SUPREME COURT OF QUEENSLAND

CITATION:	*Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams* [2015] QCA 286
PARTIES:	**JOHN ALEXANDER ABRAHAMS by his litigation guardian THE PUBLIC TRUSTEE OF QUEENSLAND** (applicant) **v** **WILLIAM JAMES ABRAHAMS as executor of the Will of Robert James Abrahams, Deceased** (respondent)
FILE NO/S:	Appeal No 6657 of 2015 DC No 3860 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 11 June 2015
DELIVERED ON:	Orders delivered ex tempore 10 November 2015 Reasons delivered 18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2015
JUDGES:	Margaret McMurdo P and Ann Lyons and Boddice JJ Judgment of the Court
ORDERS:	**Orders delivered ex tempore on 10 November 2015:**

1. If leave to appeal be needed, the applicant is granted leave to appeal.
2. The appeal is allowed.
3. The orders made by the primary judge on 11 June 2015 are set aside and instead it is ordered that:
(a) Under r 69 *Uniform Civil Procedures Rules* 1999 (Qld) (UCPR), Yvonne Carol Smith, in her capacity as executor of the Will of Robert James Abrahams (deceased), be substituted as Respondent in lieu of William James Abrahams.
(b) Under s 59 *Public Trustee Act* 1978 (Qld) and r 98 of the UCPR, the Court sanctions the compromise of these proceedings on the terms contained in the Terms of Settlement, a copy of which is Exhibit 'MGS-3', to the affidavit of Michael Gerald Stockall filed herein.
(c) Under s 41(1) S*uccession Act* 1981 (Qld), further and better provision be made for the Applicant, John Alexander Abrahams, from the Estate of

Robert James Abrahams (deceased), in the total amount of $140,000, inclusive of the Applicant's costs of these proceedings from the estate of the deceased.

(d) Under s 41(2)(a) *Succession Act*, that the provision for the Applicant referred to in paragraph (c) hereof be paid to the Public Trustee of Queensland as financial administrator for John Alexander Abrahams within 14 days of the date of this order, and that the Public Trustee's receipt as financial administrator be a sufficient discharge of the same.

(e) No legacy interest be payable to the Applicant under s 52(1)(e) *Succession Act*.

(f) The opinion of Counsel for the Applicant, the affidavit of Clinton James Miles and the affidavit of Portia Frances Costello, filed 22 May 2015, be placed in a sealed envelope, marked "not to be opened without the order of the Court" and not to be opened without such an Order.

4. The Respondent is to pay the Applicant's costs of this application and the appeal.

5. The Respondent is granted a certificate under s 15 *Appeal Costs Fund Act* 1973 (Qld).

6. The amount of the costs recoverable by the Applicant under order 4 is limited to the amount prescribed for the purposes of s 16(3) *Appeal Costs Fund Act*.

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – GENERAL PRINCIPLES – where the applicant's father died on 7 January 2014 and by his Will, no provision was made for his youngest child, the applicant – where the applicant has Down Syndrome as well as multiple other medical conditions – where the Public Trustee of Queensland was appointed as the applicant's litigation guardian – where the Public Trustee considered that the deceased's Will did not provide for the applicant's proper maintenance and filed an application in the District Court for further and better provision out of the estate – where the applicant and the solicitor acting for his siblings came to an agreement in relation to the applicant's claim – where an application was filed in the District Court seeking an order pursuant to s 59 *Public Trustee Act* and r 98 of the *Uniform Civil Procedure Rules* that the court sanction the compromise of the application for further and better provision of the deceased's estate on the terms contained in the terms of settlement – where the primary judge refused to sanction the proposed compromise of the applicant's claim for further and better provision out of his late father's estate – whether the judge erred

District Court of Queensland Act 1967 (Qld), s 118
Public Trustee Act 1978 (Qld), s 59

Succession Act 1981 (Qld), s 41, s 52
Uniform Civil Procedure Rules 1999 (Qld), r 69, r 98

Affoo v Public Trustee of Queensland [2012] 1 Qd R 408; [2011] QSC 309, cited
Praxis Pty Ltd v Hewbridge Pty Ltd & Anor [2004] 2 Qd R 433; [2004] QCA 79, cited
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, cited
Watts v The Public Trustee of Queensland [2010] QSC 410, cited

