

# SUPREME COURT OF QUEENSLAND

CITATION: *Mellino v Wnuk & Ors* [2013] QSC 336

PARTIES: **MICHELLE CHRISTINE MELLINO AS EXECUTOR  
NAMED IN THE UNSIGNED WILL OF SEAN PETER  
WNUK, DECEASED**  
(applicant)  
v  
**JULIE MARGARET WILKINS AS LITIGATION  
GUARDIAN FOR ALICIA WNUK**  
(first respondent)  
and  
**ROBERT FRASER**  
(second respondent)  
and  
**SIAN KIMMETT**  
(third respondent)

FILE NO/S: BS 4090 of 2013

DIVISION: Trial

PROCEEDING: Application

ORIGINATING  
COURT: Supreme Court at Brisbane

DELIVERED ON: 27 November 2013, ex tempore

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2013

JUDGE: Dalton J

ORDER: **Order as per draft initialled by me and placed with the  
papers.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – EXECUTION –  
INFORMAL DOCUMENT INTENDED TO BE WILL –  
where an application was made pursuant to s 18 of the  
*Succession Act* 1981 (Qld) to have a DVD declared to be the  
will of the deceased – whether the DVD is a document –  
whether the DVD fulfils the requirements of s 18 – whether  
all relevant parties are joined and have notice of the  
proceeding

COUNSEL: A Harding for the applicant  
No appearance first respondent  
J Cockburn (sol) for the second respondent  
No appearance for the third respondent

SOLICITORS: Terence O'Connor Solicitor for the applicant  
No appearance for the first respondent  
Cockburn Legal for the second respondent  
No appearance for the third respondent

HER HONOUR: This is an application pursuant to section 18 of the Succession Act to have a document, namely a DVD, declared to be the will of the deceased man Sean Peter Wnuk – W-n-u-k. I have regard to the terms of section 18 itself and also to the cases which have interpreted it, including Hatsatouris – H-a-t-s-a-t-o-u-r-i-s –  
5 and Ors v Hatsatouris in the New South Wales Court of Appeal. I’m satisfied that the DVD is a document within the meaning of the section, and I’m also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written “my will” on the DVD itself and also from the substance of what he says in the video recording on the  
10 DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.

15 Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he’s no good with paperwork and that he hopes that  
20 his recording will be sufficiently legal to operate to dispose of his property.

So it seems to me that the three tests which the court traditionally have regard to are satisfied.

25 The persons who would take on intestacy are the three children of the deceased man. Two of them have been respondents to this application since its inception. A third, Sian – S-i-a-n – Kimmitt – K-i-m-m-e-t-t – has not, but I will today make an order formally joining her as a party. As I say, these three children would take on intestacy, and I am satisfied that they are the only relevant people to be heard on the  
30 application. The first respondent did not attend, and there is correspondence before the court to the effect that the first respondent contents to the orders sought. The second respondent did attend court and was content for the orders to be made.

The third respondent did not attend court. She has had solicitors acting for her  
35 during the course of much of this proceeding, although I think it is fair to say that they have had difficulty obtaining her instructions in relation to the subject matter of the proceedings. There is quite a correspondence in the affidavit of Mr O’Connor filed with leave today as to matters between the applicant and Ms Kimmitt or at least as between her solicitors and the applicant’s solicitors. I’m satisfied that the  
40 applicant’s solicitors have acted in every way fairly to give Ms Kimmitt the opportunity to raise any matter which she wishes to raise.

I’m satisfied that although she has not been formally served as required by the rules there has been informal service of her and that these proceedings – that is, the  
45 application before me today – have come to her notice. In particular, Mr O’Connor gave supplementary evidence before me today orally deposing to the fact that yesterday he had a conversation with her about the matter. So she certainly

understood that it was to be before the court today, and she referred Mr O'Connor to what she called the letter she had sent to the court about it, but did not ask that the matter be adjourned or in any way raise objections to it proceeding in her absence.

5 She did say that because she was a resident of Townsville she would not be present. There is no letter on the file from Ms Kimmett. There is an affidavit which I have before me. It's sworn informally, and I've had regard to the contents of that affidavit, but I'm not persuaded that there are any good reasons there why I should not make a declaration pursuant to section 18 of the Succession Act.

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So my formal orders will be as per draft initialled by me and placed with the papers. All right. Thank you both for your assistance.

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