SUPREME COURT OF QUEENSLAND

CITATION:	*Re Hartley* [2020] QSC 251
PARTIES:	**CRAIG ANDREW HARTLEY** (applicant) **v** **SHANE HARTLEY** (respondent)
FILE NO/S:	SC No 366 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	15 July 2020
DELIVERED AT:	Cairns
HEARING DATE:	15 July 2020
JUDGE:	Henry J
ORDER:	**1. The application is adjourned for further hearing to 9.15 am 18 September 2020.** **2. Costs reserved.**
CATCHWORDS:	SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – ALTERATION AND REVOCATION OF GRANTS – WHO CAN APPLY – where the applicant seeks the revocation of a grant of probate to the respondent on the basis that the respondent has failed to administer the estate and advance a District Court family provision application – where the applicant in this proceeding is also the applicant in the District Court family proceeding application – where the applicant is not otherwise a beneficiary under the deceased's will – whether the applicant has standing to seek the revocation of the grant of probate when the applicant merely has a possible future interest in the estate if his family provision application is successful *Succession Act* 1981 (Qld) s 6, s 44 *Arbuz v Sanderson* (unreported, New South Wales Supreme Court, Waddell J, 24 March 1986), distinguished *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, cited *Executor Trustee Australia Limited v McDougall and Ors* [2011] SASC 140, cited

Gardiner and Ors v Hughes and Anor [2017] VSCA 167, applied
Green v Briscoe [2005] EWHC 809 (Ch), cited
Griffiths v Lewis (2013) 11 ASTLR 152, distinguished
Hogarth v Johnson [1987] 2 Qd R 383, followed
O'Brien v Seagrave and Anor [2007] 1 WLR 2002, applied
Randall v Randall [2017] Ch 77, cited
Re Estate of Culina; Poulos v Pellicer [2004] NSWSC 504, distinguished
Re Gillard (deceased) [1949] VLR 378, cited
Russo v Russo [2009] VSC 491, cited
Williams v Williams [2005] 1 Qd R 105, not followed

Meagher, Gummow and Lehane's Equity: Doctrines & Remedies (LexisNexis, 5th ed, 2014) 627 [19-185], cited

COUNSEL: T S Naylor for the applicant
J Sheridan for the respondent

SOLICITORS: Maurice Blackburn for the applicant
Cairns Beaches Law & Conveyancing for the respondent

HIS HONOUR: Shirley Hartley died on 4 June 2016. She was survived by her four sons, who I will, for convenience, refer to by their first names: Craig, Shane, Peter and Damian.

Ms Hartley executed her last will on 2 March 2015. It appointed Shane as executor. It left nothing to Craig, and left Shane, Peter and Damian one real property each, one vehicle to Shane and the residue of the estate for all three of them in equal shares. The will was accompanied by a statutory declaration executed on the same date, explaining why Craig was excluded as a beneficiary of the will. This included reference to her past financial generosity towards him, his drug addiction and alcoholism, his imprisonment, his theft from her, her restraining order against him and the stress, rather than assistance, which he caused to her during her illness with cancer.

Craig applies for a revocation of the grant of probate and the grant of letters of administration to a reputable solicitor to be appointed as administrator and trustee in Shane's place. The application relies in part upon Shane's failure to administer the estate as soon as may be. It is clear Shane has so failed, although none of the nominated beneficiaries are presently troubled by that. Frankly, if any of them were the applicant, I would readily grant the application without further ado, so lax has Shane's performance of his duties as executor been. Another presently more pertinent failure is Shane's failure to comply with his obligations as a litigant acting for the estate in defence of a family provision application filed in the District Court on 3 March 2017, to which Shane became the correctly named defendant respondent by order of 8 February 2019.

On 20 March 2019, the District Court ordered Shane to file his affidavit in the claim by 15 April 2019. That has not been done. As early as May 2019, Craig's lawyers

threatened to remove Shane as executor to no avail. Craig has been far from the model litigant in the meantime, in part because of his incarceration, but he has finally brought the threatened application.

