

# SUPREME COURT OF QUEENSLAND

CITATION: *Maisel v The National Mutual Life Association of Australasia Ltd* [2016] QSC 166

PARTIES: **STACEY ROBIN MAISEL**  
(applicant)  
v  
**THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD**  
(respondent)

FILE NO/S: SC No 261 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED EX TEMPORE ON: 24 June 2016

DELIVERED AT: Cairns

HEARING DATE: 24 June 2016

JUDGE: Henry J

ORDER: **1. That the Applicant, Stacey Robin Maisel, be at liberty to swear to the death of Bradford Zaiser Maisel, late of 2163 Dimbulah Road, Mareeba in the State of Queensland, as having occurred on or about 7 April 2016.**

**2. That the Applicant's cost of and incidental to this application be reserved to any application by the Applicant for a grant of probate in respect of the last Will of the late Bradford Zaiser Maisel.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – EVIDENCE – PRESUMPTION OF AND LEAVE TO SWEAR DEATH – where the applicant's husband was the pilot of a helicopter that crashed into waters off Cape Tribulation – where the evidence suggests the applicant's husband passed away in or as a result of the accident – where his remains have not been located despite extensive and well-publicised searches – whether to grant leave to swear to the death of the applicant's husband – whether an application for probate needed to be made before the application

*Succession Act* 1981 (Qld), s 6

*Uniform Civil Procedure Rules 1999 (Qld), r 602*

*In the Goods of Jackson* (1902) 87 LT 747, cited  
*In the Goods of Matthews* [1898] P 17, followed  
*Re Fulton* [1994] 2 Qd R 505, distinguished  
*Re Heynatz* [2006] QSC 173, followed

COUNSEL: M Jonsson QC for the applicant  
 No appearance by the respondent

SOLICITORS: Apels Solicitors for the applicant  
 No appearances for the respondent

- [1] **HIS HONOUR:** The applicant seeks the court’s leave to swear to the death of her husband, the late Bradford Zaiser Maisel.
- [2] The evidence suggests that Mr Maisel passed away in or as a result of a helicopter accident that occurred in waters off Cape Tribulation on 7 April 2016. He was in control of his Robinson R22 helicopter en route from Cooktown to a property at Mossman during the late afternoon when it plunged into waters off Noah’s Beach, Cape Tribulation. A passenger in the aircraft, Mr Gray, survived the incident. Such evidence as there is suggests the pilot, Mr Maisel, did not. His remains have not since been located, despite extensive and well-publicised searches. That is sadly not a surprising fact given the circumstances that it was an aircraft crash into coastal waters in the Far North.
- [3] The disappearance and, one would think, apparently certain death of Mr Maisel, has created practical difficulties for the performance of contracts entered into by he and his brother, Thomas, for the sale of farming land and associated water allocations. Contracts relating to the sale have been signed, but the instruments of transfer necessary to permit substantive performance of the vendors’ obligations thereunder were unsigned by Mr Maisel as at the date of his disappearance and apparent death.
- [4] Under the only known will of Mr Maisel, dated 11 December 2009, he appointed his wife, the applicant, as his sole executrix. The applicant is concerned, on advice, that she will be unable to obtain a grant of probate upon conventional proof of his death, that is to say, by production of a death certificate, at least in the short term. However, a grant is needed in the short term to permit performance of the contracts of sale and avoid exposure of the estate to liability for breach.
- [5] To overcome the practical difficulty arising it is open to the applicant to seek and obtain from the court a grant of probate in common form premised upon an order of the kind now sought. The historic rationale for the type of order now sought was explained in this way by Barnes J, *In the Goods of Jackson* (1902) 87 LT 747, 748:  
 “[T]he court never presumed death, but gave the applicant for a grant leave to swear the death, and the applicant then had to swear to the fact. Parties had to prove their right to a grant, and they did not establish their right unless they made the necessary oath. The true principle in such cases was for the applicant to obtain the leave of the court to swear in his or her belief that a person was dead.”

- [6] Examples abound historically of the exercise of the power to give such an order in the inherent jurisdiction of the court, see, for example, *In the Goods of Matthews* [1898] P 17 and, in more recent times, *Re Heynatz* [2006] QSC 173.
- [7] It may very well be that an order of the kind now sought might not be regarded as essential by a registrar considering an application for a grant. Much may turn upon the view to be formed of the admissibility of what a deponent in a situation like the applicant asserts in respect of the date and circumstances of death.
- [8] Rule 602 of the *Uniform Civil Procedure Rules* relevantly provides:  
 “(1) An affidavit in support of an application for probate or letters of administration with the will must –  
 (a) state the following –  
 (i) that the will identified in the affidavit is the last will of the deceased;  
 (ii) the date of death or, if the date of death is not known, the circumstances of death and the place of death of the deceased;  
 ...  
 (c) if a certificate of the deceased’s death is issued under the Births, Deaths and Marriages Registration Act 2003 or a corresponding law of another jurisdiction – have, as an exhibit, a certified copy of the certificate.”
- [9] The effect of rule 602(1)(c) is that the affidavit in support of the application must have as an exhibit a certified copy of the death certificate “if” a certificate has been issued. That is, where a death certificate has not been issued it will not, by virtue of the terms at least of rule 602(1)(c), preclude the granting of the application.
- [10] The thornier aspect of rule 602(1) lies in the terms of rule 602(1)(a)(ii). It is conceivable disputes may arise as to the foundational knowledge necessary for admissibility in an affidavit of a statement of the date of death or, if the date of death is not known, a statement of the circumstances of death and the place of death of the deceased. In a case like the present it would likely be acceptable to identify the relevant circumstantial evidence grounding the assertion pursuant to rule 602(1)(a)(ii) without offending the rules of admissibility. Ultimately, I find it unnecessary to reach a concluded view on this issue in circumstances where the order sought in the application before me will avoid any difficulty about admissibility for the registrar that might arguably have arisen in the event of the relevant affidavit purporting to make assertions meeting the requirements of rule 602(1)(a)(ii).
- [11] A final matter which falls for consideration is that in *Re Fulton* [1994] 2 Qd R 505, Ryan J declined to make an order of the present kind in circumstances where an application had not yet been made for probate or letters of administration, observing he could not see any justification for granting leave to swear to the death in the absence of such an application. As against this, her Honour Margaret Wilson J in *Re Heynatz* granted an order of the kind now sought in circumstances where an application for probate had not yet been made.
- [12] It may be that there were other considerations in play in *Re Fulton* that are not apparent from the judgment. Furthermore, that decision was made at the time of the old rules and not in the era of the Uniform Civil Procedure Rules. The evidence before me clearly

indicates an intention to make the application and the purpose of the present application relates directly to such an application. In those circumstances, it is unnecessary for the application for probate to have been made prior to the present application being filed.

- [13] For all of these reasons I am satisfied the order sought ought be given. In arriving at that conclusion the exercise does not require me to find the apparent death of Mr Maisel as a matter of certain fact, for the extent of the order sought and now made is to grant the applicant leave to swear to the death. It is enough the circumstantial evidence of death is sufficiently strong for the court to conclude it is appropriate, in the circumstances of the particular case, to grant leave.
- [14] I find the applicant is at liberty to swear to the death of her late husband. I order, as per the draft order signed by me and placed with the papers.