SUPREME COURT OF QUEENSLAND

CITATION:	*Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349
PARTIES:	**CARL CHARALAMBOUS** (Applicant) **v** **ESTHER CHARALAMBOUS** (First Respondent) **HARRY CHARALAMBOUS** (Second Respondent) **JOHN PAUL CHARALAMBOUS** (Third Respondent)
FILE NO/S:	9982 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Delivered ex tempore on 1 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2012
JUDGE:	Ann Lyons J
ORDER:	**1. Pursuant to s 22 of the *Succession Act 1981* (Qld) ("the Act"), the Applicant have leave to apply for an Order pursuant to s 21 of the Act that a Codicil be authorised to be made to John Matsis;** **2. Pursuant to s 21 of the Act, a Codicil be authorised to be made for John Matsis in terms of the Draft Codicil which is Exhibit "DJB-3" to the Affidavit of David John Bowles filed 25 October 2012; and** **3. The Applicant's costs of and incidental to the Originating Application be assessed on the indemnity basis and paid out of the assets of John Matsis.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – where the applicant seeks a statutory codicil to be made on behalf of his grandfather who does not have capacity to alter his will – where the codicil is that the

gift of the residuary estate is to be held on three testamentary trusts for the benefit of the applicant and his siblings instead of passing to them outright – whether the proposed codicil is the codicil the grandfather may make were he to have capacity

Succession Act 1981, s 21, s 21(1)(a), s 22, s 23, s 23(k), s 24(d)

In Re D(J) [1982] Ch 237
McKay v McKay & Ors [2011] QSC 230
Re Fenwick [2009] NSWSC 530
Re Keane; Mace v Malone [2011] QSC 49

COUNSEL: R D Williams for the Applicant

SOLICITORS: The Law Place for the Applicant

ANN LYONS J:

Background

[1] This application, pursuant to the *Succession Act 1981* (Qld) ("the Act") for a statutory codicil, was filed on 25 October 2012. The applicant, Carl Charalambous, is one of the three grandsons of John Matsis, a 90 year old man who does not have capacity to alter his will. Mr Matsis is possessed of a large and valuable estate, which is valued in excess of $13 million.

[2] The first respondent is Mr Matsis' adopted daughter, Esther Charalambous ("Esther"). The second and third respondents are Mr Matsis' grandsons, namely Harry and John Paul. Harry and John Paul are, together with Carl, the sons of Esther.

[3] Mr Matsis has an existing will dated 14 May 2001. Under that will, his estate passes as follows: his house at Spring Street West End is left to John Paul; the residuary estate to such of Harry, Carl and John Paul as survive Mr Matsis for 30 days, and if more than one, as tenants in common in equal shares.

[4] Esther is not a beneficiary under the will and does not have any need for provision from Mr Matsis' estate. Esther has provided an affidavit which sets out those factors and I am satisfied that she does not have any need for provision and has extensive personal wealth.

This application

[5] This is an application whereby the applicant applies under s 22 of the Act for leave for an order under s 21 of the Act authorising that a codicil be made for Mr Matsis. The essence of the codicil is that the gift of the residuary estate is to be held on three testamentary trusts for the benefit of Harry, Carl and John Paul respectively instead of passing to them outright. I accept that there are sound estate planning reasons for this. Each of Esther, Harry and John Paul have filed an affidavit confirming that they support this application.

Mr Matsis' family background

[6] Mr Matsis was born in Greece. He is currently 90. He migrated to Australia in 1944 with his wife, Despina Matsis. Apart from his adopted daughter Esther, who is related by marriage through his late wife Despina, Mr Matsis does not have any other natural or adopted children. I note that Mr Matsis had a son, who predeceased him without any issue.

[7] Despina died in 2007. Esther married her husband, Harry Charalambous, in 1983. They have three children: Harry, who is presently 26; Carl, who is 25; and John Paul, who is 19. None of those three grandsons are married and none of them have any children.

[8] Two of the grandsons, namely Harry and Carl, are engaged in businesses and necessarily those businesses carry a degree of financial risk. There is however no current evidence of any creditor claims or any current exposure to liability, but I accept that there is a potential exposure to liability in relation to their business activities. I also accept that it would be advantageous, as a matter of estate planning, with the substantial legacies they stand to receive from Mr Matsis' estate, that they be placed into testamentary trust rather than received as outright gifts.

[9] John Paul is a student and he lives at home. He recognises that receiving his inheritance in trust will provide a degree of protection.

Does Mr Matsis currently have capacity to alter his will?

[10] I am satisfied that Mr Matsis is currently a full-time resident of a dementia unit of a nursing home at The Gap and has been in that unit since November 2009. His solicitor, Mr David Bowles has been acting for him since 1998 and has been managing his financial affairs and personal health matters pursuant to an enduring Power of Attorney dated 7 August 2001. Mr Bowles has significant experience in wills and estates. I also acknowledge that the affidavit material indicates that it is likely that Mr Matsis ceased to have capacity probably around 2008.