COUNSEL: D B Fraser QC for the applicant
No appearance for the for the respondent

SOLICITORS: Official Solicitor to the Public Trustee of Queensland for the applicant
No appearance for the for the respondent

[1] **THE COURT:** On 10 November 2015, this Court made the following Orders, disposing of the applicant's application for leave to appeal against the decision of a District Court judge, who on 11 June 2015 refused to sanction the proposed compromise of his claim for further and better provision out of his late father's estate, pursuant to s 59 of the *Public Trustee Act* 1978 (Qld):

1. If leave to appeal be needed, the applicant is granted leave to appeal.

2. The appeal is allowed.

3. The orders made by the primary judge on 11 June 2015 are set aside and instead it is ordered that:

   (a) Under r 69 *Uniform Civil Procedures Rules* 1999 (Qld) (UCPR), Yvonne Carol Smith, in her capacity as executor of the Will of Robert James Abrahams (deceased), be substituted as Respondent in lieu of William James Abrahams.

   (b) Under s 59 *Public Trustee Act* 1978 (Qld) and r 98 of the UCPR, the Court sanctions the compromise of these proceedings on the terms contained in the Terms of Settlement, a copy of which is Exhibit 'MGS-3', to the affidavit of Michael Gerald Stockall filed herein.

   (c) Under s 41(1) S*uccession Act* 1981 (Qld), further and better provision be made for the Applicant, John Alexander Abrahams, from the Estate of Robert James Abrahams (deceased), in the total amount of $140,000, inclusive of the Applicant's costs of these proceedings from the estate of the deceased.

   (d) Under s 41(2)(a) *Succession Act*, that the provision for the Applicant referred to in paragraph (c) hereof be paid to the Public Trustee of Queensland as financial administrator for John Alexander Abrahams within 14 days of the date of this order, and that the Public Trustee's receipt as financial administrator be a sufficient discharge of the same.

   (e) No legacy interest be payable to the Applicant under s 52(1)(e) *Succession Act*.

(f) The opinion of Counsel for the Applicant, the affidavit of Clinton James Miles and the affidavit of Portia Frances Costello, filed 22 May 2015, be placed in a sealed envelope, marked "not to be opened without the order of the Court" and not to be opened without such an Order.

4. The Respondent is to pay the Applicant's costs of this application and the appeal.

5. The Respondent is granted a certificate under s 15 *Appeal Costs Fund Act* 1973 (Qld).

6. The amount of the costs recoverable by the Applicant under order 4 is limited to the amount prescribed for the purposes of s 16(3) *Appeal Costs Fund Act*.

[2] The Court indicated that reasons for those Orders would be made at a later date. These are those reasons.

Background

[3] The applicant's father died on 7 January 2014. By his Will, dated 25 February 2010, no provision was made for the applicant. The claim for further and better provision out of the estate of his late father was instituted by the applicant's litigation guardian, the Public Trustee, pursuant to s 41 of the *Succession Act* 1981 (Qld).

[4] The applicant, who is 46 years of age is, the youngest of five children of the deceased. He has Down Syndrome, as well as multiple other medical conditions which include a heart condition, bilateral cataracts and non-insulin dependent diabetes. In 2009, the applicant suffered a heart attack, which was related to his morbid obesity.

[5] The applicant resided with his parents in the family home until he was 41 years of age. His mother was his primary carer until her death in 2007. His elderly father (the deceased) then took on the role of caring for his son. When the deceased suffered a stroke, he was not able to provide the support his son required.

[6] On 5 October 2009, the Public Trustee of Queensland was appointed as the applicant's administrator for all financial matters pursuant to the *Guardianship and Administration Act* 2000 (Qld). The applicant was placed in emergency accommodation awaiting suitable accommodation. In July 2010, he was moved into accommodation with Multicap in a funded arrangement with the State and Federal governments.

