SUPREME COURT OF QUEENSLAND

CITATION:	*Leitch & Anor v Dore [2005] QSC 069*
PARTIES:	**JAMES WILSON LEITCH AND DAVID ANDREW LEITCH** (applicant) **v** **CHRISTOPHER PATRICK DORE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM HILTON BOYD CHENALL** (respondent)
FILE NO/S:	BS 2343 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2005
JUDGE:	White J
ORDER:	**Declare that the applicants do not have an interest in the estate of William Hilton Boyd Chenall sufficient to give them standing to bring an application pursuant to r 640 of the *Uniform Civil Procedure Rules* 1999.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – PRACTICE – QUEENSLAND – PROOF IN SOLEMN FORM – after making of grant in common form – interested person – whether a wish to take under a validly executed will is sufficient interest to constitute standing pursuant to an application under r 640, *Uniform Civil Procedure Rules* 1999 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 640 *Hogarth v Johnson* [1987] 2 Qd R 383, cited *In re Devoy, Fitzgerald and Pender v Fitzgerald* [1943] St R Qd 137, cited *In re Nickson* [1916] VR 274, cited *In the Goods of Chamberlain* [1867] LR 1 T&D 316, cited *In the Will of William Henry Keepkie Deceased* [1960] Qd R 436, cited *Nock v Austin* [1918] 25 CLR 518, cited

Poulos v Pellicer In the Estate of Culina [2004] NSWSC 504, not applied

COUNSEL: Ms R Treston for the applicants
Mr T Quinn for the respondent
Mr S Whitla solicitor for the residuary beneficiary

SOLICITORS: Dibbs Barker Gosling for the applicants
de Groots for the respondent
McCullough Robertson for the residuary beneficiary

[1] The applicants are beneficiaries under the will of their late uncle who was their mother's brother. The respondent is the executor of that will, a beneficiary under the will and the deceased's solicitor. The deceased died on 11 February 2005. The respondent obtained probate in common form on 17 March 2005. The applicants seek an order pursuant to r 640 of the *Uniform Civil Procedure Rules* that the respondent bring the grant of probate so obtained into the Registry. This has the effect, under the rules, that the personal representative must start a proceeding for a grant in solemn form of law.

[2] Rule 640 provides

> "(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.
>
> (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.
>
> (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 direction 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."

[3] The respondent contends that the applicants do not have "sufficient interest" in the administration of the estate to permit an order to be made. This is because they cannot point to any interest in having the will set aside wholly or in part.

[4] The affidavits in support of the application were not served in compliance with the rules as to time. The respondent's solicitor deposes that he has been unable to take instructions from his client about the contents of those affidavits. After discussion, Mr Quinn for the respondent, withdrew objection to the receipt of the late material on the basis that whether the applicants had a "sufficient interest" could be resolved without reference to or reliance on contentious statements in the affidavits. If it is concluded that the applicants have such an interest then proceedings for proof in solemn form would necessarily follow. It would then be necessary to respond to the allegations, in effect, going into the merits.

[5] The deceased was aged 69 years at his death on 11 February 2005 at Buderim. The cause of his death was primarily lung cancer and was of very brief duration. He is survived by his widow, Hilde, who, herself, is afflicted with cancer. She is the residuary beneficiary. She has been represented on this application by her solicitors. She has instructed that she does not wish to bring proceedings under r 640 herself but will do so if the applicants are unsuccessful. There are no children of the marriage.

[6] The will is in the following terms

> "1. I REVOKE all former Wills and Testamentary dispositions made by me.
>
> 2. I APPOINT CHRISTOPHER PATRICK DORE of 61-85 Pryor Road, Verrierdale via Eumundi in the State of Queensland (hereinafter referred to as "my Trustee") Executor and Trustee of this my Will.

3. I GIVE AND BEQUEATH to each of the surviving children of my sister ROSEMARY EVE LEITCH the sum of One Hundred Thousand Dollars ($100,000.00) for their sole use and benefit absolutely.

3. I GIVE DEVISE AND BEQUEATH all my shareholding in MUFFINCASTLE PTY LTD ACN 010 939 349 to the said CHRISTOPHER PATRICK DORE for his sole use and benefit.

