SUPREME COURT OF QUEENSLAND

CITATION:	*Snodgrass v Estate of McLaren* [2017] QSC 132
PARTIES:	**JODIE ALISHA SNODGRASS** (Applicant) **v** **PAUL DAVID MCLAREN AS EXECUTOR OF THE ESTATE OF THE LATE MICHAEL PAUL MCLAREN** (Respondent)
FILE NO/S:	S8 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	12 June 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	2 June 2017
JUDGE:	McMeekin J
ORDER:	**1. The application to strike out is dismissed.** **2. Costs are reserved**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – APPLICATION OF FORMER DE FACTO SPOUSE– where the executor of the estate applies for a summary dismissal of the originating application – where the applicant in the originating application seeks an order under the *Succession Act* 1981 (Qld) for further provision out of the estate of her former de facto partner – where applicant in the original application submits they are entitled to bring a claim because they meet the definition of "dependant" under s 40 of the *Succession Act* 1981 (Qld) – whether the applicant was substantially supported by a deceased person at the time of death within the meaning of s 40. *Succession Act* 1981 (Qld), s 40(1) *Family Law Act* 1974 (Cth), s 90SM(2)

Aafjes v Kearney (1976) 180 CLR 199, considered

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

Gray v Morris [2004] 2 Qd R 118 at 133, cited

Lohse v Lewis & Anor [2004] QSC 36, cited

Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259, applied

Re Cobb [1989] 1 Qd R 522, applied

Williams v Aucutt [2000] 2 NZLR 479, considered

COUNSEL: S McLennan for the applicant

MT de Waard for the respondent

SOLICITORS: J. Hamilton & Associates for the applicant

Taylors Solicitors for the respondent

[1] **McMeekin J:** The executor of the estate of the late Michael Paul McLaren (who is the deceased's father) applies for a summary dismissal of an originating application brought by Jodie Alisha Snodgrass wherein she seeks an order under Part IV of the *Succession Act* 1981 (Qld) for further provision out of the estate of her former de facto partner.

[2] Ms Snodgrass says that she is entitled to bring a claim because she meets the definition of "dependant" in s 40 of the *Succession Act* 1981. The executor contends that on her own case Ms Snodgrass cannot satisfy the jurisdictional test. The relevant part of the definition provides:

> "[D]ependent means, in relation to a deceased person, any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being –
>
> a) a parent of that deceased person; or
> b) the parent of a surviving child under the age of 18 years of that deceased person; or
> c) a person under the age of 18 years."

[3] The facts here raise a novel point. The question is whether an applicant is substantially supported by a deceased person at the time of death within the meaning of s 40 where the support is said to be the care provided by the deceased to a surviving child, where that care enables the applicant to obtain and maintain well

paid employment, and absent that care the applicant is obliged (or feels so obliged) to give up that employment to discharge her duties as a mother.

[4] To understand the point it is necessary to set out some background facts.

[5] Ms Snodgrass and the deceased lived in a de facto relationship from at least May 2012 until June 2015. A son was born on 26 February 2013.[1] Property was acquired. Ms Snodgrass claims to have made non-financial contributions. The deceased died on 11 June 2016.

[6] Prior to her pregnancy Ms Snodgrass had been in well paid employment. She gave up that employment in the course of her pregnancy on medical advice.

[7] After the birth of her son, Ms Snodgrass remained out of paid employment outside the home – she was paid a "wage" by a business conducted by the deceased which went towards household expenses.

[8] Following separation Ms Snodgrass left the former shared residence and obtained employment. She worked seven days on and seven off. She and the deceased agreed on a shared caring arrangement for their son. Her employment accommodated that arrangement. When she was "on" the deceased provided the care. When she was "off" she did. Their son attended at day care two days a week necessitated by the deceased's working arrangements. The parties decided to maintain that day care when Ms Snodgrass was on days off work to have some consistency in the care arrangements in the child's life.