[11] The affidavit material indicates Mr Matsis is currently gravely ill. He underwent an operation on 17 October 2012 in relation to a fractured hip. The medical opinion is that, given his age and the post-operative issues, his likelihood of surviving 12 months is not good.

Requirements of the Act

[12] Turning to the statutory framework, the scheme of the Act is that the Act requires a person who seeks an order under s 21 of the Act to first apply for leave under s 22. The provisions of s 22 state that a person can apply for an order under s 21 only with the Court's leave. The Court may give leave on the conditions the Court considers appropriate. The Court may hear an application for an order under s 21 with or immediately after the application for leave to make the application.

[13] Sections 21 and 22 provide:

> "**21 Court may authorise a will to be made, altered or revoked for person without testamentary capacity**
> (1) The court may, on application, make an order authorising—

(a) a will to be made or altered, in the terms stated by the court, on behalf of a person without testamentary capacity; or

(b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.

(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.

(3) For the order, the court may make or give any necessary related orders or directions.

(4) The court may make the order on the conditions the court considers appropriate.

(5) The court may order that costs in relation to either or both of the following be paid out of the person's assets—

(a) an application for an order under this section;

(b) an application for leave under section 22.

(6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

(7) In this section— ***person without testamentary capacity*** includes a minor.

22 Leave to apply for s 21 order

(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.

(3) The court may hear an application for an order under section 21 with or immediately after the application for leave to make the application.

[14] In terms of the substantive provision, which is s 21, that section provides that a Court may authorise a will to be made, altered or revoked. That section sets out the requirements which must be satisfied. In particular, it is clear that the Court may make the order only if the person for whom the order is sought lacks testamentary capacity and the person is alive; and the Court has approved the proposed will alteration or revocation; the Court can make the order and the conditions the Court considers appropriate.

[15] Section 23 then sets out the information which must be given to the Court. That is an extensive provision and, having read the affidavit material, I am satisfied that the applicant has satisfied the requirements of s 23 and has provided all of the relevant information.

[16] Section 23 provides:

"23 Information required by court in support of application for leave

On the hearing of an application for leave under section 22, the applicant must give the court the following information, unless the court directs otherwise—

(a) a written statement of the general nature of the application to be made by the applicant under section 21 and the reasons for making it;

(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 21 is sought;

(c) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;

(d) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;

(e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;

(f) any evidence available to the applicant of the person's wishes;

(g) any evidence available to the applicant of the terms of any will previously made by the person;

(h) any evidence available to the applicant of the likelihood of an application being made under section 41 in relation to the person;

(i) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;

(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;

(k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;

(l) any other facts of which the applicant is aware that are relevant to the application."

[17] Section 24 then sets out the matters I need to be satisfied of in order to grant leave.

"**24 Matters court must be satisfied of before giving leave**

A court may give leave under section 22 only if the court is satisfied of the following matters—

(a) the applicant for leave is an appropriate person to make the application;

(b) adequate steps have been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under section 21 is sought;

(c) there are reasonable grounds for believing that the person does not have testamentary capacity;

(d) the proposed will, alteration or revocation is or may be a will, alteration or revocation 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."

[18] In relation to the evidence of which I have to be satisfied, as I have indicated, s 23 sets out those matters and is it clear that each of those matters has been addressed in the affidavit material. I am also satisfied that the requirements of s 24 have been met. I am satisfied that the applicant is an appropriate applicant and that all the necessary parties have been advised of this application.

[19] As I have indicated, I am satisfied in relation to testamentary capacity. Dr Alisa Crouch clearly indicates that Mr Matsis has severe dementia, which is permanent. That dementia is advanced dementia, he is 90 years of age and he has recently undergone a serious operation. I am also satisfied therefore that it is not likely that Mr Matsis will regain that capacity before his death.

[20] In terms of the size and character of the estate, it is extensive. The estate is worth in excess of $13 million, which comprises an estate in excess of $7 million in Australia and $6 million in Greece. There are no significant liabilities, apart from land tax of about $10,000.

[21] Pursuant to s 21(1)(a), the Court can make an order authorising a will to be altered in the terms stated by the Court. The precise terms of the codicil must be placed before the Court before an order is made. In terms of the draft codicil, that document does not seek to alter the appointment of the executors. It preserves the gift of the house at West End to John Paul. It also preserves the provision of the residuary estate between the three grandsons. It includes provision for the shares of the three grandsons not to fail in the event that any of them are not living at Mr Matsis' death but is survived by a child or children. This is in accordance with s 33N of the Act.

[22] Importantly, it now incorporates testamentary trusts based on a precedent for trusts which has been provided by a legal firm which has considerable experience in the tax, trust law, superannuation and other estate planning considerations. It contains flexible powers for the executor and the trustees and includes some administrative powers as well. It has been settled by counsel.