4. I GIVE DEVISE AND BEQUEATH the residue of my estate both real and person of whatsoever nature or kind and wheresoever situate to my wife HILDE CHENALL for her sole use and benefit absolutely PROVIDED HOWEVER that should the said HILDE CHENALL predecease me or fail to survive me for a period of thirty (30) days then the following clauses of this my Will shall take effect but otherwise these clauses shall be of no effect.

5. I GIVE AND BEQUEATH to each of the surviving children of my sister ROSEMARY LEITCH a further sum of One Hundred Thousand Dollars ($100,000.00) for their sole use and benefit absolutely.

6. I GIVE AND BEQUEATH to my sister the said ROSEMARY EVE LEITCH the sum of One Million Dollars ($1,000,000.00) for her sole use and benefit absolutely.

7. I DEVISE AND BEQUEATH the residue of my estate both real and personal of whatsoever nature and wheresoever situate to the said CHRISTOPHER PATRICK DORE for his sole use and benefit absolutely.

12. IT IS my desire that I be cremated.

IN WITNESS WHEREOF I have hereunto set my hand to this my last Will and Testament this 30th day of June 2003."

[7] Whilst there is no affidavit from the respondent, certain facts would appear not to be in dispute. The estate is very large – in excess of $10,000,000 – and is readily able to satisfy the pecuniary legacies to the five nieces and nephews amounting to $500,000 immediately. The deceased came to live at Noosa from NSW in about 1967. The respondent has known and acted for the deceased and his wife for a very long time. The respondent has his practice, as appears from the grant of probate, at

Mary Street Noosaville. He has been involved in the deceased's companies as director and company secretary. The shares in the company Muffincastle Pty Ltd were held equally by the deceased and his sister Rosemary. The deceased's half share which, under the will, the respondent is to take, is estimated to be worth approximately $1.6 million. It is said to be an old Chenall family company. It had been established by the deceased and his sister's late father.

[8] To make any further reference to the allegations in the applicants' material may well trespass into the merits of the validity of the will. The basis upon which the applicants would cause the respondent to defend the will in whole or part is well summarised in a passage by A'Beckett J in *In re Nickson* [1916] VR 274 at 281

> "There is one rule which has always been laid down by the Courts having to deal with wills, and that is that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees, who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will is read over to the testatrix, and that she was of sound mind and memory and capable of comprehending it. But there is a further *onus* upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the *onus* of showing the righteousness of the transaction: *Fulton v Andrews*. I do not understand the righteousness of the transaction to mean that the will was a wise and just one, but that there was no unrighteousness in the conduct of the person who drew the will and took a benefit under it."

To similar effect was dictum by Isaacs J in *Nock v Austin* [1918] 25 CLR 518 at 528

> "The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will ..."

So, too, Barton and Gavin Duffy JJ at 524. It is unnecessary to cite further authority. If the applicants have "sufficient interest" an order that the respondent propound the will in solemn form will follow.

[9] The respondent has given undertakings not to deal with the estate without first giving seven days notice in writing.

[10] A previous will of the deceased dated in the 1980's has been located by the widow. It is not before the court. She has advised that under it she and the deceased's sister, Rosemary, the mother of the applicants, were the beneficiaries but does not say in what proportions. The applicants would have no interest on an intestacy should there be no other valid subsisting will since the widow has survived her husband.

[11] It is unnecessary to set out in any detail the history of probate law in this State so far as it relates to standing to call for proof of a testamentary document in solemn form of law. Philp J provides a summary in *In re Devoy, Fitzgerald and Pender v Fitzgerald* [1943] St R Qd 137 at 143. The question in that case came before the Full Court on a direction from Philp J (who was trial judge with a jury). It was argued for the defendant that the 1895 *Probate Rules* (they were subsequently re-enacted in the *Supreme Court Rules* 1900) effected a change in the law as to standing subsisting prior to their enactment. The expressions "interested in the estate" and "interests sufficient to entitle him to object" were in the 1895 Rules.

[12] The Full Court concluded that there was no alteration to the pre-existing law. Philp J with whom Webb CJ and Mansfield J agreed said of that body of law

> "Now ... no person, whether he were next of kin to the deceased or not, could oppose a grant of probate of a will unless he had some interest to protect; that is to say, that no person could force an executor to bring an action to prove a will in solemn form and oppose the grant of probate unless he could show that such a grant would affect some interest of his own. ... a person who merely had an interest or pretended interest in the estate could not, merely upon showing such an interest or pretended interest, oppose a will: he must have been able to show that the grant of probate would affect some interest of his. ... these principles were based on deep-rooted policy, because it is contrary to the interest of the State that persons having nothing to gain thereby should be permitted to institute or intervene in litigation, and courts are not established to enable parties

> to litigate matters in which they have no interest affecting their liberty, rights or property."

