SUPREME COURT OF QUEENSLAND

CITATION:	*Gundy v Eatts* [2013] QSC 297
PARTIES:	**BRADLEY JOHN GUNDY** (applicant/respondent) v **JOSLIN EATTS** (as administrator of the estate of the late Doreen ("Dolly") Mary-Ann Eatts, deceased, late of Winton, Queensland) (respondent/applicant)
FILE NO:	SC No 6631 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 November 2013
DELIVERED AT:	Brisbane
HEARING DATES:	22 April 2013; 18 July 2013
JUDGE:	Atkinson J
ORDERS:	**1. Application to strike out originating application dismissed.** **2. The applicant in the originating process is given leave to amend the originating application.** **3. The administrator is restrained from distributing any of the estate of the late Doreen ("Dolly") Mary-Ann Eatts until further order of the court.** **4. The administrator provide a copy of the sealed letters of administration to Bradley John Gundy.** **5. The administrator pay the applicant's costs of and incidental to the application on a standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – ORIGINATING PROCESS – where the applicant in the originating process sought, inter alia, distribution of an estate on intestacy and family provision under Parts 3 and 4 of the *Succession Act* 1981 (Qld) – where the intestate is the applicant's biological aunt – where the applicant asserts that the intestate and the applicant were in a parent-child relationship according to traditional Aboriginal custom – where the respondent submits that the applicant is not the

child of the intestate – where the respondent contends that the whole of the originating application is an abuse of process – whether the originating application should be struck out

SUCCESSION – INTESTACY AND DISTRIBUTION ON INTESTACY – where the intestate is not survived by any spouse – where the intestate was survived by her son according to Aboriginal tradition – where the question of whether the applicant could be considered as the "child" or "issue" of the intestate is to be determined at trial

SUCCESSION – FAMILY PROVISION – ELIGIBLE APPLICANTS – CHILD – whether the applicant could fall within the definition of child – where the question of whether the applicant is entitled to apply for family provision is to be determined at trial

Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld), s 60
Acts Interpretation Act 1954 (Qld), s 2
Child Protection Act 1999 (Qld), s 8, s 11(3)
Legislative Standards Act 1992 (Qld), s 4
Status of Children Act 1978 (Qld), s 10(1)
Succession Act 1981 (Qld), s 35, s 36A, s 40, s 41
Uniform Civil Procedure Rules 1999 (Qld), r 16(e)

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, cited
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors [2011] QCA 252, cited
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited
Davis v The Commonwealth of Australia (1986) 61 ALJR 32; [1986] HCA 66, cited
Dey v Victorian Railways Commissioners (1949) 78 CLR 62; [1949] HCA 1, applied
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, applied
Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86, cited
Jones v Public Trustee of Queensland & Anor [2004] QCA 269, distinguished
Madden v Kirkegard Ellwood and Partners [1983] 1 Qd R 649, cited
Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq) [2011] QCA 162, cited
Re BC [1998] 4 CNLR 7, cited
Re Targornak Adoption Petition [1984] 1 CNLR 185, cited
Ronbar Enterprises Pty Ltd v Elliot Harvey Securities & Ors [2011] QSC 239, cited
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, cited
Stone v ACE-IRM Insurance Broking P/L [2003] QCA 218, cited

von Risefer v Permanent Trustee Co P/L & Ors [2005] QCA 109, [2005] 1 Qd R 681, cited

COUNSEL: P W Bates for the applicant
A J Moon for the respondent

SOLICITORS: Gerard Malouf & Partners for the applicant
Robert Nehmer McKee Lawyers for the respondent

[1] Bradley John Gundy filed an originating application in court on 26 July 2012 for various declarations and orders pursuant to the *Succession Act* 1981 (Qld), the *Status of Children Act* 1978 (Qld) and the *Child Protection Act* 1999 (Qld). The respondent who is the administrator of the estate of the late Doreen ("Dolly") Mary-Ann Eatts applied to have the whole of the originating application struck out as an abuse of process of the court. This is my decision as to whether or not the originating application should be struck out.

[2] It should be noted that this decision refers to deceased Aboriginal people by name after the matter was raised with the parties and no objection taken to that course.

Relief sought by the originating application

[3] The applicant, Bradley Gundy, sought the following declarations:

1. A declaration that pursuant to s 10(1) of the *Status of Children Act* 1978 (Qld) that he is a "child" of Doreen Eatts who died in Winton on 3 December 2011 and that she was his "parent" under "Aboriginal tradition" within the meaning of the *Child Protection Act* 1999 (Qld) s 11(3) and also for the purpose of Parts 3 and 4 of the *Succession Act* 1981 (Qld);
2. A declaration that he takes the whole of the estate of Doreen Eatts as the "next of kin" pursuant to s 36A(3) of the *Succession Act* 1981;
3. Further or in the alternative, a declaration that he is a person for whom adequate provision was not made from the estate of Doreen Eatts for his proper maintenance and support.

