring a family provision application is to be determined at the date of the deceased's death and the adoption order, in effect at that date, meant the applicant is and remains ineligible.
- [54] That argument can be easily dispensed with having concluded that the proper construction of the legislation is that the applicant has at all times been an eligible applicant for provision, the adoption order having been discharged.
- [55] Second, the respondent argues that, because of the exceptional nature of the discharge order, that the deceased could not have foreseen the need to make provision for the applicant at the time of his death. This limb of argument was based upon the authority of *Coates* where Dixon CJ said (at 507):

"...that the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just rather than a fond or foolish husband or father. The learned judge then said: "To take into consideration changes in circumstances which could not have been foreseen by the testator would be to attribute to him not only wisdom and a sense of justice but also the gift of prophecy. What the testator 'ought to have done in all the circumstances of the case' could only be determined by a consideration of matters as they stood, at the latest, at his death. Unforeseeable circumstances arising after that event surely could not govern the wisdom or justice of his actions whilst alive." The court is required to determine whether or not he has made adequate provision in his will for the proper maintenance and support of the applicant which would seem to indicate that the court is

¹² *Spencer v The Commonwealth* (2010) 241 CLR 118, 131 [24] (French CJ and Gummow J), [55] (Hayne, Crennan, Kiefel and Bell JJ); *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55, [127] (Jackson J).

¹³ *General Steel Industries v Commissioner for Railways* (NSW) (1964) 112 CLR 125, 129 (Barwick CJ).

to put itself in his position, attributing to him justice and wisdom, not after but immediately before death”.”

(emphasis added, footnotes omitted)

- [56] The argument raised by the respondent is not that the applicant is unable to demonstrate that she has some need for provision out of the deceased's estate. Rather, that in circumstances where the testator must have known at date of death that he had no moral obligation to provide for the applicant, she having been adopted by someone else, it is irrelevant how close and loving the relationship was between the applicant and the deceased, or indeed how necessitous she was, because at date of death she was not, in law, a child of the deceased and he was not obliged to provide for her.
- [57] As such, the respondent submitted that no trial judge could make a finding that wise and just testator would have made any, or greater, provision for the applicant, because any wise and just testator would have proceeded on the basis that the applicant was not the testator's child - an adoption order having been made and there being no indication that the applicant would seek to have it discharged. The problem for the respondent on this argument is that this testator *did* make such provision for the applicant; he left her \$50,000. Whilst that might not be a complete answer, it suggests to me it is at least arguable that a wise and just testator would have done so, in that, or some other sum.
- [58] I cannot therefore accept the applicant's case as to what a wise and just testator may have known, or done, is so clearly untenable as to warrant striking out.
- [59] Once that is accepted, it is enough for the applicant's material to show a *prima facie* case that she has been left without proper maintenance and support. I am satisfied there is such evidence. As I have already observed, the applicant was born in WA in 1966. The biological father's name is not listed on her birth certificate. The applicant was adopted just prior to her first birthday in Western Australia. It was not until 1989 that she located the deceased and advised him that she understood that she was his biological daughter. At that time the deceased did not even know of her existence or that she had been adopted.
- [60] In or around 1990, the applicant met with the deceased for the first time in person after a series of telephone calls to him. He arranged and paid for DNA testing. Whilst there are issues raised by the executors in relation to the DNA evidence, for the purposes of this proceeding, the parties agreed I could have regard to the DNA testing carried out in December 1990 which concluded that the likelihood that the deceased was the applicant's father was in excess of 99.999 per cent.
- [61] From 1990 onwards, the applicant says that she shared a close and loving relationship with her father. All the details of the relationship do not need to be set out here, but it is open to conclude on this application that there was some closeness to the relationship. The deceased attended the applicant's wedding and drove her bridal car. At the wedding, he was seated at the parents' table. The applicant says that she maintained regular contact with him over the course of the next almost 40 years, contacting him for occasions such as Father's Day, Christmas, and his birthday, as well as involving him in numerous other family events.

- [62] Her personal circumstances are that she is married and has a 16-year-old child. She owns a property in Western Australia which is mortgaged. She is employed three days per week and earns between \$43,050 and \$63,000 per year. Her husband's earnings are more significant, in the vicinity of \$150,000 per year. She identifies various health issues from which she suffers.
- [63] The applicant was left \$50,000 under the deceased's Will, and the deceased's net estate is approximated at \$1,519,953.15.
- [64] Whether \$50,000 was adequate provision in the context of the size of the estate, the applicant's needs, the needs and moral claims of the other surviving adult children and all the other relevant consideration are matters for a trial. No doubt the question of whether the deceased ought to have considered whether he had a moral obligation to provide for the applicant (who had been adopted) will be a fertile area of argument at a trial. But I cannot conclude that the applicant's claim is so hopeless that it ought to be summarily dismissed.
- [65] In my view, the argument raised is a long way from the certainty for which the respondent contends being that no trial judge could make a finding that a wise and just testator would have made any provision for the applicant. Contrary to the respondent's submission, in the unusual factual circumstances of this case, the applicant's claim for provision out of the deceased estate warrants careful consideration of all the available evidence. As such, it is not amenable to summary determination.
- [66] I will hear the parties as to costs.