

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Hay* [2016] QSC 106

PARTIES: **VICTOR MORRIS HAY**  
(applicant)

FILE NO: 3703 of 2016

DIVISION: Trial

PROCEEDING: Miscellaneous Application (Civil)

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 May 2016 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 5 May 2016

JUDGE: Atkinson J

ORDERS:

1. Pursuant to s 22 of the *Succession Act 1981* (Qld) ('the Act'), the Applicant has leave to apply for an order pursuant to s 21 of the Act authorising the making of a Will on behalf of Carmyn Ethel Kingston ('Ms Kingston').
2. It is directed that, in order for the Court to consider whether to make an order pursuant to s 21 of the Act, the Applicant take the following steps:
  - (a) The Applicant is to obtain written report by a geriatrician, providing an expert opinion as to whether Ms Kingston currently has testamentary capacity in accordance with the test outlined in *Banks v Goodfellow*.
  - (b) The Applicant is to arrange for Ms Kingston to be interviewed by an Accredited Specialist in Succession Law who is independent of the solicitors for the Applicant, to take instructions from Ms Kingston as to the preparation of a proposed Will, and for such Accredited Specialist to be requested, in particular, to:
    - (i) assess whether, in their opinion, Ms Kingston currently has testamentary capacity in accordance with the test outlined in *Banks v Goodfellow*; and

- (ii) ask sufficient questions in order to establish whether Mrs Kingston understands, and is able to articulate, details of all persons who may reasonably be thought to have a claim on her testamentary bounty.
  - (c) The Applicant is to arrange for the Accredited Specialist referred to in paragraph 2(b) to file an affidavit, containing a note of the interview and their opinion referred to in paragraph 2(b)(i) above.
  - (d) If the Accredited Specialist is of the opinion that Ms Kingston is able to give instructions and has testamentary capacity, then the Accredited Specialist should arrange for the execution of a will by Ms Kingston in accordance with her instructions.
  - (e) The Applicant is to provide to the Accredited Specialist, in advance of the interview referred to in paragraph 2(b), a copy of the affidavit material filed in this proceeding and a copy of these reasons.
  - (f) The Applicant is to make further enquiries to establish the accuracy or otherwise of the statements of fact concerning the financial position of Jocelyn Edith Wearing that are made at paragraph 13(b) of Ms Kingston's affidavit sworn on 15 April 2016, and to file further affidavit evidence in respect of that.
3. The remainder of the Originating Application be adjourned to a date to be fixed in the Civil Applications list.

**CATCHWORDS:** SUCCESSION – MAKING A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where applicant applies for leave to make an application for a statutory will – where evidence supports the granting of leave but is presently insufficient to justify authorising the will to be made – whether leave should be granted and directions given for the purpose of the substantive application being brought at a later date

*Succession Act* 1981 (Qld), s 21, s 22, s 23, s 24

*Banks v Goodfellow* (1870) LR 5 QB 594

COUNSEL: R Williams for the applicant

SOLICITORS: Boulton, Cleary & Kern Lawyers for the applicant

- [1] **ATKINSON J:** This is an application made pursuant to Subdivision 3 of Division 4 of Part 2 of the *Succession Act 1981 (Qld)* (“*Succession Act*”) for the court to make an order authorising a will to be made on behalf of Carmen Ethyl Kingston, said to be a person without testamentary capacity. That subdivision of the *Succession Act* mandates a two-stage process: a party must first apply for leave to apply for such an order and then, if granted leave, the party may apply for an order authorising the will to be made.
- [2] The test for the grant of leave and the test for making an order authorising a will to be made are different. Commonly, the two applications are heard together, pursuant to s 22(3) of the *Succession Act*, but there are circumstances in which it is more appropriate for the application for leave to be heard first and then the substantive application be made. I am satisfied that this is such a case.
- [3] Section 21 of the *Succession Act* is the section by which the court authorises the making of a will. Section 22 provides that:
- (1) A person may apply for an order under section 21 only with the court’s leave.
  - (2) The court may give leave on the conditions the court considers appropriate.
- [4] Section 23 sets out the information required by the court in support of an application for leave and s 24 sets out the factors the court must be satisfied of before giving leave. The three most significant factors in this case are set out in ss 24(c), (d) and (e), that is:
- (c) there are reasonable grounds for believing the person does not have testamentary capacity.
  - (d) the proposed will is or may be a will that the person would make if the person were to have testamentary capacity.
  - (e) It is or may be appropriate for an order to be made under section 21 in relation to the person.