The deceased's Will

[7] Pursuant to a Will executed on 25 February 2010, the deceased appointed his daughter Yvonne Carol Smith as the executor and trustee of his estate. Under the terms of that Will, the deceased essentially left his entire estate to her with provisions that if she predeceased him or died before the estate was distributed then the estate went to his daughter Pauline and then to his son William. Clause 5 of that Will contained the following paragraph in Clause 5:

> (a) "my son John Alexander Abrahams ('John') who suffers Down's Syndrome, resides in a Multicap facility and has all of his financial and lifestyle needs met from his social security benefits and Multicap; John has no understanding of money and lacks the capacity to go out and spend it. It is likely that any amount he might otherwise receive under my Will would just sit in a bank account without actually benefiting him."

[8] A further paragraph in Clause 5 related to the deceased's son Richard. It provided that the deceased was not making any provision for him as he had breached his trust by stealing amounts totalling $45,000 from him over a period of 18 months and also "stealing about $150,000.00 from John representing funds my late wife and I set aside for him". He concluded that it was his view that Richard's conduct made him undeserving of any benefit under the Will.

[9] A further Will, which did not comply with the formal requirements of the *Succession Act* 1981 (Qld), was executed by the deceased some ten months later, on 12 December 2012. Pursuant to that later informal Will, the deceased left one quarter of his estate to the applicant but made no provision for Richard. In that informal Will, the deceased appointed his son William James Abrahams as executor, and in default, the Public Trustee.

The application for further and better provision from the estate

[10] The Public Trustee, as administrator for the applicant, considered that neither the deceased's last Will nor the informal document adequately provided for the applicant's proper maintenance and support. The applicant's total assets amounted to $21,472. The deceased left an estate valued at approximately $443,175.85.

[11] On 3 October 2014, an application was filed in the District Court by the Public Trustee, as the Litigation Guardian, for further and better provision out of the estate. The respondent to that application was William James Abrahams as executor of the 12 December 2012 informal Will. However, an application to propound the informal Will was dismissed on 7 October 2014. Accordingly, we ordered that the name Yvonne Carol Smith be substituted as the executor of the last Will of the deceased dated 25 February 2012.

[12] After that application was dismissed on 7 October 2014, negotiations occurred between the solicitor acting for the applicant and the solicitor acting for his siblings Yvonne, Pauline and William. Richard Abrahams took no active role in the proceedings but was kept informed. The parties came to an agreement in relation to the applicant's claim.

[13] On 22 May 2015, an application was filed in the District Court seeking an order pursuant to s 59 of the *Public Trustee Act* and r 98 of the UCPR that the Court sanction the compromise of the application for further and better particulars of the deceased's estate, on the terms contained in the terms of settlement. Orders were sought that pursuant to s 41(1) of the *Succession Act*, further and better provision be made for the applicant out of the estate of Robert James Abrahams in the sum of $140,000, inclusive of the applicant's costs of the proceedings from the estate of the deceased. A further order was sought pursuant to s 41(2)(a) of the *Succession Act* that the funds payable pursuant to the order be paid to the Public Trustee of Queensland as financial administrator within 14 days.

[14] After a 20 minute hearing on 11 June 2015, the primary Judge dismissed the application to sanction the settlement. It is hard to discern the material the primary judge had regard to as the Court Order sheet does not record what material was read on the application. That Court Order sheet should clearly contain such information so that an appeal court can ascertain what material was before the primary judge. The transcript suggests that some of the material which was tendered and relied upon at the hearing was returned to Counsel rather than being retained on the file. That material should have been retained on the file with the Opinion of Counsel placed in a sealed envelope with the usual order that it not be opened without the order of a judge.

[15] The transcript reveals that whilst there is a reference to an affidavit of Robert Moran the two documents essentially relied upon by the judge appear to be the "Opinion of Counsel" and a "Needs Assessment Report". The primary judge appears to have considered the Needs Assessment Report to be a contentious document, although there was no competing evidence.

[16] The application was declined in the following terms:

> (a) "I'm not going to sanction the settlement. I'm simply not satisfied that he has a need of the magnitude of what's proposed. I'm just - l'm not going to upset the - - -
>
> (i) ...
>
> (ii) No. I decline the application. You can renegotiate another settlement if you wish but I'm not prepared to sanction $140,000. I decline the application, make no order as to costs."[1]

Is leave to appeal required?