[4] In addition he sought the following orders:

1. That the respondent, Joslin Eatts, to whom letters of administration in respect of the estate of Doreen Eatts had been granted, be restrained personally and/or by her agents from distributing any of the estate of Doreen Eatts until further order of the court;
2. That Joslin Eatts as administrator should provide Bradley Gundy with a true copy of the grant of letters of administration of the estate of Doreen Eatts and an inventory of the assets and liabilities and all financial transactions and property transactions conducted by or purportedly authorised by or on behalf of the estate of Doreen Eatts;
3. That the estate of Doreen Eatts make adequate provision for Bradley Gundy's proper maintenance and support in the proper exercise of the court's discretion.

Factual background

[5] The factual background is drawn from affidavits filed in this matter. None of the deponents were required for cross-examination and the respondent, Joslin Eatts, accepted the facts therein deposed to for the purposes of this application.

[6] Bradley Gundy is a 34 year old man who was born in Longreach and whose biological mother was Roslyn Eatts. However he was raised from the time he was a baby by Doreen Eatts, his aunt, who was Roslyn Eatts' sister. He called her "Mum" and she treated him as her son. Her aunt, Joy McCabe, described how Roslyn Eatts freely gave up Bradley to be raised by Doreen Eatts as her own son as Doreen was unable to have children. There was never a legal adoption but thereafter Bradley was always considered to be Doreen's son. Similar evidence was given by Joslin Eatts' brother, Noel Doyle. Bradley always referred to Doreen as "Mum" and Roslyn Eatts as either Roslyn or Auntie.

[7] Bradley lived with Doreen Eatts in Longreach until they moved to Mt Isa when Bradley was three or four. They then moved to Sydney when Bradley was six years old. Doreen Eatts lived in a de facto relationship in Sydney with David Gundy until 1989. In that year David Gundy died after being shot by police and for the first time, Bradley Gundy discovered that Doreen Eatts and David Gundy were not his biological parents. He nevertheless continued to regard them as his parents.

[8] After David Gundy's death, at Doreen Eatts' suggestion, Bradley Gundy changed his surname from Eatts to Gundy to honour the memory of David Gundy as his father. Doreen Eatts applied, as Bradley Gundy's mother, for compensation for Bradley Gundy as David Gundy's son after David Gundy's death was investigated by the Royal Commission into Aboriginal Deaths in Custody.[1]

[9] Commissioner Wootten refers in his report into the death of David Gundy to Bradley Eatts, who was nine years old, as the "foster son" of David Gundy and Doreen Eatts, who had been with them since he was a baby and regarded them as his mother and father. He also observed that Bradley lived with them as their "son" until David Gundy's death. Bradley was at home with his father in the adjoining bedroom when his father was shot. The Commissioner recommended that compensation be paid to them by the New South Wales government for the unlawful actions of the New South Wales police. He was very critical of the extreme insensitivity shown by the police for the welfare of a child whose father, as the Commissioner referred to David Gundy, had been shot by the police in the next room:

> "The nine year old, Bradley Eatts, was in the next bedroom when his father was fatally shot. He was in the house when the ambulancemen came and took his father away. Police officers made no attempt to comfort him or even to explain to him what had happened. Without any explanation at all they put him a police car to take him in to his uncle's place and on the way he heard on the radio that his father had died. Police left him at his uncle's place and took no further interest in him."

[10] Bradley Gundy continued to live in Sydney with Doreen Eatts as his mother. She enrolled him in primary and secondary schools. When he was 14 years old Doreen Eatts applied for a passport for him as his "mother or guardian". In an addendum explaining his change of surname requested by passport officials she is described as his "foster mother". They travelled overseas together to speak at United Nations activities about black deaths in custody. Doreen Eatts and Bradley Gundy moved together to Mt Isa when he was 15 or 16. He was enrolled in boarding school in

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1 Report of the inquiry into the death of David John Gundy by Commissioner JH Wootten, 1991.

Charters Towers by "Doreen Eatts-Gundy" who signed the application for entry and described herself in the application as his mother. He attended TAFE courses in Mt Isa and then commenced work in 1997 when he was 18.