### **Whether leave should be granted**

- [5] I am satisfied there are reasonable grounds for believing that Ms Kingston does not have testamentary capacity. Her capacity has certainly been thrown into doubt, in particular by reason of decisions of the Queensland Civil and Administrative Tribunal regarding enduring powers of attorney and the appointment of an administrator for financial matters; however, the tribunal quite properly did not make findings that she did not have testamentary capacity. That was not the question before the tribunal. The tribunal did, however, give leave to the applicant, who is Ms Kingston’s administrator for financial affairs and one of her nephews, to make this application to the court to determine that very matter, as well as the other matters of which the court is required to be satisfied.

- [6] Assuming, without deciding, that Ms Kingston does not have testamentary capacity, I am satisfied that the proposed will is one that Ms Kingston *may* have made if she had testamentary capacity; however, since it purports to leave the whole of the estate to one only of her many nephews and nieces, in my view there is presently not sufficient evidence to be satisfied that Ms Kingston *would* have made the will if she had testamentary capacity.
- [7] Similarly, I am satisfied that it may be appropriate for an order to be made under s 21 *Succession Act*, but the present state of the evidence is insufficient for a decision presently to be reached about whether such an order *is* appropriate.
- [8] In the circumstances, I am satisfied that leave to make the application should be granted.
- [9] It falls next to decide whether the substantive application should be determined and, if so, whether it should be granted.

### **Whether the court should authorise a will to be made**

- [10] Before the court may authorise a will to be made under s 21 *Succession Act*, it must be satisfied not just that there are reasonable grounds for believing the person does not have testamentary capacity, it must be satisfied that the person in relation to whom the order is sought actually lacks testamentary capacity. In this regard, s 21(2) provides:
- (2) The court may make the order only if—
- (a) The person in relation to whom the order is sought lacks testamentary capacity; and
- (b) the person is alive when the order is made; and
- (c) the court has approved the proposed will, alteration or revocation.
- [11] The requirement for the court to approve the will under s 21(2)(c) is, of course, different from the finding of satisfaction required by s 24(d), relating to the granting of leave to make the application, that the proposed will may be a will that the person would make if the person were to have testamentary capacity.
- [12] While there is no question that Ms Kingston is presently alive, there is currently insufficient material before the court to establish the other requirements of s 21(2). I am not presently satisfied that Ms Kingston does, in fact, lack testamentary capacity. Nor am I presently satisfied that the proposed will is one that the court would approve.
- [13] Accordingly, I propose to grant leave to make the application and then to give a number of directions designed to enable material to be gathered which might satisfy the court of the matters of which it needs to be satisfied under s 21(2).

### **Orders**

1. Pursuant to s 22 of the *Succession Act 1981* (Qld) ('the Act'), the Applicant has leave to apply for an order pursuant to s 21 of the Act authorising the making of a Will on behalf of Carmyn Ethel Kingston ('Ms Kingston').

2. It is directed that, in order for the Court to consider whether to make an order pursuant to s 21 of the Act, the Applicant take the following steps:
  - (a) The Applicant is to obtain written report by a geriatrician, providing an expert opinion as to whether Ms Kingston currently has testamentary capacity in accordance with the test outlined in *Banks v Goodfellow*.
  - (b) The Applicant is to arrange for Ms Kingston to be interviewed by an Accredited Specialist in Succession Law who is independent of the solicitors for the Applicant, to take instructions from Ms Kingston as to the preparation of a proposed Will, and for such Accredited Specialist to be requested, in particular, to:
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    - (ii) ask sufficient questions in order to establish whether Mrs Kingston understands, and is able to articulate, details of all persons who may reasonably be thought to have a claim on her testamentary bounty.
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  - (d) If the Accredited Specialist is of the opinion that Ms Kingston is able to give instructions and has testamentary capacity, then the Accredited Specialist should arrange for the execution of a will by Ms Kingston in accordance with her instructions.
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