SUPREME COURT OF QUEENSLAND

CITATION:	*Panochini v Jude* [1999] QCA 444
PARTIES:	**CORAL JESSIE PANOCHINI** (Applicant/Appellant) v **MARGARET JUDE, as executrix of the estate of Frederick Otto John, deceased** (Respondent)
FILE NO/S:	Appeal No 11025 of 1998 OS No 1822 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 1999
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 1999
JUDGES:	McMurdo P, Davies and Thomas JJA
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – JURISDICTION – PERSONS IN WHOSE FAVOUR ORDER MAY BE MADE – CHILDREN – STEPCHILDREN – testator's family maintenance application brought by stepchild of deceased – whether applicant fell within definition of "stepchild" in Part IV of the *Succession Act* 1981 – *Re Burt* [1988] 1 Qd R 23, *Re Marstella* [1989] 1 Qd R 638, *Re Monckton* [1996] 2 Qd R 174 discussed – effect of 20 June 1997 amendment to the *Succession Act* considered – whether amendment should be construed as affecting rights created upon death of testator in April 1997 STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF STATUTES – RETROSPECTIVE OPERATION – IN GENERAL – whether amending Act declaratory *Succession Act* 1981, s 40, s 40A, s 41 *Commonwealth of Australia v Orr* (1981) 37 ALR 653, considered *Hogan v Hogan* [1981] 1 NSWLR 63, approved

R v Cook, ex parte C (1985) 156 CLR 249, considered
Re Burt [1988] 1 Qd R 23, considered
Re Marstella [1989] 1 Qd R 638, considered
Re Monckton [1996] 2 Qd R 174, considered

COUNSEL: Mr G Koppenol, with him Mr L Stephens, for the appellant
Mr A Wilson for the respondent

SOLICITORS: Sciacca's Lawyers for the appellant
Stephens & Tozer for the respondent

[1] **THE COURT**: The appellant brought a testator's family maintenance application alleging that she was a stepchild of the deceased and that she was entitled to provision from his estate. Her application was dismissed by a trial division judge on the ground that she did not fall within the definition of "stepchild" in Part IV of the *Succession Act* 1981. The appeal is against that dismissal of her claim.

[2] The appellant, who was born in 1942, was the daughter of Edward and Carol Hann. Her father died in 1960, and in 1968 her mother married Mr Frederick John. The appellant's mother died in September 1996. Mr John, from whose estate the appellant seeks provision, died on 19 April 1997. The respondent obtained probate of the will on 23 May 1997.

[3] On 20 June 1997 certain amendments were made to the *Succession Act* which widened the ambit of the definition of stepchild for the purposes of Part IV of the *Succession Act* 1981. It is common ground that if those provisions apply to the claim brought by the appellant, she satisfies the necessary definition of stepchild.

[4] Prior to that amendment, the relevant legislation (s 40 of the *Succession Act* 1981) provided as follows:

> "In this part … **"stepchild"** means, in relation to a deceased person, a child of that person's spouse who is not a child of the deceased person".

[5] With respect to that definition, and to the former definition of "stepchild" in the preceding *Succession Act* 1867-1977, it has been held in a number of decisions in the Full Court and in the Court of Appeal that the relationship of stepchild and step-parent does not subsist after the termination of the marriage which created it[1]. In short the death of the natural parent or the divorce of the natural parent from the step-parent were regarded as precluding an applicant from satisfying the definition of stepchild in the legislation. The following statements in *Re Burt*[2] illustrate the approach that was taken:

> "[I]n order to constitute an applicant the "stepchild" in relation to the deceased person referred in s. 90 of the Act, the applicant must be the child by a former marriage of one who is the husband or wife of that person at the date of death of the latter"[3].

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1 *Re Burt* [1988] 1 Qd R 23; *Re Marstella* [1989] 1 Qd R 638; *Re Monckton* [1996] 2 Qd R 174.
2 [1988] 1 Qd R 23.
3 Ibid at 29 per McPherson J.

> "I am satisfied that the relationship of affinity between step-parent and stepchild which comes into being with the marriage of the child's natural parent with the step-parent depends for its continued existence upon the continuity of that marriage and that it ceases with the termination of that marriage whether by death or divorce"[4].