The legatee in that case had the same interest under a number of wills. The Full Court concluded that since she had no right to be protected by opposing the grant sought she had no right to intervene.

[13] *In the Will of William Henry Keepkie Deceased* [1960] Qd R 436 Stable J with whom Mack and Wanstall JJ agree approved the proposition in *In re Devoy* that an interest sufficient to entitle a person to object to a grant must be some right of that person "which will be affected by the grant" at 441. In that case one of the named executors of a will filed a caveat claiming "to be interested in the said estate" and requiring the double grant sought by his co-executor to be proved in solemn form of law. The Full Court, referring to *In the Goods of Chamberlain* [1867] LR 1 T&D 316 concluded that an executor of a will has no interest in the estate of the deceased per se. Any interest that he has stands or falls with the will.

[14] A narrow view of "interest" will not be taken. This is demonstrated by *Hogarth v Johnson* [1987] 2 Qd R 383 where the illegitimate son of the deceased commenced an action against the executrix and sole beneficiary under two wills and the surviving heirs of the testator being his legitimate sons and daughters from a first dissolved marriage. He sought to have the wills set aside on the ground that the testator lacked capacity. He sought provision out of the testator's estate for his maintenance and support. The executrix's demurrer to the statement of claim concerned principally the plaintiff's standing and was overruled. The court held that he had a *prima facie* interest in the estate. See the different position in NSW discussed by Windeyer J in *Poulos v Pellicer In the Estate of Culina* [2004] NSWSC 504 where it is said that the interest in family provision is dependent upon order, not the validity of the will.

[15] The provisions relating to objections to a grant of probate under the previous Rules of the Supreme Court, governed as they were by the system of caveats, has been simplified in the UCPR. The words "no interest sufficient to entitle the person to object to the grant applied for" as found in RSC O 71 r 59 appears as "a sufficient interest in the administration of the estate" in r 640 of the UCPR but is no different in meaning and effect from the previous rule. There is nothing to suggest that the body of authority to which reference has been made does not apply to the interpretation of r 640.

[16] The interest which Ms Treston for the applicants submits they have is novel. She contends that they are interested as legatees in a validly executed will. That is, they do not wish to take under a will of doubtful validity, even as to part. They have no interest under any earlier will so far as can be known. That their mother was named as a beneficiary with their aunt in an earlier will is quite insufficient to give them standing. Since the widow has survived the death of her husband the applicants have no entitlement under an intestacy. I am prepared to infer that their purpose in bringing the application is for the entirely proper one of having tested the suspicious circumstances *prima facie* surrounding the preparation and execution of the will. That is, that the respondent be compelled to show that there was no "unrighteousness" in his conduct. Nonetheless, consistently with the authorities, they have no interest sufficient to give them standing.

[17] The residuary beneficiary does have that standing. Her share of the estate would be augmented should the gift to the respondent fail. Her attitude was explained to the court by her solicitor and more fully set out in her solicitor's letter to the applicants' solicitors dated 4 April 2005. Notwithstanding that Mr Quinn focussed upon the sentence in the letter of her solicitors to the respondent of 23 March 2005 "while

our client is appreciative of everything you have done for her and her husband in the past, she is anxious to ensure that the administration of this estate is not bogged down in unnecessary litigation" it is necessary to read further. She requested the respondent to disclaim his gift under clause 3 of the will; that he renounce his role as executor and trustee; that he resign as director and secretary of all companies in which the deceased had an interest; and return all company and personal documents to the widow together with all items held in safe custody.

[18] It will be a matter for her to bring an application requiring the grant made to the respondent to be brought into the Registry. This will have the consequence that the respondent must start proceedings for a grant in solemn form. It may be that the applicant could seek to be substituted for the present applicants in the existing originating application. She has not sought to do so but rather than dismissing the originating application I will declare that the applicants have no interest sufficient to give them standing to bring the application pursuant to r 640 of the *Uniform Civil Procedure Rules*.