SUPREME COURT OF QUEENSLAND

CITATION:	*Aronis v Aronis & ors* [2019] QSC 292
PARTIES:	**MARIETTA ARONIS** **(applicant)** **v** **MATTY ARONIS AS EXECUTOR OF THE ESTATE OF MARIA ARONIS (DECEASED)** **(respondent)** **MATTY ARONIS** **(second respondent)** **THEODORA LOULA ARONIS** **(third respondent)** **GEORGE ARONIS** **(fourth respondent)** **KATERINA ARONIS** **(fifth respondent)** **JOHN ARONIS** **(sixth respondent)**
FILE NO/S:	BS10436 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	29 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2019
JUDGE:	Holmes CJ
ORDERS:	**1. The application is adjourned to a date to be fixed, pending determination of the constructive trust proceeding, BS 12875/15, or further order.** **2. The matter is to be placed on the Wills and Estates Supervised List.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – PROCEDURE – PROOF IN SOLEMN FORM – where the applicant seeks orders that the first respondent bring into the registry a grant of probate in common form of her deceased mother's will and start a proceeding for a grant in solemn form, pursuant to rule 640 of the *UCPR* – where the respondent argues that there is no triable issue in relation to the deceased's testamentary capacity and that the application should be dismissed for delay – where the respondent, in the alternative, seeks an

adjournment of the application until a separate proceeding in relation to the estate assets is resolved – where the making of the orders sought by the applicant would prevent the respondent from defending that separate proceeding due to a lack of financial means – whether there is a triable issue with respect to the deceased's testamentary capacity – whether the applicant's delay in bringing the application is explained – whether an adjournment should be granted in the exercise of power under s 6 of the *Succession Act*

Succession Act 1981 (Qld), s 6, s 45
Trusts Act 1973 (Qld), s 96
Uniform Civil Procedure Rules 1999 (Qld), r 640, r 642

Bailey v Bailey (1924) 34 CLR 558; [1924] HCA 21, cited
Green v Critchley [2004] QSC 22, distinguished
Hoffman v Norris and White [1805] 161 ER 1129; [1805] EngR 81, cited
In re H. [1902] QWN 72, considered
In re Wood Deceased [1961] Qd R 585, considered
In the Will of Agnes Auld Gomm, Unreported, Supreme Court of Queensland, 23 July 1984 (Weld M), considered
Stott v Lyons and Stott [2006] QSC 135, considered

COUNSEL: G R Allan for the applicant
S J Webster and P J Coore for the first and second respondent

SOLICITORS: Walt Allan for the applicant
Cooper Grace Ward for the first and second respondent

[1] This is an application under r 640 of the *Uniform Civil Procedure Rules* 1999 by the applicant, Marietta Aronis, that the first respondent, Matty Aronis, as executor of the will of her deceased mother, Maria Aronis, bring into the registry the grant of probate in common form which she obtained in February 2017 and start a proceeding for a grant in solemn form.

[2] The basis of the application is a concern on the part of the applicant that the deceased may have lacked testamentary capacity or that she did not know and understand the contents of her will. The deceased was 92 years old when the will in question was executed on 5 September 2016, and died about seven weeks later. She had had two children: the first respondent and a son, the applicant's father, who had predeceased her. The will left virtually the entire estate to the first respondent, who is also joined in this application as second respondent (presumably in her capacity as beneficiary). The remaining respondents are the deceased's daughter-in-law (the applicant's mother), Theodora Aronis, and the applicant's three siblings, all of whom, like the applicant, would stand to benefit under either of two earlier wills if the 2016 will were set aside. None of the respondents, apart from the first (and second) respondent, has appeared on this application; for simplicity, I will refer to her as "the respondent" for the purposes of these reasons.

[3] There is no dispute that the applicant has an interest in the administration of the estate, because under both of the earlier wills she would take a one-eighth share of the estate. The deceased made a will in 1984, at the same time as her husband; it mirrored his will. The two appointed each other as sole executor and trustee and gave their estate to each other. In each case, should the spouse predecease them, the estate was given to their son and daughter, or in the event of their deaths, to be divided equally among their children. Under a later will made in 1991, the respondent took no benefit. The deceased left her estate equally between her son and his wife with, in the event that either predeceased her, his or her share going to their children equally. The applicant's father died in 2015; under the 1984 and 1991 wills she would, accordingly, receive an equal share with her three siblings in half of the estate. (A complication is that in an affidavit made in the year of her death the deceased deposed that she had not intended to make the 1991 will and did not understand what it was when she signed it.)