[6] The third member of the Court in *Burt (*Thomas J) found it unnecessary to express a view as to whether the status of stepchild could survive the death of the natural parent.

[7] The similar though not identical definitions of "child" and "stepchild" in the *Succession Act* 1981 were considered by the Full Court in *Re Marstella*[5]. A similar view was taken by that court of the definition of "stepchild" to that expressed by McPherson J in *Re Burt.* The members of the court recognised that whilst different interpretations were arguable, the interpretation which should prevail was the ordinary and natural meaning of the word "stepchild" which connotes the child by a former marriage of the spouse, that is to say, the husband or wife of the testator or testatrix at the date of his or her death. It was noted that the definition of "spouse" in s 40 of that Act contemplates a living person, and that the reference in that Act to "a child of that person's spouse" means only children of a spouse living at the date of the putative step-parent's death[6].

[8] In *Monckton*[7] the question was whether, after the death of their mother, children remained stepchildren of the deceased within the meaning of Part IV. The court saw no reason to depart from the approach taken in *Re Burt* and *Re Marstella.* The court recognised that there were arguments to the contrary but saw no sufficient reason to depart from the construction adopted in those decisions. Special leave to appeal against the decision of the Court of Appeal in *Monckton* was refused, Toohey J observing on behalf of the court that:

> "[t]his application concerns the meaning of stepchild in the *Succession Act (Queensland)* 1981. The decision of the Court of Appeal that on the death of the natural parent the relationship no longer exists accords with recent decisions of that Court and, furthermore, as a matter of construction it is a conclusion which is reasonably open. In those circumstances, the application for special leave to appeal is refused"[8].

[9] The amendment upon which the appellant relies was effected to the *Succession Act* 1981 by the *Justice and Other Legislation (Miscellaneous Provisions) Act* 1997 which was assented to on 15 May 1997. The part of that Act with which we are concerned (Part 21) came into operation on 20 June 1997. Under that Act the definition of "stepchild" was omitted and the following new definition inserted:

> **"Meaning of "stepchild"**
>
> **40A.(1)** A person is a **"stepchild"** of a deceased person for this part if-
>
> (a) the person is the child of a spouse of the deceased person; and

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4 Ibid at 24 per Andrews CJ.
5 [1989] 1 Qd R 638.
6 Ibid at 646.
7 [1996] 2 Qd R 174.
8 *Zeith v Public Trustee of Queensland* (1996) 4 Leg Rep SL 3.

> (b) a relationship of stepchild and stepparent between the person and the deceased person did not stop under subsection (2).
>
> (2) The relationship of stepchild and stepparent stops on the divorce of the deceased person and the stepchild's parent.
>
> (3) To remove any doubt, it is declared that the relationship of stepchild and stepparent does not stop merely because-
>
> (a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
>
> (b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died".

[10] As already observed, if this new definition is taken to apply to the appellant's application she would qualify as a "stepchild" for the purposes of the Act. The question is whether the amendment should be construed as affecting rights which were created upon the death of the testator in April 1997.

[11] Upon the death of the testator in April 1997 the deceased's will took effect, and various beneficiaries obtained rights under it. Simultaneously, statutory rights were conferred upon eligible persons by s 41 of the *Succession Act* 1981 to make a claim to obtain "such provision as the court thinks fit … out of the estate". The creation by the 1997 amendment of additional rights of the latter kind necessarily impacts adversely upon the existing rights of beneficiaries. This was recognised by McLelland J in *Hogan v Hogan*[9], where it was held that retrospective effect should not be given to 1976 legislation which created testator's family maintenance rights not previously held by ex-nuptial children.

[12] It was submitted for the appellant that the 1997 amendment was retrospective in effect. As a general rule, a statute changing the law "ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events"[10].

[13] The language of this amending provision does not speak about affecting past rights or events. Indeed the amendment is effected by means of an assertion that "the relationship of stepchild and step-parent does not stop merely because" of certain specified events such as death of the stepchild's parent before that of the deceased person. This seems more consistent with prospective than retrospective application. Counsel for the appellant however submitted that the amendment should be interpreted as a "declaratory act" having retrospective effect once it was proclaimed to commence. It is true that in *Commonwealth of Australia v Orr*[11] Lockhart J stated:

> "As to declaratory Acts: "If a doubt is felt as to what the common law is on some particular subject and an Act is passed to explain and

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9 [1981] 1 NSWLR 63.

