SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Queensland v Attorney General of Queensland* [2004] QSC 328
PARTIES:	**THE PUBLIC TRUSTEE OF QUEENSLAND** (applicant) **v** **THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	SC 4986/04
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2004
JUDGE:	Atkinson J
ORDER:	**1. The Court declares that the Will of Marcus William Siebler deceased dated 19 August 1998 substantially complies with the formal requirements prescribed by s 9 of the *Succession Act* 1981.** **2. Subject to the formal requirements of the Registrar, an order to administer the estate of Marcus William Siebler with the Will of 19 August 1998 be granted to the Public Trustee of Queensland.** **3. The costs of all parties, of and incidental to the application, be taxed on an indemnity basis and paid out of the estate of Marcus William Siebler, deceased.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – EXECUTION – ATTESTATION – IN GENERAL – where will executed with only one witness signatory – where will expresses the testamentary intention of the testator – whether substantial compliance with *Succession*

Act 1971 (Qld), s 9

Succession Act 1971 (Qld), s 9

Re Matthews [1989] 1 Qd R 300, considered
Re the Will of Eagles [1990] 2 Qd R 501, considered
Re White [1985] QSC 611, cited
White v Public Trustee & Blundell [1986] Qld FC 28, unreported, Motion 231 of 1985, 13 May 1986, cited

COUNSEL: BW Nickel for the Applicant
KA Parrott (solicitor) for the Respondent

SOLICITORS: Public Trustee for the Applicant
Crown Law for the Respondent

[1] On 17 May 2002, Marcus Siebler died at the age of 88 at the Redland Hospital. At the time of his death, he was domiciled in Queensland. He had been a teacher who had never married. His estate consists of a house at Victoria Point in Queensland, and about $480,000 in cash, shares, Government stock, debentures and term deposits.

[2] The Public Trustee of Queensland has applied to the court for an order declaring that a will made by Mr Siebler on 19 August 1998 (the "1998 document") substantially complies with the formal requirements prescribed by s 9 of the *Succession Act* 1981, and that subject to formal requirements of the registrar, an order to administer his estate be granted to the Public Trustee. Mr Siebler's 1998 document does not strictly comply with the formal requirements of a will and hence the application that has been made. The Attorney-General was respondent to the application but in a formal sense only and did not oppose the making of the orders sought by the Public Trustee.

[3] Mr Siebler made a will on 30 May 1969 (the "1969 will"). That will was made at the Public Trust office in Broken Hill, and after appointing the Public Trustee as executor, devised the whole of his estate to his sister, Clarice Bernice Carter, absolutely. In the event that she pre-deceased him, his estate was bequeathed to his niece, Judith Ann Carter, absolutely. Unfortunately, both named beneficiaries, his sister and his niece, pre-deceased Mr Siebler. Judith Kassim (nee Carter) died of motor neurone disease on 11 November 1996. Her death certificate divulges that she had two children, Soraya and Liza.

[4] On 19 August 1998, Mr Siebler added the following two handwritten paragraphs to his 1969 will:

> "(5) In relation to (3) above, as Clarice Bernice Carter and Judith Ann Kassim (nee Carter) have pre-deceased me, I hereby bequeath the whole of my estate, both real and personal, to my grandnieces, Soraya Kassim and Liza McDonald.
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> (6) The only exception to (5) shall be with regard to my Toyota motor vehicle which I bequeath to Maureen Creer."

[5] On the same date, Mr Siebler created a handwritten form of will which, after formal matters, says:

> "This is the last will and testament of Marcus William Siebler.

> I bequeath the whole of my estate, except my car, to my two grandnieces, Soraya Kassim, residing at present at 10 Gore Street, Greenwich, NSW 2065, and Lisa McDonald, residence 80 Kissing Point Road, South Turramurra NSW 2074.
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> I bequeath my car to Maureen Creer, residence 104 Seagull Avenue, Mermaid Beach, Queensland 4218."

[6] Like the handwritten addendum to the 1969 will, the 1998 document was signed by Mr Siebler and witnessed by one witness, T Manwarring. Mr Manwarring has no interest in the estate.

[7] The Public Trustee of New South Wales has renounced his right to a grant of probate of the 1969 will. If a grant is made with respect to the 1969 will, the sole beneficiary of the estate would be the Crown in the right of the State of Queensland.

[8] The 1998 document is in writing, appears to express the testamentary wishes of Mr Siebler and is the disposition that one would expect him to have made given that his sister and niece pre-deceased him rendering the 1969 will ineffectual. The problem which arises in this case is the failure of the 1998 document to comply with the formal requirements of s 9 of the *Succession Act* 1981 in that there was only one witness to the document. That section provides:

> "**9. Will to be in writing and signed before 2 witnesses**
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> A will shall not be valid unless it is in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in the testator's presence and by the testator's direction and such a signature shall be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that –
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> (a) the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator; and
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> (b) the court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument."

[9] It should be noted that the proviso found in this section of the Queensland *Succession Act* was intended to relieve from the unbending requirements of formal execution so that a document which represented the testamentary intention of the testator could be admitted to probate notwithstanding a failure to strictly comply with the formal requirements referred to in s 9.

[10] The formal requirements for the execution of a will serve several useful purposes. In particular, they provide evidence of the testamentary intention and the testamentary capacity of the testator. The fact that the will is in writing, and that it

is signed at its end by the testator, in the presence of two or more witnesses, means that if there is any doubt about testamentary capacity, those disinterested witnesses can give evidence as to that testamentary capacity. The formality of the document demonstrates and dispels doubts as to the exercise of testamentary intention.