A more obvious and alternative remedy to advance matters is that Craig could have sought orders in the District Court litigation to compel Shane's compliance. His counsel contends the present application is preferable because Shane is likely to continue to be a recalcitrant litigant below. Some reliance is also placed upon his unsuitability to act for the estate in the litigation because of the conflict with his interest as a beneficiary. However, it is common enough for executors to also be beneficiaries and that bare state of affairs does not evidence that there will be a breach of duty. The courts are reluctant to allow such notional conflict to prompt intervention unless it is manifesting as an actual source of jeopardy to the due and proper administration of the estate – see, for example, *Executor Trustee Australia Limited v McDougall and Ors* [2011] SASC 140; compare *Russo v Russo* [2009] VSC 491 at [30]–[31].

The matter has not yet reached that point. Shane deposes to having held a belief that Craig was no longer interested in pursuing his action. Now accepting that is not so, he undertakes to advance the defence of the litigation properly and to that end exhibits proposed orders of the District Court to which he would consent.

In light of that response, balanced against Shane's dilatory conduct to date, I am inclined not to take him at face value, but to adjourn the application for some months to ascertain whether, indeed, Shane is conducting the District Court litigation in accordance with his obligations. That is because it is the need for the family provision application to be compromised or litigated to a conclusion which is the main driver of the present application.

There has, however, been a threshold point raised, namely, the question of whether or not, as Shane contends, Craig has no standing to bring the present application. I am conscious, of course, that s 6 *Succession Act 1981* (Qld) confers such jurisdiction in estate matters "as may be convenient". However, the breadth of jurisdiction conferred by s 6 does not logically remove the need for the Court's intervention to be sought by a party with standing to apply for such intervention.

It is said to be a fallacy that the general law has a singular or uniform test of standing – see *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2014) at 627 [19-185]. In the High Court's decision in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, McHugh J observed at 280 that the doctrine of standing is a "house of many rooms". His Honour's observations indicate that what constitutes standing will vary depending upon the nature of the case and the nature of the asserted interest or right of the party whose standing is in question.

A line of English cases dealt with the meaning of interest as that undefined term is used in r 57.7 of the English *Civil Procedure Rules* ("CPR") – see *Green v Briscoe* [2005] EWHC 809 (Ch) which was succeeded by *O'Brien v Seagrave and Anor* [2007] 1 WLR 2002. In *O'Brien*, the claimant had a statutory claim for financial

provision under the *Inheritance (Provision for Family and Dependents) Act 1975* (UK). She brought a probate claim against the defendant seeking a declaration that the will was invalid and applying for probate to be revoked on the grounds that the will was forged or was obtained by undue influence. It was held that on its proper construction the term "interest" in CPR r 57.7(1) included a right to bring a claim for financial provision under the Act and that, accordingly, the claimant had an interest in the estate for the purposes of the probate claim. *O'Brien* was approved by the English Court of Appeal in *Randall v Randall* [2017] Ch 77 at 88.

Turning to the Australian context, in Victoria, Randall was cited with other cases in support of the final sentence in the following observation of McLeish JA with whom Tate JA and Kyrou JA agreed in *Gardiner and Ors v Hughes and Anor* [2017] VSCA 167 at [90]:

> "…[I]n order to establish standing, an applicant for an order revoking a grant of probate or letters of administration must have a sufficient interest in the proceeding. Sufficiency of interest is established by showing that the applicant's rights would or might be affected if the grant were to be revoked. The bare possibility of an interest will suffice."

This was a shift of position from the earlier Victorian case of *Griffiths v Lewis* (2013) 11 ASTLR 152 in which McMillan J followed the reasoning of Windeyer J in the New South Wales case of *Re Estate of Culina; Poulos v Pellicer* [2004] NSWSC 504. Windeyer J relevantly observed in that matter that "a possible claim under the *Family Provision Act* is not sufficient interest to challenge a will, the interest being dependent upon order, not validity of the will". His Honour cited *Arbuz v Sanderson* (unreported, New South Wales Supreme Court, Waddell J, 24 March 1986) in that context. Those were, however, single-Judge decisions whereas *Gardiner* was a decision of a Court of Appeal.