[9] Upon the death of the deceased these arrangements of necessity had to change. Grandparents have provided assistance where they can. But the end result has seen the care arrangements chopping and changing, and, for present purposes I assume as Ms Snodgrass asserts, the four year old boy distressed and showing some physical signs of that distress and Ms Snodgrass dissatisfied that she is properly discharging her duty to care for her son.

[10] Following the ending of the relationship Ms Snodgrass retained solicitors to pursue a property claim against the deceased under the provisions of the *Family Law Act* 1974 (Cth). The deceased had given an undertaking to the Court not to dispose of any property without Ms Snodgrass' consent or an order of the Court. As at the date of death no application had been filed.

[11] It is common ground that as no application had been filed by the time of the deceased's death any right that Ms Snodgrass had to a property adjustment under the *Family Law Act* ended on the passing of the deceased: see s 90SM(2) *Family Law Act*. I do not consider whether the provision has that effect but adopt the assumption of both parties.

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1 Whilst not in issue there is a mistake in the affidavit of Ms Snodgrass sworn 1 June 2017. She there states that she fell pregnant with her son in mid-2013. Presumably she means mid-2012.

[12] The deceased left a Will. His last will was executed two months before the birth of his son – on 1 February 2013. The son is the sole beneficiary under the Will save that a life interest in a nominated property is granted to Ms Snodgrass. The precise worth of the estate is not yet known but may well be in excess of $2,000,000. The son will not take until he is aged 25 years. The executor is empowered to make distributions for the "maintenance, education, advancement or betterment" of the son. No distributions have yet been made.

[13] Ms Snodgrass sought to maintain her right to bring the Part IV application on the basis of the actual increased costs that she now incurs in maintaining her son and which have come about as a direct result of the deceased's death. She is now meeting expenses that the deceased used bear. Accepting that she incurs such increased costs formerly met by the deceased cannot provide any basis for her claim as under the terms of the Will any such costs can and should be met by a distribution under the Will. If the executor refuses to assist (and there is no reason to think that he would) then Ms Snodgrass is entitled to come to Court and seek appropriate orders. It is on that basis that summary dismissal was sought.

[14] The more significant point was raised in the course of oral submissions. If, in order to provide the care that her son needs, the applicant reasonably gives up her employment or seeks less remunerative employment, can that provide a proper basis for the claim? To put the point another way, was the deceased in effect providing substantial support to Ms Snodgrass by taking on the care of the child in alternate weeks? He thereby freed up Ms Snodgrass' earning capacity. Absent that support Ms Snodgrass cannot exercise her earning capacity and discharge the duty owed by her to their son.

[15] Counsel inform me that the argument is a novel one and they can find no authority on point.

[16] This is not the occasion to determine the matter. The executor seeks summary dismissal of the application. The authorities are clear that that should be done only in the clearest of cases: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Gray v Morris* [2004] 2 Qd R 118 at 133. The authorities speak of the "great care" that should be taken before exercising the power of summary dismissal: *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 Holmes J (with whom Davies JA and Mullins J agreed) at 264-5.

[17] In my view the point is not unarguable.

[18] What really is in issue is whether the concept of "support" is limited to direct financial contributions and further whether it is appropriate to bring into account "past events and future probabilities".

[19] There is some support in the authorities for acceptance of that wider concept.

[20] In *Aafjes v Kearney* (1976) 180 CLR 199 Gibbs J (as his Honour then was) said at 208 in relation to a dependency issue but under the workers' compensation legislation:

> "It is not the mere fact of receipt of support but the dependence or reliance upon another to provide it that matters. The question whether there is in fact dependence or reliance at the date of death is not to be answered by looking only to the circumstances as they existed at that date; 'past events and future probabilities' have to be considered."