[23] In terms of the draft codicil, pursuant to s 24(d) of the Act, which relates to the proposed alteration, I have to be satisfied that the proposed alteration is or may be an alteration that Mr Matsis would make were he to have testamentary capacity. It is clear, therefore, that the applicant does not have to satisfy the Court that this is the codicil Mr Matsis would make, but, rather, it is a codicil he "may" make were he to have capacity.

[24] There are relatively few decisions in relation to this aspect of statutory wills. There are, however, a number of decisions which refer to the tests. In particular, the decisions in *Re Fenwick,* [1] *Re Keane; Mace v Malone*;[2] and *McKay v McKay &*

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1 [2009] NSWSC 530.

2 [2011] QSC 49.

Ors.[3] In *McKay*, I indicated that I had to be satisfied whether the proposed will is one that the testator would or may make if they were to have testamentary capacity.

Is the Draft Codicil a codicil which is or may be a codicil that Mr Matsis would make were he to have testamentary capacity?

[25] On the facts currently before me, I am satisfied that the draft codicil is or may be a codicil that Mr Matsis would have made were he to have capacity.

[26] Importantly, the draft codicil provides, in general terms, for the estate to pass to and for the benefit of the same persons who are the beneficiaries under the 2001 will and in the same proportions.

[27] Mr Bowles has set out in his affidavit[4] extensive evidence of his interaction with Mr Matsis and his approach to financial and property matters. The affidavit indicates that his family fortune was amassed from his earnings from a small barber shop conducted from premises at West End. Mr Bowles stated in his affidavit:

> "70. …Mr. Matsis often discussed those years with me, telling me about the long hours he worked and his satisfaction from doing so. It was clear to me that he took significant pride from the fact that he was the founder of the family fortune that the benefit of his hard work would pass through the generations.
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> 71. From my knowledge of Mr. Matsis, I can state unequivocally that he was at that time, and would today if he had testamentary capacity continue to be, very supportive of any measure which would increase the ability of his grandsons to be entrepreneurial to engage in their own business enterprises.
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> ...
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> 74. Accordingly, I am strongly of the view that were I today able to have the opportunity to explain to Mr. Matsis, and were he able to understand, the protection that a testamentary trust can give to a person who is self-employed in quarantining assets, he would have been strongly supportive of the concept and would have wished to execute a codicil into his 2001 Will basic testamentary trusts of the kind that are contained in the Draft Codicil. I base this belief on my understanding of his views derived from acting as his Solicitor for more than a decade."

[28] In my view it is significant that the incorporation of testamentary trusts into the will is entirely consistent with Mr Matsis' entrepreneurial approach, which is set out in the affidavit material. That approach was strongly instilled into his grandsons and he had a very strong emphasis on keeping the wealth within the family. I am also satisfied on the basis of Mr Bowles evidence that given the protection that a testamentary trust can give to a person who is self-employed, he would have been

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3 [2011] QSC 230

4 Affidavit of D J Bowles sworn 25 October 2012.

strongly supportive of the concept and would have wished to execute a codicil to introduce into his 2001 will basic testamentary trusts of the kind that are contained in the draft codicil.

[29] Mr Bowles has also outlined in his affidavit the reasons why the concept of a testamentary trust was not discussed with Mr Matsis at the time the will was executed. It would seem that the issue was going to be discussed with Mr Matsis in the future but he lost capacity before that opportunity arose. I am satisfied therefore that this is a codicil which is or may be a codicil that Mr Matsis would make were he to have testamentary capacity. It would also seem to me that this codicil would in fact satisfy the test set out in *In Re D(J),*[5] which is that assuming Mr Matsis had a brief lucid interval with full knowledge of the past and full realisation that as soon as he executes the codicil he will lapse back into his existing mental state and assuming he was being advised by a competent solicitor, it is a codicil that he would make in those circumstances.

Possible family provision application

[30] In terms of the possible family provision application, the only person who may be within the class of eligible applicants is Mr Matsis' adopted daughter, Esther. There are no other eligible claimants and I am satisfied, and she has indicated, she has sufficient personal wealth and does not need any further support from her father's estate.

[31] There is no evidence that Mr Matsis might reasonably be expected to make any gift by his will. He clearly has not done so in his existing will.

[32] I am satisfied that all of the parties have been served and do not appear in court today. I am also satisfied that there is no evidence that any other person has a proper interest in the estate.

[33] There should also be an order that the costs of the application be paid out of Mr Matsis' assets. There will be an order in the following terms, which have been proposed:

ORDERS

1. **Pursuant to s 22 of the *Succession Act 1981* (Qld) ("the Act"), the Applicant have leave to apply for an Order pursuant to s 21 of the Act that a Codicil be authorised to be made to John Matsis;**

2. **Pursuant to s 21 of the Act, a Codicil be authorised to be made for John Matsis in terms of the Draft Codicil which is Exhibit "DJB-3" to the Affidavit of David John Bowles filed 25 October 2012; and**

3. **The Applicant's costs of and incidental to the Originating Application be assessed on the indemnity basis and paid out of the assets of John Matsis.**

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5 [1982] Ch 237.