[17] Section 118 of the *District Court of Queensland Act* 1967 (Qld) provides:

> "118 Appeal to the Court of Appeal in certain cases
>
> (1) This section--
>
> (a) does not apply to an appeal from a judgment of the District Court in the exercise of its criminal jurisdiction under part 4; but
>
> (b) does apply to an appeal from other judgments of the District Court in the exercise of its criminal jurisdiction, including on an appeal brought before the court under the *Justices Act 1886*, section 222.
>
> (2) A party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
>
> (a) is given for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
>
> (b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit.
>
> (3) Subject to sections 118A and 118B, a party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court.
>
> (4) In deciding whether there is a right of appeal under this section, the Court of Appeal may—

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1 ARB p 11.

(a) inform itself in any way it considers appropriate, including by reference to the appeal record; and

(b) decide the question summarily without hearing evidence.

(5) If it is reasonably arguable that a right of appeal under this section exists, the Court of Appeal may treat that circumstance as a ground for granting leave to appeal.

(6) If the Court of Appeal grants leave under subsection (3), it may grant it on the conditions it considers appropriate.

(7) A single judge of the Court of Appeal may—

(a) grant (with or without condition) or refuse leave mentioned in subsection (3); or

(b) make the decision mentioned in subsection (4)(b).

(8) An appeal from the District Court in its original jurisdiction is by way of rehearing.

In this section—

final judgment, of the District Court, includes a judgment that grants leave to enter a judgment mentioned in subsection (2).

Magistrates Courts jurisdictional limit means the amount of the jurisdictional limit of Magistrates Courts for personal actions stated in the *Magistrates Courts Act 1921*, section 4(a)."

[18] Whether leave is required depends upon the construction of s 118(2) and whether the appeal relates to a claim "for, or relating to property, that has a value equal to or more than the Magistrates Court jurisdictional limit". That limit is $150,000.

[19] In *Praxis Pty Ltd v Hewbridge Pty Ltd*,[2] this Court held:

"[8] The criterion adopted in s 118(2)(b) is concerned not with simple money claims in personal actions like the present, which can be measured by the amount recovered by the judgment; but primarily with claims for the recovery of land or other things *in specie* or their value in actions for detinue and the like. The legislative history of s 118 and its predecessor s 92 of the Act bears this out. It is true that s 118(2)(b) includes not only a claim 'for' property having the value specified but also to a claim "relating to" property of that value. But the words "relating to", although susceptible on occasions of a wide interpretation, take their meaning and colour from the context in which they appear. An action under s 82 of the *Trade Practices Act* to recover the amount of the loss or damage caused by a contravention of s 53A of that Act is not, within the meaning of s 118(2)(b) of the *District Court of Queensland Act*, a claim relating to property even if the

[2] [2004] QCA 79.

> representation constituting the contravening conduct concerned property valued at more than $50,000. If that were not so, a claim for damages itself insignificant in amount for a temporary or casual trespass to land worth millions of dollars would be appealable as of right under s 118(2)(b). The same would apply, for instance, to slight damage inflicted on an unusually expensive motor car or other valuable property."

[20] The applicant was left with no provision from the estate of his late father, which was valued at around $412,000. Depending on the relative claims of the other siblings, the judge who ultimately heard the application pursuant to s 41 of the *Succession Act* could have awarded the entire amount to the applicant.

[21] Whilst the proposed compromise may have been less than the jurisdictional limit of the Magistrates Court, the applicant's claim for further and better provision was from his father's estate, which meant that the deceased's entire estate in excess $412,000 was in fact potentially in issue at the time of the application for the sanction. The application for further and better provisions from the estate was therefore a claim "relating to" property in excess of $412,000. That is a value which is more than the Magistrates Court jurisdictional limit. Leave to appeal is not required.

The Grounds of Appeal

[22] The Grounds of Appeal are as follows:

(i) The applicant suffered an injustice by being denied the benefit of a compromise of his claim under s 41(1) of the *Succession Act* 1981 (Qld).

(ii) The basis upon which the application was refused was inconsistent with community standards in relation to the exercise of the jurisdiction to make orders pursuant to s 41(1) of the *Act*.

(iii) The applicant was denied natural justice by refusing to hear further submissions on the basis for the compromise.

(iv) The primary judge in making those errors failed to afford the applicant a proper exercise of the jurisdiction required to be exercised.

