SUPREME COURT OF QUEENSLAND

CITATION:	*Re Chambers (dec'd)* [2023] QSC 230
PARTIES:	**IN THE WILL OF KEVIN JOHN CHAMBERS** (deceased) **CHERIE GAYLE JOHNSON** (applicant)
FILE NO:	BS No 5943 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 October 2023
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Davis J
ORDERS:	**1. The application is to proceed without oral hearing pursuant to r 489(1) of the *Uniform Civil Procedure Rules* 1999 (Qld).** **2. Letters of administration with the will of Kevin John Chambers dated 14 October 2017 be granted to the applicant as administrator.** **3. The costs of and incidental to the application be paid from the estate of the late Kevin John Chambers on an indemnity basis.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – EXECUTION – SIGNATURE OF TESTATOR – POSITION OF SIGNATURE – where the testator purported to make a will – where the testator signed the first page of the will – where the testator did not sign the second page of the will – where the witnesses signed the second page of the will – where the witnesses did not sign the first page of the will – where there were no operative clauses on the second page of the will – whether the will was duly executed Preece, *Lee's Manual of Succession Law*, 8th Ed, Law Book Co, 2019 *Succession Act* 1981, s 9, s 10, s 11, s 13, s 15 *Succession Amendment Act* 2006 *Succession Act Amendment Bill* 2005

	Uniform Civil Procedure Rules 1999, r 489, r 491, r 603
	Cinnamon v Public Trustee (Tas) (1934) 51 CLR 403; [1934] HCA 26, cited *Coyle v Kerwin* [2006] QSC 50, cited *Re Bell* [2001] QSC 092, cited *Re Gardner (dec'd)* [2023] QSC 142, cited *Re Kimpton* (1864) 164 ER 1340; [1864] EngR 315, cited *Re Sharland* [2006] 1 Qd R 562, cited *Will of Moroney* (1928) 28 SR (NSW) 553; [1928] NSWStRp 74, cited
SOLICITORS:	Andrew Douglas Solicitors for the applicant

[1] The applicant, Cherie Gayle Johnson (Cherie), applies for letters of administration of a document which purports to be a will of Kevin John Chambers (Kevin). Application to the Court is necessary as the Registrar issued a requisition that the will was not duly executed.

Background

[2] Kevin died on 17 March 2023 at the age of 91.

[3] Kevin's marriage to Merle Agnes Chambers (Merle) produced two children:

1. Cherie; and
2. Michael Frederick Chambers called in some of the documents "Michael Thomas Chambers" (Michael).

[4] Merle died in 2003 and Michael died in 2014.

[5] Kevin made a will on 14 October 2017 (the will) by which he:

1. appointed his grandson, Daniel Thomas Johnson (Daniel), his trustee and executor;
2. left his entire estate to Cherie.

[6] Daniel has renounced his right to administration of Kevin's will.

[7] Cherie, having priority,[1] applied for letters of administration. Her application was met with the following requisitions from the Registrar:

> "**Requisitions**
>
> I refer to the above matter filed in the registry on the 15 May 2023, notwithstanding the evidence you have filed in the matter I do not have the authority to issue the Grant.
>
> Section 10 of the *Succession Act 1981* (*the Act*) sets out the way a Will must be executed that attestation clause in this Will has been

1 *Uniform Civil Procedure Rules* 1999, r 603.

signed by the 2 witnesses however the testator has not signed the Will in the attestation clause.

Action required:-

File a form 9 to the Court as constitute by a judge, together with supporting material, and obtain an order in accordance with Section 18 of the *Succession Act 1981* as a Judge can dispense with execution requirements for a Will, alteration, or revocation."[2]

[8] In response to the requisitions, Cherie filed an application to the Court constituted by a judge[3] for letters of administration. She seeks to have that application determined without oral hearing.[4]

The execution of the will

[9] The will is in a pre-printed form and consists of two pages. The first page contains all the operative provisions. It identifies Kevin as the testator, revokes all former testamentary instruments, appoints Daniel as executor and trustee, and gives the entire estate to Cherie.