[11] No such doubts arise in this case. The 1998 document is, as I previously mentioned, precisely the will one might expect from a testator whose previous will has been rendered obsolete by the death of the primary and subsequent beneficiaries. It is in that factual context that the question of substantial compliance must be considered.

[12] Evidence has been given by Mr Manwarring, the witness to Mr Siebler's signature, which makes it perfectly clear that Mr Manwarring knew the testator very well and that the 1998 document represented Mr Siebler's testamentary intention, that he intended it to be his will and that he had testamentary capacity when he signed it. It appears that the only reason why there was no second witness is that neither Mr Siebler nor Mr Manwarring knew that a second witness was required for a will to be valid. Mr Siebler, as I have said, had been a teacher all his life and Mr Manwarring was a business man and an entirely disinterested witness. Legal advice had not been sought or obtained.

[13] The earliest cases decided under s 9 of the *Succession Act* in Queensland suggested that witnessing by one signatory was such a basic defect that substantial compliance could not be found to have occurred: *re White.*[1] However, in *re Matthews,*[2] Carter J admitted to probate a will which was signed by the testator in the presence of one witness only, although a short time later another witness purported to attest and subscribe the will but not in the presence of the testator. In that decision, Carter J repeated a view expressed earlier by Thomas J that:

> "It would be unfortunate if the Courts by a series of decisions, returned to the old rigid attitudes and I would expect a liberal approach be taken in applying the 'substantial compliance' provisions".

[14] His Honour said that he did not understand the Full Court to have held that in no circumstances would there be substantial compliance if only one person signs as a witness. Referring to the particular circumstances, Carter J said at 303:

> "On the occasion in question the testator was obviously intent on expressing his testamentary intentions. At that time only one witness was available. He was aware of the statutory requirement for two witnesses but at the time he was intent upon making the will he had only one to call upon. It would in my view be unduly harsh and to insist unduly on rigid formalities to deny efficacy to a testator's expressed testamentary intention merely because he had only one witness available and not two. ... each case will depend on its own facts and … the question whether there is in the circumstances substantial compliance will remain a matter of degree."

[15] Subsequent decisions of this court have shown that it is a question of degree to be decided on the particular facts of the particular case. Whilst finding in *Re the Will*

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1 [1985] QSC 611, unreported, M231 of 1985, 27 September, 1985, Macrossan J; *White v Public Trustee & Blundell* [1986] Qld FC 28, unreported, motion 231 of 1985, 13 May 1986.

2 [1989] 1 Qd R 300.

of Eagles[3] that there had not been substantial compliance in the particular case, Williams J agreed with the observations by Carter J to which I have referred. His Honour also said, however, that it did not follow that in all cases where there had been attestation by only one witness present at the time the testator signed the document, that there would be substantial compliance.

[16] In my view, the circumstances of this case explain why there was only one witness to the will: the will is not in the slightest bit unusual and there is nothing to arouse any suspicion. Both the deceased and the witness believed that only one witness was necessary. The witness had no interest in the estate. The will gives effect to the intention to benefit the testator's two grandnieces whom he consistently favoured over many years. There is no opposition from the Public Trustee, who has in fact made the application, or from the Attorney-General. The State, who would benefit if the application were unsuccessful, has no wish to displace the beneficiaries under the 1998 document. It is clear that the 1998 document expresses the testamentary intention of a person with testamentary capacity. There has, in all the circumstances, been substantial compliance with the formalities prescribed by s 9. I am therefore prepared to make the orders sought in the application.

[17] In conclusion, a case such as the present would benefit from the law reform recommended by the National Committee for uniform succession law reform in its *Consolidated Report to the Standing Committee of the Attorney-General on the Law of Wills* (QLRC MP 29, December 1997). The National Committee made the following recommendation for statutory reform for implementation in each State and Territory:

> "10 **When court may dispense with the requirements for execution of wills**
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> (1) A document or part of a document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration of such a will, or the revocation of such a will, if the Court is satisfied that the deceased person intended the document to constitute his or her will, an alteration to his or her will or the revocation of his or her will.
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> (2) In forming its view, the Court may have regard (in addition to the document or any part of the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.
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> (3) This section applies to a document whether it came into existence within or outside the [*insert name of jurisdiction*].
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> (4) For the purposes of this section:
> *document* means any record of information, and includes:
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> (a) anything on which there is writing, or

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3 [1990] 2 Qd R 501.

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph."

[18] A similar provision is found in s 9 of the *Wills Act* (Victoria)[4] and has been the subject of much judicial commentary.[5] Such a provision enables the court to admit to probate a document which expresses or gives effect to the testamentary intention of the deceased person, notwithstanding lack of compliance, substantial or otherwise, with the formal requirements for execution of wills.

Orders

1. The Court declares that the Will of Marcus William Siebler deceased dated 19 August 1998 substantially complies with the formal requirements prescribed by s 9 of the *Succession Act* 1981.

2. Subject to the formal requirements of the Registrar, an order to administer the estate of Marcus William Siebler with the Will of 19 August 1998 be granted to the Public Trustee of Queensland.

3. The costs of all parties, of and incidental to the application, be taxed on an indemnity basis and paid out of the estate of Marcus William Siebler, deceased.

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4 There are similar provisions in the *Wills Probate and Administration Act* 1898 (NSW), s 18A; *Wills Act* 1992 (Tas), s 26; *Wills Act* 1970 (WA), s 34; *Wills Act* 1936 (SA), s 12; and *Wills Act* 1968 (ACT), s 11A.

5 See, for example, *Equity Trustees v Levin* [2004] VSC 203 and *re Trethewey* [2002] VSC 83.