10 Per Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 267.

11 (1981) 37 ALR 653, 659.

> declare the common law, such an Act is called a Declaratory Act": *Craies on Statute Law* 7th ed, at p 58. Declaratory Acts … are not regarded as altering the law, but as making its meaning clear. Sometimes declaratory Acts are passed "to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes" *Craies*, at p 58".

[14] There was however no doubt as to what the common law was on this question, or more precisely, what the construction according to common law principles of the relevant existing statutory provisions was up to that time. Plainly Parliament took the view that the existing provisions, as interpreted, were not wide enough, and that the category of persons able to make claims as stepchildren ought to be extended. But the Act said nothing about changing the law retrospectively or as to the application of the new definition in relation to existing rights and obligations. In our view there is a distinction between legislation which effects a change in the law and legislation which declares the meaning for all purposes (past and present) of an existing law[12].

[15] Counsel for the appellant placed reliance upon the words "to remove any doubt, it is declared" in s 40A(3). The phrase "to remove any doubt" is, regrettably, an overused expression in legislation of the last decade. Commonly it is used as a bridging phrase between a general provision and an example that the draftsmen fears may not have been clearly enough covered by the general statement. The present instance would seem to be such an example. The general intention of the new provision seems to have been stated in s 40A(1) and s 40A(2). Section 40A(3) then states that "to remove any doubt, it is declared that the relationship of stepchild and step-parent does not stop merely because" of the stepchild's parent's death or of the deceased person's remarriage in the circumstances there set out. Further, the use of the words "it is declared" is far from determinative of the question whether legislation has retrospective effect[13]. The language in which Parliament may give retrospective effect to a change in the law is by no means circumscribed, but a good example which has not infrequently been used when such an effect was intended is a statement declaring that a certain provision is "and always has been" the law[14]. Perhaps such an assertion may these days be regarded as unduly bombastic, but if legislation is intended to affect existing rights and claims, it is not difficult for Parliament to say so[15]. In the present case we consider that the effect of the 1997 amendment was to change the law as distinct from stating what it is to be taken to have meant before the statute took effect, including at the time when the testator died.

[16] For these reasons and for the reasons expressed by the learned trial division judge at first instance, the proper construction of the amending Act is that it has only a prospective operation.

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12 Compare the discussion in *Pearce & Geddes* in "Statutory Interpretation in Australia" 4th edn at para 10.10.

13 *Harding v The Commissioner of Stamps for Queensland* [1898] AC 769, 775.

14 See *The Franconia* (1877) 2 PD 163, 35 LT (NS) 721. Compare *Craies on Statute Law*, 7th edn at 58-59.

15 Compare *Mabo v The State of Queensland* (1988) 166 CLR 186 at 211-212.

[17] The rights of the appellant therefore fell to be determined according to the statutory provisions in force in April 1997. These had been authoritatively determined in *Re Burt, Re Marstella and Re Monckton*[16], adversely to the appellant. However counsel for the appellant submitted that these cases were wrongly decided and that *Re Monckton* should be overruled. The submission is based upon the premise that a statement in the dissenting judgment of Deane J in *Cook*[17] was a correct statement of the law, and that the judgment of McPherson J in *Burt,* which was subsequently adopted by the Full Court in *Re Marstella* and by this court in *Re Monckton,* does not reveal that Deane J's remarks were taken into account. Reliance was also placed upon certain statements in *Re Monckton* which concede that other views of the matter were reasonably arguable. With due deference to counsel's argument we do not propose to discuss it at length. There is no ground for thinking that any of the three cases cited above were determined per incuriam. Indeed, Deane J's judgment in *Cook* was expressly referred to by Thomas J and was mentioned at least obliquely by McPherson J. The fact that the ensuing decisions of the court acknowledged the existence of contrary arguments hardly detracts from the authority of the decisions that were then made. Indeed, to the contrary, it indicates that the decisions were made with adequate recognition of contrary arguments. There is no reason to overrule any of those decisions and they should be taken as accurately construing the former statutory provisions.

[18] The appeal should be dismissed with costs.

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16 Cited above, footnote 1.

17 *R v Cook, ex parte C* (1985) 156 CLR 249 at 263.