[4] The 2016 will, which is very terse, revokes all previous wills, appoints the respondent as executor and trustee, gives sums of $50 to the deceased's daughter-in-law, Theodora Aronis, and to each of the latter's children, and the balance of the deceased's estate, consisting of seven properties registered in her name and worth some $6,000,000, to the respondent. That will was made after Theodora had, in October 2015, lodged caveats on all seven properties and in December of that year filed a proceeding seeking declarations that they were held on constructive trust for her personally and as executor of her late husband's estate.

[5] The respondent contends, firstly, that there is no triable issue in respect of her mother's testamentary capacity and that the applicant's delay in making the application should be taken into account; or, alternatively, that the application should be adjourned because if Theodora Aronis were to succeed in the constructive trust proceeding, there would effectively be no estate to be administered and the present application would lack all utility. (That proceeding has been placed on the Wills and Estates Supervised List, and is awaiting a hearing date, which, it is hoped, will be in the first half of 2020.) Moreover, the respondent would, if the order sought by the respondent were made, be put into a position where she was unable to defend the constructive trust proceeding.

[6] Rule 640 of the *Uniform Civil Procedures Rules* provides:

> **"640 Proof in solemn form**
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> (1) If the court has made a grant in common form of probate or of administration with the will, any person who claims to have a sufficient interest in the administration of the estate may apply to the court for an order for the personal representative to bring the grant into the registry.
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> (2) However, the court must not make the order unless it is satisfied the applicant has an interest in the administration of the estate, or a reasonable prospect of establishing an interest in the administration of the estate.
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> (3) If the court orders the personal representative to bring the grant into the registry, the court may also give the directions the court considers appropriate, including directions about the persons to be made parties to the proceeding and about service.

> (4) As soon as practicable after the court makes an order under this rule, the personal representative must start a proceeding for a grant in solemn form."

[7] Authority on the considerations relevant to the exercise of the discretion under r 640 is scant. Counsel pointed to some decisions involving the construction of the rule and its predecessor, o 71 r 82,[1] which was in similar terms. In *In re H.*,[2] Power J took the view that the only relevant condition for the making of an order was the existence of an interest in the administration of the estate. In that case, an applicant who had established her interest was entitled to proof of the will in solemn form, so that the merits of the capacity question were not to be considered. That approach did not prevail. In *In re Wood Deceased*,[3] Wanstall J rejected a submission that an order would automatically follow from proof of interest. He considered that there was a discretion to be exercised, observing that

> "… the authority of the legal personal representative, derived as it was from the granting of administration, a judicial act even though done only in common form, was not to be lightly impeached".[4]

He went on to quote a judge of the Prerogative Court,[5] the effect of whose statement, he said, was

> "… that to allow a party to impeach a grant 'under any circumstances' would be 'contrary to reason and to every principle of justice'".[6]

Regard was to be had to whether the circumstances rendered it "unconscientious" that the application be allowed. In that case, a failure to account for delay and to give particulars of the allegations against the validity of the will, together with the fact that the applicant had received a substantial amount of her legacy which she had not offered to pay into court to abide the result, were all factors militating against the favourable exercise of the discretion.

[8] Counsel for the applicant suggested that *In Re Wood Deceased* represented one line of authority and a decision of Fryberg J in *Stott v Lyons and Stott*,[7] another. I do not think that the second case represents any notable departure from the first. In it, Fryberg J said that he was prepared to proceed on the assumption that all that had to be shown was a triable issue, provided the necessary interest was established; but since that case turned on the applicant's inability to show an interest, the decision is not of much assistance. In *In the will of Agnes Auld Gomm*,[8] Weld M observed that once there was established a triable issue in relation to capacity, it was not for the court to weigh the quality of the issues, and unless there were some other discretionary reason, the order that the grant be brought into the registry should be made. Those authorities do not appear to me to suggest any particular constraints on the r 640 discretion; and at the least, Wanstall J appears to have accepted the proposition that justice and reason play a part.

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1 *Supreme Court Rules* 1900.
2 [1902] QWN 72.
3 [1961] Qd R 585.
4 At 592.
5 Sir William Wynne in *Hoffman v Norris and White* [1805] 161 ER 1129.
6 *In Re Wood Deceased* at 592.
7 [2006] QSC 135.
8 Unreported, Supreme Court of Queensland, 23 July 1984 (Weld M).

[9] The respondent urged the approach taken by Atkinson J in *Green v Critchley* [9] in which her Honour referred[10] to a passage from *Bailey v Bailey*[11] to the effect that "mere proof of a serious illness" was not enough to displace a prima facie case of capacity and that there had to be "clear evidence". It was urged on me that that case, in which Atkinson J found that the will was that of a "free and capable testator" turned on very similar facts to the present. But I do not think that it is in fact of assistance. Although the cover sheet and a footnote refer to r 640, her Honour describes the application as one for "the revocation of a grant of probate";[12] so it seems very probable that it was in fact made under r 642. The present application seems to me properly to be decided according to a less stringent standard, and I am content to adopt the "triable issue" test referred to by Fryberg J and Weld M, while recognising that, depending on the circumstances, other considerations may be relevant to the exercise of the discretion.