[23] A perusal of the transcript indicates that counsel acting for the applicant was not given a fair opportunity to advance the submissions he wished to make on the part of the applicant. Whilst it appears that the primary judge read the Opinion of Counsel in relation to the compromise he did not allow counsel to develop in any detail his oral arguments in support of his written material. The transcript records the following:

> "HIS HONOUR: I understand that but he's someone who's quite entitled to that and the state looks after people with disabilities, as it should.
>
> MR KLEBANSKY: Well, there's additional needs that could be obviously met from the - - -
>
> HIS HONOUR: Well, you keep saying there are additional needs but I can't see where they are.
>
> MR KLEBANSKY: Okay. Well- - -
>
> HIS HONOUR: I think we're at cross purposes. I'm saying to you you have someone with a serious impairment who's being looked after in

a 24-hour facility with support and someone who doesn't go out on their own. It is - he can't just go down to the pub, have a few drinks, bet on the races - - -

MR KLEBANSKY: Sure.

HIS HONOUR: - - - go to the movies. He's not going to do that.

MR KLEBANSKY: No.

HIS HONOUR: So where's his need over and above what he's got, given his life?

MR KLEBANSKY: Well, you go through the report. My first point is, obviously, for any contingencies that aren't met that may arise in the future. Some [indistinct] obviously about health, if your Honour could infer that there may be matters that are not met.

HIS HONOUR: His life expectancy is only 10 years.

MR KLEBANSKY: It's longer than that, your Honour.

HIS HONOUR: How old is he? Forty what? He's got Down Syndrome. I'm looking at RAJM9.

MR KLEBANSKY: 45, your Honour.

HIS HONOUR: 55 to 65. Well- - -

MR KLEBANSKY: 45.

HIS HONOUR: Well, he's got 10 to 20 years life expectancy. I'm looking at his doctor's report: RAJM9 to the affidavit - the first affidavit - the one that you took me to with the - I think it's Mr Miles' affidavit - Moran's affidavit.

MR KLEBANSKY: Okay. But he says 55 to 65 is becoming more normal. So that's - if you took the high side of that, that's 20 years. There's no evidence that it's only going to be 10.

HIS HONOUR: Well, I think - where he's morbidly obese and he has other health issues, I think the high side of that is probably being a bit optimistic. But I don't want to sound overly cynical.

MR KLEBANSKY: I'm just going to go through the needs report, your Honour. Maybe I can point out a few to you in detail, if that's okay.

HIS HONOUR: Sorry. What was that?

MR KLEBANSKY: **I might just go through the needs report and see what I can point out in detail.**

HIS HONOUR: All right. But - well, look. No. You needn't - I'm not going to sanction the settlement. I'm simply not satisfied that he has a need of the magnitude of what's proposed. I'm just - I'm not going to upset the - - -

MR KLEBANSKY: But not even on a contingency basis?" (emphasis added)

[24] After that short exchange, the primary judge declined the application to sanction the compromise in the terms previously set out. When counsel for the applicant attempted to

take the primary judge to the material which established the need the primary judge cut off any further submissions and would not hear further argument. The applicant was not afforded natural justice in this regard.

[25] The primary Judge also failed to properly exercise the jurisdiction of the court. The only evidence before the Judge established that the applicant had unmet needs. That figure had been quantified by an expert. The primary judge must have acted on an erroneous perception or understanding of that evidence in coming to a contrary conclusion. Alternatively, the primary judge substituted his own views about the applicant's needs, which were contrary to the evidence before him.

[26] Furthermore, the primary judge's reasons for refusing to sanction the settlement failed to acknowledge the significance of contemporary International Human Rights Instruments,[3] which recognise the rights of people with disabilities, and failed to show an appreciation of the principles which should have been taken into account in making a decision in respect to a person with a disability. The primary judge failed to recognise that the applicant has the same basic human rights as anyone else and that he has a right to respect for his human worth and dignity.

[27] That dignity would be enhanced by extra financial assistance to provide him with new clothes and furniture including a functional television set. The applicant is a valuable member of the community. He should be recognised as such by being encouraged and supported to participate more actively in the community. Such participation would be facilitated by financial assistance from the estate of his late father to attend social and recreational activities and to undertake an annual holiday.

