

# SUPREME COURT OF QUEENSLAND

CITATION: *Maynard v The Estate of Maynard* [2015] QSC 144

PARTIES: **Kylie Jane MAYNARD**  
(applicant)  
v  
**THE ESTATE OF PETER JAMES ALEXANDER  
MAYNARD**  
(respondent)

FILE NO/S: SC No 3869 of 2015

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 20 May 2015

DELIVERED AT: Brisbane

HEARING DATE: 20 May 2015

JUDGE: Atkinson J

ORDERS: **The orders of the court are that:**

- 1. Kylie Jane Maynard be at liberty to swear to the death of Peter James Alexander Maynard, late of Castaways Beach in the State of Queensland.**
- 2. A grant of letters of administration upon intestacy be made to Kylie Jane Maynard for the estate of Peter James Alexander Maynard, such grant to be made subject to the formal requirements of the Registrar.**
- 3. The applicant's costs of and incidental to the application be paid on an indemnity basis from the estate.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – EVIDENCE – PRESUMPTION OF AND LEAVE TO SWEAR DEATH – where the applicant believed her husband to be deceased – where the respondent was the estate of applicant's husband – where seven years had not expired such as to give rise to the common law presumption of death – where the applicant's husband had left home to travel for a period – where the applicant's husband went surfing in difficult seas – where there was evidence to suggest that the applicant's husband had died whilst surfing – where extensive searches had been conducted in an attempt to

locate the applicant's husband – where no body had been found – where no death certificate had been issued – where the applicant's husband had not left a will – whether the applicant should be granted leave to swear to the death of her husband – whether a grant of letters of administration upon intestacy should be made in favour of the applicant

*Succession Act* 1981 (Qld) s 6

*Axon v Axon* (1937) 59 CLR 395, referred to

*In re Purton* [1943] QWN 33, cited

*Mackay v Mackay* (1907) 18 WN (NSW) 266, cited

*Re Bennett* [2006] QSC 250, cited

*Re Mayne* (1858) 1 SW & TR 11; (1858) 164 ER 606, cited

*Re Parker* [1994] QSC 329; (1995) 2 Qd R 617, cited

COUNSEL: D J Morgan for the applicant  
No appearance for the respondent

SOLICITORS: Cartwright Lawyers for the applicant

- [1] **ATKINSON J:** Section 6 of the *Succession Act* 1981 (Qld) gives jurisdiction to this Court “to grant ... probate ... or letters of administration of the estate of any deceased person, [and] 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...”.
- [2] The jurisdiction in section 6 is very wide, but depends on the Court being satisfied that the person for whom probate or the administration of the estate is sought is, in fact, deceased. This usually requires the presentation of a death certificate. In some circumstances, however, as Dal Pont and Mackie set out in *The Law of Succession*,<sup>1</sup> “it may be difficult to conclusively determine whether or not the person has in fact died”.<sup>2</sup> The common law, in dealing with that issue, has recognised what is termed a “presumption of death”; that is, following a person’s disappearance for at least seven years, the person may be presumed to be deceased.<sup>3</sup> However, whether or not a person is deceased is a question of fact and as such, it is not always necessary to wait seven years for a person to be held to be deceased, even where that person’s body has not been found.

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<sup>1</sup> LexisNexis, 2013.

<sup>2</sup> *Ibid* at [11.7].

<sup>3</sup> *Ibid*; see also *Axon v Axon* (1937) 59 CLR 395 at 405.

- [3] This case shows circumstances in which the Court is able to make the finding that a person is deceased and allow his widow to swear to his death. This will have the effect of enabling her to obtain a grant of the letters of administration upon his intestacy, the Court having been satisfied that it is most unlikely that he made a will.
- [4] The circumstances of this case are set out in various affidavits that have been sworn and filed and that are well summarised in the outline of submissions filed by Mr Morgan of counsel. It appears that on 18 August 2014, Peter James Alexander Maynard left his family home at Castaways Beach in Queensland to travel on a surfing holiday in Bali. He was travelling by himself. The evidence shows that he arrived in Bali and checked into his accommodation, but never checked out and was not seen again after he left that accommodation on 24 August 2014 to go surfing. On that day, a fragment of his surfboard was recovered by a local dive master, who has sworn an affidavit in Indonesian. The affidavit has been translated and that translation is before the Court.
- [5] Despite an extensive search, Mr Maynard's body has not been found. The extent of the searches are thoroughly set out in the material by his wife and show that an extremely thorough search was conducted for his body over several days, but his body was never recovered. Mr Maynard leaves a wife, to whom he has been married since 21 March 1998, and three children.
- [6] I have previously analysed the law that applies in a case like this in the matter of *Re Bennett*.<sup>4</sup> In that case, a diver went missing during a dive in South Korea and was presumed to have died. There was evidence before the Court in that case from which I could safely infer that he had died and it was not necessary to wait the seven years for the Court to be able to infer death. In that case, I referred to a number of previous decisions dealing with this question. Those were *Re Mayne*,<sup>5</sup> involving the demise of the master of a ship presumed sunk; *Mackay v Mackay*,<sup>6</sup> relating to a passenger aboard a ship that was wrecked; *In re Purton*,<sup>7</sup> in which a flying boat pilot was presumed deceased after not reaching his destination when fleeing the impending Japanese invasion of Java; and *Re*

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<sup>4</sup> [2006] QSC 250.

<sup>5</sup> (1858) 1 SW & TR 11; (1858) 164 ER 606.

<sup>6</sup> (1907) 18 WN (NSW) 266.

<sup>7</sup> [1943] QWN 33.

*Parker*,<sup>8</sup> where a man was washed from rocks on which he had been fishing into the sea and did not resurface.

- [7] Mr Maynard died in Indonesia without his body being found and no death certificate has issued. It would be a difficult and lengthy process for an Indonesian death certificate to be obtained. Mr Maynard was domiciled in Queensland. His estate is in Queensland. His wife and children live in Queensland and the evidence shows that they are suffering financial hardship. It is therefore appropriate for this case to be heard and determined in Queensland.
- [8] In the circumstances where it is known that Mr and Mrs Maynard had a close relationship with each other and that Mr Maynard had a close relationship with his children; where the time when he disappeared is known, as is the fact that he went surfing in what were apparently quite difficult seas; that the remnants of his surfboard have been found and suggest a severe impact with a coral reef; that extensive searches were carried out without success; and that he has not contacted his wife, any other member of his family or his friends, or operated any of his bank accounts, since 23 August 2014, I am satisfied, in all of the circumstances, that Kylie Jane Maynard should be at liberty to swear to the death of Peter James Alexander Maynard, late of Castaways Beach in the State of Queensland. I am also satisfied on that basis that a grant of the letters of administration upon intestacy should be made to Kylie Jane Maynard for his estate, such a grant to be made subject to the formal requirements of the Registrar.

### **Orders**

- [9] The orders of the court are that:
1. Kylie Jane Maynard be at liberty to swear to the death of Peter James Alexander Maynard, late of Castaways Beach in the State of Queensland.
  2. A grant of letters of administration upon intestacy be made to Kylie Jane Maynard for the estate of Peter James Alexander Maynard, such grant to be made subject to the formal requirements of the Registrar.

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<sup>8</sup> (1995) 2 Qd R 617.

3. The applicant's costs of and incidental to the application be paid on an indemnity basis from the estate.