[10] I turn now to the first argument raised by the respondent, that the applicant had failed to establish any triable issue. The applicant pointed to the following matters as raising suspicion about the deceased's testamentary capacity and whether she knew and understood the contents of her 2016 will. Firstly, the 2016 will is substantially different from the 1991 will, in which the deceased left her estate equally between her son and his wife, excluding the applicant, who under the 2016 will takes the estate, effectively, in its entirety. Secondly, for the 2016 will, the deceased went to a different solicitor from Mr Jacobson, the solicitor who had prepared her earlier wills, and required a Greek interpreter to assist her by translating for her, whereas for the purposes of her earlier wills she had not required an interpreter and, according to the applicant's affidavit, was able to speak English fluently.

[11] There is some support for that last contention in a statutory declaration made by Mr Jacobson who says that the deceased had "adequate" English skills. Although he does not expressly say that no interpreter was used in the preparation and witnessing of the 1984 and 1991 wills, the inference is that none was. The deceased herself, in an affidavit made in the year of her death, said that she could read English if she tried, although she could not always understand complex documents. Finally, the deceased's contact with the applicant and her mother had ceased after the death of her son in August 2015; her landline and mobile telephones were disconnected and the respondent no longer brought her to visit them, after the dispute arose about Theodora Aronis' entitlement to the seven properties registered in the deceased's name.

[12] As to delay, the applicant says that she was not aware of the respondent's application for probate filed in January 2017 and granted a month later. In April 2017, she attended a meeting with her mother and a barrister and solicitor where the possibility of Theodora's making an application under r 640 was discussed. The lawyers advised that, given the issue the deceased had raised as to the validity of her own 1991 will and the fact that Theodora was not a beneficiary under the 1984 will, there was no point in making such an application. The applicant said that she did not realise until September this year that she was in a position to make the application.

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9 [2004] QSC 22.
10 At [18].
11 (1924) 34 CLR 558 at 566-567.
12 At [1].

[13] Importantly, the applicant relied on a report obtained from Professor Gerard Byrne, an expert in geriatric psychiatry. He had given some preliminary views on the basis of extracts from medical records from the Royal Brisbane and Women's Hospital and copies of the deceased's three wills. The medical records were heavily redacted, having been obtained under the *Right to Information Act* 2009; Professor Byrne observed that the information obscured was likely to be relevant in assessing the deceased's cognitive function and behaviour. According to Professor Byrne, those records showed that the deceased had suffered brain damage caused by strokes and angiopathic disease of a type which commonly led to dementia. Assessments of her in March 2015 indicated the likelihood of clinically significant cognitive impairment, which, in turn, Professor Byrne regarded as likely to have been of a nature and severity to warrant a diagnosis of dementia. He expressed concern that the deceased may not have been aware of the nature and extent of her assets or been able to discriminate between the claims of potential beneficiaries. It seems probable that the last concern was based on the actual content of the 2016 will.

[14] The respondent has filed an affidavit from the solicitor who prepared the 2016 will and dictated a file note about his dealings with the deceased. In his view, she was of sound mind, memory and understanding and had capacity. A letter from a physician dated about a month later confirmed that view, but without giving the basis for his opinion. (An earlier medical certificate dated 3 February 2016 from the deceased's general practitioner also certified that the deceased was then of sound mind and testamentary capacity, similarly without details as to the reasons for that view.)

[15] The applicant pointed to some matters in the solicitor's file note which, it was said, suggested that the deceased was delusional: a reference to the "others… stealing everything" and a statement attributed to the deceased, through the interpreter, that she wanted to leave nothing to Peter (her deceased son) or his children. In a context where her daughter-in-law and son had managed the properties and retained the income from them on the basis of an entitlement which the deceased rejected, the reference to stealing is not surprising. The deceased having made it clear elsewhere in the interview that her son had died about a year earlier, I am more inclined to think that the reference to him is simply a mistake or something lost in translation; so I would not give much weight to those matters.

[16] There seems a strong prospect that the file note would in fact answer some of the concerns expressed by Professor Byrne, and the evidence of the solicitor is likely to have very substantial weight. It may also be that knowledge of the context in which the will was made – that Theodora Aronis had lodged caveats against the deceased's properties and launched proceedings against her – would have affected Professor Byrne's views. The problem for the respondent, though, is that an application of this kind is not the occasion for a weighing of the merits. The material which the applicant relies on, particularly Professor Byrne's view as to the likelihood of dementia on the basis of the radiological evidence and the March 2015 assessments, together with some evidence of a decline in the deceased's language skills, in my view raises a triable issue about capacity.

