

SUPREME COURT OF QUEENSLAND

CITATION: *Kowalski v Public Trustee & Ors (No 2)* [2011] QSC 384

PARTIES: **ELIZABETH ANN KOWALSKI**

(Applicant)

And

**THE PUBLIC TRUSTEE AS EXECUTOR FOR THE
ESTATE OF STAN KOWALSKI (DECEASED)**

(First Respondent)

And

LEIGH ANNE-LOUISE KOWALSKI

(Second Respondent)

And

**JOHN SHANAHAN AND JOANNE DUNN AS
TRUSTEES OF THE BANKRUPT ESTATE OF LEIGH
ANNE-LOUISE KOWALSKI**

(Third Respondent)

FILE NO/S: S243 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court Rockhampton

DELIVERED ON: 12 December 2011

DELIVERED AT: Rockhampton

HEARING DATE: On the Papers

JUDGE: McMeekin J

ORDER:

- 1. The orders are in accordance with the draft annexed to these reasons marked "A".**
- 2. The second respondent's request for a stay of proceedings is refused.**

CATCHWORDS: PROCEDURE – COSTS – on which basis costs should be awarded – costs of application of subpoenaed evidence

PROCEDURE – STAY OF PROCEEDINGS – where second respondent will be appealing original decision – whether stay of execution of orders ought to be granted

Uniform Civil Procedure Rules 1999 (Qld)

Asia Pacific International P/L v Peel Valley Mushrooms & Anor [2000] QSC 168

Collett v Knox[2010] QSC 132

Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] QCA 322

Elphick v MMI General Insurance Ltd & Anor [2002] QCA 347

Kowalski v Public Trustee & Ors [2011] QSC 323

Raschilla & Anor v Westpac Banking Corporation [2010] QCA 255

Underwood & Anor v Sheppard [2010] QCA 76

COUNSEL: M Rothery (solicitor) for the applicant
J Otto for the first respondent
Second respondent in person
No appearance for the third respondent

SOLICITORS: South & Geldard for the applicant
Official Solicitor to the Public Trustee of Queensland for the first respondent
Second respondent in person
No appearance for the third respondent

- [1] **McMeekin J:** I heard this matter on the papers. On 10 November I gave reasons. I proposed altering the terms of an agreement reached, subject to sanction, between the applicant and the first respondent to resolve the applicant's claim for family provision.¹ I directed that the parties provide submissions as to the orders that would give effect to these alterations and as to any orders for costs that should be made.
- [2] The first respondent has provided a draft form of orders intending to give effect to my reasons with which the applicant agrees. As well the first respondent submits that I should make the following orders:
- (a) there be no order as to the applicants' costs;

¹ *Kowalski v Public Trustee & Ors* [2011] QSC 323

- (b) that the first respondent's costs be paid out of the estate on the indemnity basis;
 - (c) that the second respondent be ordered to pay the first respondent's costs of the second respondent's application for leave to inspect subpoenaed documents;
 - (d) that there be no other order as to the second respondent's costs; and
 - (e) that there be no order as to the costs of the third respondents.
- [3] The second respondent filed submissions that, for the most part, argued against the merits of my decision to alter the proposed agreement, challenged my findings in respect of her evidence² and repeated her alternative proposal which had not found favour with me.³
- [4] More relevantly the second respondent disputed the first respondents' entitlements to receive costs out of the estate, stated a firm intention to appeal and requested that the court issue a stay of the orders under r761(2).⁴ I deal with those issues now.

Stay of Orders

- [5] The factors that I am to take into consideration when determining whether to grant a stay of the enforcement of a decision which is pending appeal are:
- (a) Whether there is a good arguable case;
 - (b) Whether the applicant will be disadvantaged if a stay is not ordered; and
 - (c) Whether there is some competing disadvantage to the respondent should the stay be granted which outweighs the disadvantage suffered by the applicant if the stay is not granted.⁵
- [6] In circumstances where it can be demonstrated that there are no or very poor prospects of success on appeal, that can weigh heavily against the granting of the application for a stay.⁶
- [7] In my view this is such a case. The second respondent has not pointed to any cogent ground on which her proposed appeal might succeed.
- [8] As well the proceedings have dragged on for some time now. A significant matter is the age of the applicant. She is nearly 90 years old. Her age and state of health and the inappropriateness of the home in which she lives, which is the principal asset of the estate, were the factors that in my judgment called for the Court to interfere in the estate. Those factors equally compel a speedy resolution of the matters in dispute and go against a stay.

² [2011] QSC 323 at [21] – [22]

³ *Ibid* at [71]

⁴ *Uniform Civil Procedure Rules 1999* (Qld)

⁵ *Asia Pacific International P/L v Peel Valley Mushrooms & Anor* [2000] QSC 168; *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347

⁶ *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322 per Keane J; *Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255 per Fraser JA

- [9] The significant disadvantage to the second respondent caused by a refusal of the stay is that the home will be sold and the asset converted into cash in what she perceives to be a poor market. That may be so but it cannot be known whether or when the market might improve, nor can it be predicted what level of improvement there might be. That cannot provide a reason for staying these orders.
- [10] I decline to grant a stay of execution of the orders that I now propose to make.

Costs

- [11] It is consistent with my reasons⁷ that no orders be made with respect to costs of the applicant. Her costs are brought into account by the provisions of the altered agreement that I propose to impose.
- [12] The costs of the first respondent incurred in respect of the application to inspect subpoenaed documents are to be paid by the second respondent. The possibility of such an eventuality was foreshadowed by the first respondent to the second respondent in the course of the hearing in the event that no relevant or helpful evidence was obtained. I am satisfied that the subpoenaed documents, as the applicant and the first respondent anticipated, were unhelpful.
- [13] Otherwise there is to be no order as to the second respondent's costs.
- [14] As to the first respondent's costs, I order that they be assessed on the indemnity basis and paid out of the estate. They are not guilty of disqualifying conduct as the second respondent alleged. As executors they have a "fiduciary duty to which they must have regard in conducting litigation affecting the estate."⁸ Their proposal to compromise the suit, a suit which I found to be a valid application for family provision, and one that involved a difficult balancing exercise, was in keeping with this duty.⁹
- [15] The third respondents did not participate actively in these court proceedings and would be entitled to recover any legitimate costs incurred in these proceedings in the second respondent's bankruptcy. Accordingly there will be no order as to their costs.

Orders

- [16] The orders annexed to the first respondent's submissions reflect the conclusions to which I have come. The orders will be in accordance with the draft provided by the first respondent.
- [17] The second respondent's application for a stay of these orders is refused.

⁷ [2011] QSC 323 at [76]

⁸ *Underwood & Anor v Sheppard* [2010] QCA 76

⁹ See the authorities discussed by me at *Collett v Knox* [2010] QSC 132 at [167]