[11] In 1997, Bradley Gundy commenced a de facto relationship with Rebecca Carters. Their son, Malik Gundy, was born in July 1998 and Bradley and Rebecca moved to live in Darwin while Doreen Eatts moved to live in Winton. Doreen Eatts lived with Bradley Gundy and Rebecca Carters for six months in Darwin to help with the new baby whom she referred to as her first grandson. Two children were subsequently born and Doreen Eatts referred to them as her grandchildren. Doreen Eatts kept in regular contact with Bradley Gundy and his children by phone calls, birthday cards, presents and visits. Birthday and Christmas cards from Doreen Eatts to Bradley Gundy are attached to his affidavit which demonstrate that Doreen Eatts regarded herself as Bradley's "Mum" and Malik's "Nana". Joslin Eatts' sister, Joy McCabe, has sworn to a strong, loving and enduring mother-son relationship between Doreen Eatts and Bradley Gundy and grandmother-grandchildren relationship between Doreen Eatts and Bradley's children. Doreen Eatts opened and maintained a Westpac Bank account jointly with Bradley Gundy as trustee for Malik (and the other children).

[12] Doreen Eatts was injured in a motor vehicle accident in 2005 and Bradley Gundy was by her side in hospital when she came out of a coma. During 2010 and 2011 until about three months before her death Bradley Gundy was her full-time carer. There is a letter from Doreen Eatts to the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd dated 23 November 2010 which supports this evidence. In that letter she refers to Bradley as her son. A tenant file from the address shared by Doreen Eatts, Bradley Gundy and Rebecca Carters in 2010 and 2011 shows conflict between Doreen Eatts and Bradley Gundy but refers to them as mother and son.

[13] Bradley Gundy and Doreen Eatts are asserted by Bradley Gundy to be in a parent-child relationship under Aboriginal tradition. Mrs McCabe swore that within many families in the Aboriginal community, children are raised by their grandparents or aunts or uncles. Those who raise the children are regarded by themselves and the community as the children's parents. It appears that the change in status was permanent.

[14] Joslin Eatts is Bradley Gundy's maternal grandmother and the mother of Roslyn Eatts and Doreen Eatts. They were recognised as members of the native title claim group, the Maiawali Karawali people, in a decision of the National Native Tribunal in QC 99/10 dated 16 April 1999. The Maiawali people were described as including, *inter alia*, Joslin Eatts and descendants and Doreen Eatts and descendants. While Bradley Gundy falls within the category of Joslin Eatts' descendants; if the category of Doreen Eatts' descendants is also to have any meaning, he is the only potential member of that category as she had no natural children of her own.

[15] The court has been assisted by a report by an experienced anthropologist, Dr Francis McKeown, on the question whether there was a relationship of mother and son which amounted to a parent-child relationship under "Aboriginal tradition". Dr McKeown referred to a variety of sources in reaching his conclusion that there was such a relationship including the affidavits filed in this matter; the Report of the Royal Commission into Aboriginal Deaths in Custody into the Death of David

Gundy; details of pre-colonial traditions of the people of the Middle and Upper Diamantina River recorded by Dr WE Roth, a medical practitioner based at Boulia in the 1890s;[2] academic studies of classificatory kinship in Aboriginal Australia and ethnographic studies reporting numerous examples in Aboriginal communities of a woman raising her sister's children; studies from native title claims of traditional adoption practices; and the Australian Law Reform Commission Report "The Recognition of Aboriginal Customary Law" (1986) ALRC 31. Dr McKeown concluded that:

> "The relationship between Bradley Gundy and Doreen Eatts was a permanent relationship that amounted to a mother and son relationship according to contemporary traditions practised by the Maiawali people."

[16] On the basis of the evidence relied on for this application, Bradley Gundy has at least an arguable case that he was the child of Doreen Eatts under Aboriginal tradition.

The estate of Doreen Eatts

[17] Doreen Eatts died intestate on 3 December 2011 and letters of administration were issued to her mother, Joslin Eatts, on 21 February 2012. At the time of Doreen Eatts' death, she had seven surviving siblings including Roslyn Eatts.

[18] Bradley Gundy deposed to the financial circumstances of himself, his children and his current partner which are relevant to his application for further and better provision from Doreen Eatts' estate.