I record, for completeness also, that there had been an earlier single-Judge Victorian case, *Re Gillard (deceased)* [1949] VLR 378, which was consistent with the position eventually taken by the Court of Appeal in *Gardiner*. In *Re Gillard*, Barry J observed at 381:

> "Generally speaking, an interest sufficient to entitle a person to oppose a grant is sufficient to entitle him to seek revocation of a grant. The position is stated accurately in *Tristram and Coote's Probate Practice* (19th ed, 1946), at p 477, thus –
>
> > 'The foundation of title to be a party to an action in the probate division is interest – so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest, or possible interest, of any person, such person has a right to be a party to such a suit.'"

In Queensland the position has been somewhat mixed. For instance, in *Williams v Williams* [2005] 1 Qd R 105, Wilson J did not favour the first applicant there. Her Honour observed of the first applicant at 109–10:

> "The first applicant is not a beneficiary under the will. She has the custody of the second applicant, who is the sole beneficiary of the estate, and she is an applicant for family provision under section 41 of the *Succession Act* … The first applicant has no right to family provision: whether an order is made in her favour and if so the extent of the provision ordered are matters in the discretion of the Court. It is the executor's duty to uphold the will and to act as contradictors to her application. In these circumstances, I do not think that she has standing to apply for the removal of the executors."

That single-Judge decision did not, however, refer to what would appear to have been a binding 1985 decision of the Full Court of the Supreme Court of Queensland in *Hogarth v Johnson* [1987] 2 Qd R 383. In that matter, the plaintiff, the illegitimate son of Hogarth, commenced an action against the first defendant, who was the executrix and sole beneficiary under two wills of Hogarth, and the second defendant, seeking declarations that the wills were invalid and that the testator died intestate. He also claimed against the second defendant, Hogarth's next of kin, further and better provision for his maintenance and support from Hogarth's estate. The first defendant demurred to the plaintiff's amended statement of claim on the ground that the plaintiff had no standing to bring the action. Overruling the demurrer, the Full Court held that the plaintiff did have standing to bring the action because the possibility that the Court would allow his claim for further and better provision out of the estate demonstrated that he had a prima facie interest in the estate.

I note Hogarth was expressly not followed in *Re Estate of Culina* where Windeyer J purported to distinguish it as being a Queensland case in a different setting. Hogarth clearly aligns with the prevalent English and Victorian reasoning. Such reasoning strongly supports the applicant's argument as to standing here.

The interest of Craig vis-à-vis the estate is self-evidently prospective. That Craig's standing to bring the District Court action is a creature of statute is clear. If his District Court action succeeds, he will be entitled to a share of the estate. Whilst prospective, such an interest is an interest of a sufficiently substantive character that the legislature has seen fit to allow for its existence in the context of the executor's responsibilities in administering the estate. For example, s 44 *Succession Act* provides protection for an executor who may distribute estate assets which could otherwise be used to meet a successful family provision application if the executor first secures the consent of the family provision applicant. This too favours the concrete nature of Craig's prospective interest. That Craig's prospective interests via a family provision application feature in this way, by way of legislative protection as to what protection will or will not be conferred upon the executor, is a powerful indicator that his interest as a family provision applicant is sufficient to give him standing.

I conclude Craig has standing to bring the present application. Nonetheless, it would be a significant step to allow the application in circumstances where the applicant, who was quite deliberately excluded under his mother's will, seeks the removal as executor of the person she quite deliberately appointed to that task in her will and where he does so for the obvious purpose of facilitating the litigation of his own action in the District Court. Such a purpose is not of itself improper, but such circumstances dictate caution before taking the significant step, in effect, of changing the applicant's opponent in that litigation in order to facilitate its conduct.

Before further considering the application on its merits, I shall adjourn it to 18 September 2020 which, it appears common ground, should allow sufficient time for it to become apparent whether the executor is conducting himself consistently with his duties as executor, including in his role as a party to the District Court litigation.

My orders are:

1. The application is adjourned for further hearing to 9.15 am 18 September 2020.
2. Costs reserved.