[10] Kevin has signed the will under the clause which makes the gift to Cherie.[5] At clause 3, this appears:

> 3. I give Cherie Gale Johnson, my entire estate
> K G Chambers.

[11] At the foot of page 1, this appears:

> **Continued overleaf**
>
> K G Chambers
>
> .... Witness .... Witness
>
> If the whole Will fits on this page then the Testator and witnesses must sign the above, but must also sign over the page – and write in the date – and rule through the blank space over the page to make sure nothing can be added.

[12] No operative clauses appear on the second page of the will. The second page is headed "The Will continued". Below that heading is blank and then at the bottom of the page:

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2 The above requisition notice has been faithfully produced with grammatical errors.

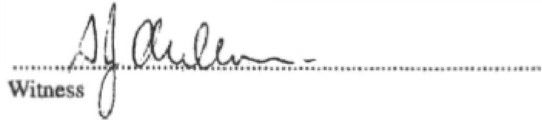
3 As opposed to the Registrar.

4 *Uniform Civil Procedure Rules* 1999, r 489.

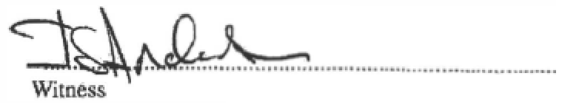
5 Clause 3.

Dated this 14th day of October in the year two thousand Seventeen

SIGNED by the Testator/Testatrix as and)
for his/her last Will and Testament)
in the presence of us both)
present at the same time who)
at his/her request in his/her presence)
and in the presence of each)
other have hereunto subscribed)
our names as attesting witnesses)



Witness



Witness

The Testator/Testatrix and witnesses must sign above – don't forget the date

[13] The two witnesses to the will are Simon and Sarah Anderson. Mr Anderson swore an affidavit, relevantly in these terms:

> "2. The deceased executed the will on the day it is dated by signing his name at the foot of the first page of the will meaning and intending the same to be his final signature to the will.
>
> 3. The deceased signed the will in my presence and in the presence of my wife SARAH ANDERSON the other witness who signed the will, both of us being present at the same time, and we then attested and signed the will in the presence of the deceased and of each other."

[14] Mrs Anderson swore an affidavit in similar terms where she confirmed witnessing Kevin executing the will in the presence of both her and Mr Anderson. She was present when Mr Anderson signed the will as witness.

[15] Both Mr and Mrs Anderson swear to the subjective intention of Kevin when he signed the will, namely intending his signature at the foot of page 1 "to be his final signature to the will". That opinion evidence is inadmissible but nothing turns on the inadmissibility of that evidence.

The issues

[16] There are three matters for consideration:

1. whether the application should be determined without oral hearing;
2. whether the will is duly executed; if not;
3. whether an order should be made dispensing with due execution.

Should the application be determined without oral hearing?

[17] Rule 489 of the *Uniform Civil Procedure Rules* 1999 (UCPR) provides:

> **“489 Proposal for decision without oral hearing**
>
> (1) A party making an application, including an application in a proceeding, may propose in the application that it be decided without an oral hearing.
>
> (2) If the applicant proposes the application be decided without an oral hearing, the court must decide the application without an oral hearing unless—
>
> (a) under rule 491, the court considers it inappropriate to do so; or
>
> (b) under rule 494, the respondent requires an oral hearing; or
>
> (c) under rule 495, the applicant abandons the request for a decision without an oral hearing; or
>
> (d) the Chief Justice or Chief Judge suspends the operation of this rule by direction.”

[18] The structure of r 489 is that:

1. jurisdiction to proceed without oral hearing is granted;
2. the jurisdiction is enlivened by a proposal by an applicant;
3. the proposal must be accepted, and the application determined without oral hearing, in the absence of the features in r 489(2)(a)-(d).[6]

[19] Cherie has proposed that the application be determined without oral hearing. That enlivens the jurisdiction. The application for letters of administration has been duly advertised. There is no opposition to the application being determined in this way. The Chief Justice has not suspended the operation of r 489. Cherie continues to press for the application to be determined without oral hearing. Therefore, none of the circumstances prescribed by r 489(2)(b), (c) or (d) apply.