Submissions by the administrator to strike out the originating application

[19] The administrator, Joslin Eatts, submitted that Bradley Gundy has no interest on intestacy as his mother (Roslyn Eatts) did not predecease Doreen Eatts and so his application for a declaration under s 35 of the *Succession Act* is an abuse of process and should be struck out. She further submitted that Bradley Gundy did not fall within the ambit of persons entitled to make an application for further and better provision from the estate as he is not a child of the deceased as defined in the *Succession Act*. The application, she submitted, is incompetent and should therefore be struck out. It was submitted that as Bradley Gundy is over the age of 18, the *Child Protection Act* has no application to him. The purpose of the *Status of Children Act* is to provide a procedure whereby orders can be made as to who is the biological father or mother of a person. As the originating application is, it was submitted, entirely doomed to fail it should all be struck out.

The applicant's submissions

[20] The applicant Bradley Gundy contended that it is reasonably arguable that he is the surviving "child" and "issue" of Doreen Eatts within the meaning of Part 3 and especially s 36A of the *Succession Act*; that he is a "child" of Doreen Eatts within the meaning of Part 4 and particularly ss 40 and 41(1) of the *Succession Act* for the purposes of the family provision jurisdiction; and that it is not "impracticable" to ascertain that he is "entitled in law" to succeed under Part 3 or Part 4 of the

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[2] Roth, WE "Ethnological Studies among the North-West-Central Queensland Aborigines", Volume 1, Hesperian Press, Western Australia, 1984.

Succession Act to "part" or all of the estate of Doreen Eatts within the meaning of the discretionary provisions of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Qld) s 60.

The law regarding an application to strike out

[21] The rule of court to be applied to an application to strike out or set aside an originating process is found in r 16(e) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR").

[22] There is a distinction between striking out an originating application and striking out a statement of claim. Striking out an originating process is the end of the proceeding whereas the striking out of a statement of claim does not necessarily, by itself, put an end to the proceeding, except in a case where the claim has also been struck out or the plaintiff is refused leave to replead.[3]

[23] The case must be very clear to justify the summary intervention of the court to prevent a party from presenting its case for determination at trial. Those principles were set out by the High Court in *Dey v Victoria Railways Commissioners*.[4] Barwick CJ summarised the authorities with regard to summary dismissal in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129:

> "… these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action – if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal – is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'."

[24] The defendant must demonstrate "a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[5]

[25] Most recently the High Court held with regard to the power of the Federal Court to dismiss a proceeding summarily under in s 31A of the *Federal Court of Australia Act* 1976 (Cth):[6]

> "Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a 'fanciful' prospect of

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3 *Ronbar Enterprises Pty Ltd v Elliot Harvey Securities & ors* [2011] QSC 239 at 1-7 citing *von Risefer v Permanent Trustee Co P/L & Ors* [2005] 1 Qd R 681.

4 (1949) 78 CLR 62 at 91. See also *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at 91; *Davis v The Commonwealth of Australia* (1986) 61 ALJR 32 at 35; *Madden v Kirkegard Ellwood and Partners* [1983] 1 Qd R 649 at 652; *Stone v ACE-IRM Insurance Broking P/L* [2003] QCA 218 at [5]; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & ors* [2011] QCA 252 at [24]; *Spencer v The Commonwealth* (2010) 241 CLR 118 at [24].

5 *Agar v Hyde* (2000) 201 CLR 552 at 576 [57]; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 275 [46]; *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq)* [2011] QCA 162 at [13].

6 See *Spencer v Commonwealth of Australia* [2010] HCA 28 at [25] per French CJ and Gummow J.

> success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success."

[26] The onus rests on the respondent to the originating application to satisfy the court that it should be struck out.

The *Succession Act*

[27] Part 3 of the *Succession Act* deals with the distribution of an estate on intestacy and Part 4 with family provision.

Intestacy

[28] Where, as is alleged here by the administrator of the estate, a person dies without leaving a will, the distribution of the estate is governed by Division 2 of Part 3 of the *Succession Act*. Section 35(1) provides:

> "… the person or persons entitled to take an interest in the residuary estate of an intestate, and the interest in that estate which that person is or those persons are entitled to take shall be ascertained by reference to schedule 2 according to the facts and circumstances existing in relation to the intestate."

[29] Part 2 of Schedule 2 provides for the way in which the estate is to be distributed where, as is uncontroversial in this case, the intestate is not survived by any spouse. The following is the relevant extract from Part 2 of Schedule 2:

> "
>
Circumstance	**Way in which the intestate's residuary estate is to be distributed**
1 Where the intestate is survived by issue	The issue are entitled to the whole of the residuary estate in accordance with section 36A.
2 Where the intestate is not survived by issue but is survived by a parent or both parents	The parent is entitled to the whole of the residuary estate or, if both parents survive the intestate, the parents are entitled to the whole of the residuary estate in equal shares."