[28] The relevant human rights principles emphasise the importance of the applicant being encouraged and supported to achieve his maximum, physical, social, emotional and intellectual potential and becoming as self-reliant as possible. The provisions of funds would allow him to have access to a podiatrist and better dental care as well as allowing a reassessment of his ability to communicate so that his views and wishes could be taken into account with respect to decisions affecting his life.

[29] In light of those errors the appeal was allowed and the orders of the primary judge made on 11 June 2015 set aside. This Court then considered afresh the application to sanction the compromise of the Family Provision proceedings commenced under s 41(1) of the *Succession Act*.

The nature of the Court's jurisdiction in Family Provision Applications

[30] As Dalton J observed in *Affoo v Public Trustee of Queensland*,[4] the final disposition of a Family Provision application is an exercise of the court's discretion. It cannot be achieved by agreement or deed. Any agreement reached at a mediation or between the parties at any stage cannot in any way circumvent the requirement that the court must consider whether it should make an order in the terms sought because it would finally dispose of the Family Provision application. The court can only make an order if it has jurisdiction to act under the terms of the statute.[5]

[31] The test for a Family Provision application was set out in *Singer v Berghouse*.[6] The High Court referred to the test as a two stage process. The first stage calls for an

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3 Declaration on the Rights of Disabled Persons. U.N. General Assembly - 30th Session. 1975. http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx Convention on the Rights of Persons with Disabilities 2007 http://www.un.org/disabilities/convention/conventionfull.shtml.

4 [2012] 1 Qd R 408.

5 *Watts v The Public Trustee of Queensland* [2010] QSC 410.

6 (1994) 181 CLR 201.

assessment as to 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."[7]

[32] The first part of the test involves looking at the circumstances of the case. Once the court is satisfied that the first stage has been answered in the affirmative, the second stage involves the determination as to what provision should be made.

[33] As a disabled son, there is no doubt the applicant has a need and a moral claim. In the circumstances, the requirements of the *Succession Act* were made out as no provision was made for the applicant out of the estate of the deceased at all. The jurisdiction of the Court was clearly enlivened.

[34] In the normal course of events, that claim would have been litigated at trial. However, the Public Trustee, as the applicant's litigation guardian, reached an agreement with the solicitor for the other three family members who had an interest in the estate and applied to the District Court pursuant to UCPR r 98 for the court to approve the compromise pursuant to s 59.

[35] The appropriate approach for a court to take in relation to an application to sanction a compromise of the proceedings was set out in *Watts v The Public Trustee*:

> "[13] In the second case *Hadley v McNamara re the Estate of Mary Anne McNamara* (unreported, NSWSC, 7 December 2005) Young J pointed to the change wrought by the decision of the High Court, he said:-
>
> 'In former times the court used to look at these applications as if they were discretionary matters and seek to work out whether the court had jurisdiction. It is now clear that that is the wrong approach under the Family Provision Act and that if the parties agree to settle proceedings under the Family Provision Act, and there is no other interest involved, ordinarily the court should merely make the orders in accordance with the terms of settlement. There will, of course, be the odd exception where it clearly appears on the face of it that there is no jurisdiction in the sense that the plaintiff has no need of provision.'
>
> [14] The point was further considered by the Supreme Court in Western Australia in *Schaechtele v Schaechtele* ([2008] WASC 148) where Le Miere J considered (at para 18):-
>
> 'This Court cannot make an order giving effect to the proposed settlement unless the Court thinks that such provision should be made out of the estate of the deceased for the proper maintenance or support of the plaintiff. **But that does not mean that the Court is in effect to hear the matter as if it were a contested application and then to give or withhold orders to give effect to the settlement by comparing the settlement with the judgment**

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7 *Singer v Berghouse* (1994) 181 CLR 201, at 208-209.

> **which the Court would have given.** The Court must give proper consideration to the evidence before it. The Court should be aware of the risks of litigation in an area in which reasonable people can reasonably reach different conclusions and give [proper] weight to the fact that the parties wish to effect the settlement. If the Court is satisfied that the settlement falls within the bounds of a reasonable exercise of discretion then the Court should make orders to give effect to that settlement.'
>
> I respectfully agree with this approach to the question" (emphasis added).