[20] The question then is whether it is inappropriate for the application to be heard without oral hearing.[7]

[21] The substantive questions in issue on the application are as to the execution of the will. There is no reason to doubt the evidence of Mr and Mrs Anderson. The original will which bears the execution by both Kevin and Mr and Mrs Anderson has been filed, and is before me.

[22] There is nothing to suggest that an oral hearing is either necessary or desirable in the interests of justice.[8]

[23] In the circumstances, it is not “inappropriate”[9] to consider the application without oral hearing.

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6 *Re Gardner (dec’d)* [2023] QSC 142 at [22].
7 *Uniform Civil Procedure Rules* 1999, rr 489(2)(a) and 491.
8 *Re Briggs (dec’d)* [2023] QSC 226 at [17].
9 *Uniform Civil Procedure Rules* 1999, r 491(1).

Was the will duly executed?

[24] Kevin signed the front page of the will in two places; below the gift to Cherie,[10] and at the foot of that page.[11]

[25] Contrary to the pre-printed note at the bottom of the first page, Mr and Mrs Anderson did not sign that page. Mr and Mrs Anderson each signed the second page but, contrary to the pre-printed note on the bottom of that page, Kevin didn't.

[26] Therefore, the first question is whether there is any significance in the fact that Kevin has not signed the second page of the will which contains an attestation clause or, in other words, has not signed at the foot or end of the will.

[27] Section 10 of the *Succession Act* 1981 prescribes how a will must be executed. Section 10 provides:

> "**10 How a will must be executed**
>
> (1) This section sets out the way a will must be executed.
>
> (2) A will must be—
>
> (a) in writing; and
>
> (b) signed by—
>
> (i) the testator; or
>
> (ii) someone else, in the presence of and at the direction of the testator.
>
> (3) The signature must be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time.
>
> (4) At least 2 of the witnesses must attest and sign the will in the presence of the testator, but not necessarily in the presence of each other.
>
> (5) However, none of the witnesses need to know that the document attested and signed is a will.
>
> (6) The signatures need not be at the foot of the will.
>
> (7) The signature of the testator must be made with the intention of executing the will.
>
> (8) The signature of a person, other than the testator, made in the presence of and at the direction of the testator must be made with the intention of executing the will.
>
> (9) A will need not have an attestation clause.
>
> (10) A person who can not see and attest that a testator has signed a document may not act as a witness to a will.

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10 See paragraph [10] of these reasons.
11 See paragraph [11] of these reasons.

(11) If a testator purports to make an appointment by will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed under this section.

(12) If a power is conferred on a person to make an appointment by will and the appointment must be executed in a particular way or with a particular solemnity, the person may make the appointment by a will that is executed under this section but is not executed in the particular way or with the particular solemnity.

(13) This section does not apply to a will made under an order under section 21." (emphasis added)

[28] Section 10(2) and s 10(4) provide that the testator and witnesses must sign the will. Section 10(6) of the *Succession Act* specifically provides that the signature of those persons need not be at the foot of the will.

[29] Section 10 of the *Succession Act* in its present form has some history. It was enacted by amendment in 2006 through the *Succession Amendment Act* 2006 (the amendment Act). The amendment Act repealed ss 9, 10, 11, 13 and 15 of the *Succession Act*.[12]

[30] Sections 9 and 10 of the *Succession Act*, before the amendments effected by the amendment Act, provided, relevantly:

"**9 Will to be in writing and signed before 2 witnesses**

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 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 …

10 When signature to a will shall be deemed valid

(1) A will, so far only as regards the position of the signature of the testator on the will, is not invalid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as the testator's will. …" (emphasis added)

[31] In 1991, the Standing Committee of Attorneys-General initiated a reform known as the "Uniform Succession Law Project". That project was coordinated by the

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[12] Explanatory Memorandum to the *Succession Act Amendment Bill* 2005.