[17] As to the submission that the applicant's delay should disqualify her from success in this application, there is an explanation offered in the applicant's affidavit and there is no basis on the material before me to reject her account. Because of the caveats on the properties, the estate assets have not been dealt with, although there is the consideration

that the respondent, as executor has been put to considerable expense from her own monies, over $200,000, in defending the constructive trust proceeding, which she may never have undertaken had the grant of probate in common form been promptly contested. On the whole, though, I do not think the delay is of disentitling proportions.

[18] Those considerations point to a favourable exercise of the discretion to make the orders sought. But the respondent also asked me to exercise my discretion to adjourn the application until the constructive trust proceeding is resolved. That exercise of discretion falls, as it seems to me, to be exercised, not pursuant to r 640, but rather as an exercise of power under s 6(1) of the *Succession Act* 1981. That provision gives the court a very broad jurisdiction:

> **"6 Jurisdiction**
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> (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.
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> …"

[19] The respondent points to the inutility of requiring the will to be proved in solemn form in circumstances in which Theodora Aronis, should she succeed in the constructive trust proceeding, would take all the properties which are the assets in the estate. I am not convinced that that of itself would be a sufficient reason to adjourn. If the orders were made, the respondent would have to commence proceedings to prove the will, but it does not follow that orders could not be made effectively postponing any further steps in the proceeding until after the constructive proceeding is resolved; which, if the respondent's optimism is justified, will not be too long away.

[20] A more powerful consideration is a strong likelihood that should the orders be made, the respondent will not be in a position to defend that proceeding. If the grant of probate is recalled, under s 45(3) of the *Succession Act* the property in the estate will vest in the Public Trustee pending a subsequent grant; but under s 45(6) the Public Trustee is not required to take any steps in the administration of the estate during the interim period between the bringing in of the grant in common form and the grant in solemn form, in respect of whichever will is proved. It is, however, the case, as the applicant points out, that so long as the grant is not actually revoked, but merely recalled, the respondent is able to continue defending the constructive trust proceeding as the executor of the estate. The real problem will be her financial incapacity to do so.

[21] On 8 November 2019, Bowskill J made orders[13] on an application by the respondent under s 96 of the *Trusts Act* 1973, permitting the first respondent to mortgage one of the seven estate properties, paying the proceeds into a trust account and to use them: to fund the maintenance of the other properties; to meet legal costs and disbursements in relation to the present proceedings and any application by her seeking probate of the

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[13] *Aronis v Aronis & Anor; Aronis & Anor v Aronis* [2019] QSC 275.

will in solemn form; and, importantly, to meet the costs and disbursements in respect of the constructive trust proceeding and an appeal by the plaintiff against an interlocutory order in that proceeding. Should those orders be rendered ineffective because the respondent is no longer the trustee of the estate, she will not have the means to defend the constructive trust proceeding, having already used all her savings for that purpose. Bowskill J observed,[14] and I agree, that the respondent's conduct in defending the constructive trust proceeding was in the best interests of the estate, since that proceeding was a challenge to the whole of the property comprising the estate.

[22] That leads me to the question of whether the prospect of an adjournment of this application is properly to be entertained in circumstances where there appears to be a triable issue and the delay in bringing the application is not of disentitling proportions. I have come to the conclusion that to adjourn is a proper exercise of power under s 6(1) of the *Succession Act*. Whether or not it was the intent of the application, the effect of making the orders sought would be to prevent the respondent from defending the constructive trust proceeding, with the likely outcome that Theodora Adonis would obtain judgment and there would be no asset left in the estate. There is also the less weighty consideration that the respondent's significant personal expenditure thus far in defending the action, properly undertaken in the estate's interests (albeit also in her interests as beneficiary), would be to no avail and would presumably not be recoverable. But most importantly, to adjourn this application seems to me to be an order which is convenient in relation to the administration of the estate, so that the executor may endeavour to preserve it.

[23] The applicant points out that should Theodora Aronis succeed in an appeal she has filed against Bowskill J's order, it will be necessary in any event for the respondent to fund the constructive trust proceeding herself. In that event, the reason for this adjournment will no longer exist, and the application can be brought on again.

[24] The application is adjourned to a date to be fixed, pending determination of the constructive trust proceeding, BS 12875/15, or further order. I direct that the matter be placed on the Wills and Estates Supervised List. I will hear the parties as to costs.

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[14] At [27].