[36] The evidence before the primary judge made it manifestly clear that the applicant was not provided for in the deceased's Will and that his only source of income was the Disability Support Pension. It is also clear that prior to his father's death he was cared for in the family home and had been dependent on his parents who it would seem had saved and set aside an amount of $150,000 for his future needs. The deceased that amount was stolen by the applicant's brother Richard.

[37] The material before the primary judge included the Needs Assessment Report prepared by an occupational therapist, Clare Butcher, dated 12 June 2014. That report identified that the applicant resided with two co-tenants in a Department of House and Public Works property run by Multicap which was housing which had shared support arrangements for all tenants. That report also referred to the applicant's heart attack in July 2009 as well as his other medical difficulties and identified the need for ongoing intervention from an eye specialist as well as diabetes management.

[38] The Report noted it would be beneficial for the applicant to obtain regular check-ups from an optometrist and a dentist, particularly given that he had lost several teeth. He also required podiatry treatment due to his diabetes. The need for physiotherapy and occupational therapy was identified as was the involvement of a dietician and a consistent approach to weight management. The Report also indicated that the applicant has limited expressive vocabulary and makes his wishes known with gestures and pointing. He would benefit from an assessment in relation to his communication.

[39] The Report explained that the applicant would benefit from access to podiatry, diet management, physiotherapy, occupational therapy, and speech therapy. It also indicated that as the applicant's current health services were only being accessed via Medicare the provision of funds for Private Health Insurance would improve his choice and access to services. It is uncontroversial that Private Health Insurance would offer him choices, allow a greater range of health programs and services as well as maximising his medical treatment.

[40] In terms of other needs the Report identified that he had very few personal items and was in need of new clothing. He also required basic household items including a new bed, other items of furniture in his room and his own television. His television in his room was not working properly and he had indicated that he would like his own television and DVD player. The Report recommended greater social interaction with the community, and stated that access to some funds would allow occasional outings, meals and coffee, which would also assist in his enjoyment of life. The Report also referred to the benefit to him of having a holiday and recommended that funds be provided for annual holidays to allow him to receive the benefits that so many other disabled members of the community enjoy.

[41] The clear recommendation from the Report was that the applicant would benefit significantly from funds which would allow him access to additional services. The Report indicated that Mr Abrahams had needs and that his very simple life could be considerably assisted by access to better health cover, new clothes, furniture and a functional television set.

[42] The Report of Ms Butcher supported a need in the order of $225,000. However, as this is a modest estate, those needs had to be adjusted to the size of the estate. The amount of $140,000, agreed between the parties, is approximately 34 per cent of the estate. The advice of counsel set out the competing beneficiaries' assets. All potential beneficiaries had very limited assets and savings. All are siblings. Two were in their mid to late 60s and one was in her mid-50s. One was unemployed, one was a pensioner and the youngest sibling was in employment but had limited assets.

[43] The affidavits of Robert Moran, Michael Stockall and Clinton Miles established that the prospective applicants had been notified of this application. William Abrahams, Yvonne Smith and Pauline Arvidson agreed to the compromise of the proceedings. The remaining sibling, Richard Abrahams, had not filed a notice or application for provision from the estate despite being served with a copy of all of the material.

[44] Once the jurisdictional question had been satisfied, considerable weight must be given to the agreement, and "[t]he circumstances would be unusual indeed for the court to override the agreement of the parties who are of full age and where there is no evidence of undue influences at work in the reaching of the agreement."[8]

[45] The question before the primary judge was whether the compromise of the applicant's claim for further and better provisions out of his father's estate should be sanctioned by the court pursuant to s 59 of the *Public Trustee Act* was in his best interests and whether the compromise which had been reached between the parties was appropriate.

[46] Not only did the parties so agree, but the Public Trustee, who brought the application on behalf of the applicant for further and better provision out of the estate, was also of the view that the compromise of the action was appropriate in all of the circumstances. The compromise was in the best interests of the applicant and was appropriate in all of the circumstances.

[47] For those reasons this Court on 10 November 2015 allowed the appeal and made orders 3(b)-(f), 4, 5 and 6.

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8 *Watts v The Public Trustee of Queensland* [2010] QSC 410, [15].