Queensland Law Reform Commission (QLRC). The QLRC[13] recommended the abolition of the requirement that a will be signed "at the foot or end thereof".[14]

[32] In the Second Reading Speech to the *Succession Amendment Bill*, the Attorney-General, the Honourable LD Lavarch, observed:

> "Mr Speaker, the Bill also relaxes certain formal execution requirements by removing the current requirement that a will must be signed ' at the foot or end thereof'. Until now, this requirement has meant that where a signature is unconventionally placed on a will, all gifts that appear below it are invalid. The Act will now require that the signature of the testator is made with the intention of executing the will but it is not essential that the will be signed at its foot."[15]

[33] In the past, cases have arisen where clauses appear in a will after that place in the will which bears the testator's signature. In some cases, those clauses have been found to be operative and, in some cases, not.[16] Ultimately that is a matter of construction of the particular will.[17] The fact that, by s 10 of the *Succession Act* in its present form, due execution may be effected by signature before the end of the will, does not necessarily avoid arguments about the proper construction of a will and whether it was the testamentary intention that clauses appearing after the signature are operative.[18]

[34] No such problems arise here. Kevin signed the will immediately under the only clause which operated to gift any part of his estate, and he signed the will again at the foot of the first page in circumstances where there were no clauses on the second page. Even though Kevin did not sign at the foot or end of the will, he obviously intended the will to be a testamentary instrument and for the clauses on the first page to operate upon his death.

[35] Neither the positioning of Kevin's signature on the first page, nor his failure to sign the second page, constitute a breach of the requirements of s 10 of the *Succession Act*.

[36] Mr and Mrs Anderson did in fact sign at the foot or end of the will. There is nothing in s 10 of the *Succession Act* which suggests that the witnesses must sign on the same page or place as the testator. Section 10(4) requires the witnesses to "attest and sign the will" and s 10(6) provides that "the signatures" (clearly a reference to each of the testator's and the witnesses' signatures[19]) need not be at the foot of the will. Section 10(6) applies to all signatures required by s 10(2) and (3) and on a proper construction, some of those signatures might and might not be at the foot of the will, and some might be on different pages to others.

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13 The Law of Wills; Report No 52, December 1997.

14 Report No 52 at page 11.

15 23 August 2005, Hansard, page 2588.

16 *Re Bell* [2001] QSC 092, *Coyle v Kerwin* [2006] QSC 50 and *Re Sharland* [2006] 1 Qd R 562.

17 See generally *Re Kimpton* (1864) 164 ER 1340, *Will of Moroney* (1928) 28 SR (NSW) 553 and *Cinnamon v Public Trustee (Tas)* (1934) 51 CLR 403.

18 Preece, *Lee's Manual of Succession Law*, 8th Ed, Law Book Co, 2019, paragraph 4.50.

19 *Succession Act* 1981, s 10(2) and 10(3).

Conclusion

[37] The evidence shows:

1. Kevin signed the will;[20]
2. Mr and Mrs Anderson each were present with Kevin and saw him sign the will;[21]
3. Mr and Mrs Anderson each attested and signed the will in the presence of Kevin.[22]

[38] It follows that:

1. the will is validly executed;
2. there is no need to consider dispensation with due execution under s 18 of the *Succession Act*;
3. letters of administration should be granted to the applicant.

Orders

[39] The orders of the Court are:

1. The application is to proceed without oral hearing pursuant to r 489(1) of the *Uniform Civil Procedure Rules* 1999 (Qld).
2. Letters of administration with the will of Kevin John Chambers dated 14 October 2017 be granted to the applicant as administrator.
3. The costs of and incidental to the application be paid from the estate of the late Kevin John Chambers on an indemnity basis.

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20 *Succession Act* 1981, s 10(2)(b)(i).
21 *Succession Act* 1981, s 10(3).
22 *Succession Act* 1981, s 10(4).