[21] It has been accepted that the concept of "support" is a wider concept than "maintenance": *Lohse v Lewis & Anor* [2004] QSC 36 per Mullins J at [94], citing *Williams v Aucutt* [2000] 2 NZLR 479 per Richardson P at [52]. The discussion in *Williams* is not directly apposite as it did not concern the jurisdictional hurdle. It is however of interest in that the New Zealand Court of Appeal accepted that the concept of "support" in analogous legislation was not limited to "financial provision to meet economic needs and contingencies". It has a wider meaning. Richardson P said, in delivering the joint judgment of four members of the Court:

> "The test is whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. "Support" is used in its wider dictionary sense of "sustaining, providing comfort". A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand, where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member."

[22] If "support" has that wider meaning in determining what is "adequate" and "proper" then it must have a like meaning when considering the jurisdictional issue. And it is a small step from "sustaining, providing comfort" to accepting that "support" that has significant economic consequences if withdrawn is within the legislation.

[23] To an extent that approach is supported by Kneipp J's decision in *Re Cobb* [1989] 1 Qd R 522. The issue there was whether monies that Mr Cobb had saved from his independent income could be brought into account in determining dependency of the applicant following Mr Cobb's death. There was an agreement between the parties that the monies that were banked in his name were intended in due course to be used for the establishment of a jointly owned home. Kneipp J stated at 523:

> "However, I do not think that it is necessary that the provision of support or maintenance is necessarily confined to the provision of support or services or the like. It seems to me that if savings are being accumulated for the benefit of two parties, and if the savings come out of the income of one party, there is support or maintenance being provided to the other if the moneys are to be used partly or wholly for the benefit of that other in the event that the relevant plans come to fruition. In the present case, having regard to the agreement between the parties as to the dispositions of their respective incomes, it seems to me to be at least arguable that the applicant might have claimed a proportion of the moneys which had been invested by the deceased in accordance with the agreement between them. In the result, it seems to me that one should take an overall view of the situation, and in these circumstances I think that one can appropriately take the view that each was contributing to the support of the other as a result of their living together in a household to whose finances both made contributions. I therefore find, although I must confess I have found the matter to be one of considerable difficulty, that the applicant was a dependant of the deceased."

[24] It might be said that *Cobb* is a stronger case than this. But Kneipp J's approach supports the notion that not just direct financial payments but indirect support is within the contemplation of the legislation.

[25] Mullins J thought the decision in *Cobb* supported the proposition that "past events and future probabilities" were relevant to the issue of dependency and how substantial that might be: see *Lohse* at [88], [95]. The future plans there were that monies put aside by one were to be for the benefit of both. Here the future plans were that the deceased would provide the care necessary to enable Ms Snodgrass to be periodically relieved of her obligation to care for their son and so support herself.

[26] If the enquiry excludes "past events and future probabilities" or is limited to direct contributions then the application under Part IV cannot succeed. But if the concept is wider and extends to indirect support, and is informed by those future probabilities, justifying a finding of a reasonable assumption by both parties that the support will be ongoing into the foreseeable future and with potentially significant financial consequences for the applicant if that support is withdrawn then the application may well succeed.

[27] To an extent that argument relies on an extension of previously accepted concepts. On full examination it may prove not soundly based. But for present purposes I am not prepared to find that it is so hopeless as meriting summary dismissal.

[28] Assuming for the moment that support of this type is relevant to the dependency issue the executor submits that there is a further point. The jurisdictional hurdle that the applicant must clear is that she was "wholly or substantially … supported" by the deceased at death and the executor argues that there is no sufficient evidence that whatever the level of support was it met that threshold test. While that might be right at this point in time it is so because Ms Snodgrass is still trying to determine what care arrangements (and so employment arrangements for her) will work best for her son. If it be that in the present economic circumstances that prevail in the provincial regions Ms Snodgrass is unable to obtain employment that permits her to provide a reasonable level of care for her son, then she may find herself unemployed and she will easily meet that test. At this stage there has been no exploration of what options are realistically open and what financial impact there will be. In my view the assessment of that issue should await the trial of the matter.

[29] I dismiss the application to strike out. I reserve the question of costs.