[30] Doreen Eatts was survived by her son according to traditional Aboriginal custom, Bradley Gundy, and her mother, Joslin Eatts, so it is unnecessary to go further down the list of those entitled, that is the next of kin, because either Bradley Gundy takes the whole of the estate under Circumstance 1, or, if that fails, Joslin Eatts takes the whole of the estate under Circumstance 2.

[31] If Bradley Gundy can be considered to take as issue of Doreen Eatts, then because he is the only person to fall within that category he would take the whole of the estate under s 36A(1) - (3) which provides:

> "(1) In this section —
> ***Survive*** means survive the intestate.
> (2) If an intestate's issue are entitled to the whole or a part of the intestate's residuary estate, the entitlement is to be distributed among the issue as set out in this section.
> (3) If the intestate had only 1 child and the child survived, the child takes."

[32] I shall return to the question of whether Bradley Gundy could be considered as the "issue" or "child" of Doreen Eatts after I have considered the question of his entitlement to claim family provision.

Application for family provision

[33] If the applicant were to succeed in his application for a declaration that he was entitled to take the whole of the estate on intestacy, then the application for family provision would be otiose, however should it not be successful the applicant may nevertheless be entitled to apply for family provision under Part 4 of the *Succession Act*. The right to make an application would be governed by s 41 of the *Succession Act* insofar as it applies to a "child" of the deceased. "Child" is defined in s 40 to mean, in respect of Part 4 "any child, stepchild or adopted child of that person".

[34] Section 41(1) gives rise to the entitlement to apply and for the court to make an order. With respect to the child of a deceased person it provides:

> "(1) If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's … child … the court may, in its discretion, on application by or on behalf of the said … child … order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such … child ….".

[35] The question is whether the applicant could fall within the definition of "child" for the purposes of that section. "Child" is not defined in the *Succession Act*. It is therefore relevant in answering this question to examine the definitions found within Schedule 1 of the *Acts Interpretation Act* 1954 (Qld) which apply to all Acts by virtue of s 2 of the *Acts Interpretation Act*. "Child" is defined therein as follows:

> "if age rather than descendancy is relevant, means an individual who is under 18."

[36] In this case, it is descendancy rather than age that is relevant. The term "descendant" is then defined in the *Acts Interpretation Act* to include:

> "(a) in relation to Aboriginal people - a descendant under Aboriginal tradition."

[37] "Aboriginal tradition" is a defined term. It means:

> "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances,

> customs and beliefs relating to particular persons, areas, objects or **relationships**." (emphasis added)

[38] Accordingly, so long as the applicant is able to prove that he is in the relationship of being the child of Doreen Eatts according to Aboriginal tradition, then he is arguably entitled to make a claim for further provision under Part 4 of the *Succession Act*. Unlike the claim in *Jones v Public Trustee of Queensland & Anor*[7] the claim is supported by, rather than in contradistinction to, Queensland's statute law.[8] The evidence led is sufficient to satisfy me that he may well be able to prove that he is the child of Doreen Eatts and thus have a claim under the family provision jurisdiction.

[39] This outcome is perhaps not surprising since one of the fundamental legislative principles set out in s 4 of the *Legislative Standards Act* 1992 (Qld) ("LSA") is having sufficient regard to Aboriginal tradition. That is achieved by stating in s 4(1) of the LSA that fundamental legislative principles "are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law." These principles include requiring that legislation has sufficient regard to "the rights and liberties of individuals" (LSA s 4(2)(a)). Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, it "has sufficient regard to Aboriginal tradition and Island custom" (LSA s 4(3)(j)).

Intestacy

[40] Bradley Gundy's entitlement to take on intestacy depends on whether he can establish that he is the issue or child of Doreen Eatts. "Issue" is not defined in the *Succession Act* or the *Acts Interpretation Act* but is generally understood as meaning the person's children, grandchildren and other descendants. The Oxford English Dictionary gives the apt definition: "offspring, progeny; a child or children; a descendant or descendants. Now chiefly in legal use or with reference to legal succession."[9] If Bradley Gundy can show that he is a child or descendant of Doreen Eatts under Aboriginal tradition then arguably he is within the definition of "issue" extended by the Aboriginal tradition referred to in the *Acts Interpretation Act*. The evidence led satisfies me that he may well be able to show that he is a child or descendant and therefore the "issue" of Doreen Eatts.

[41] The provisions of s 60 of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 which gives the power to the chief executive of the relevant department to determine who is entitled to succeed to the estate of an Aboriginal person have no application where, as here, it is not impracticable to ascertain the person or persons entitled in law to succeed to the estate.[10]

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7 [2004] QCA 269.

8 Aboriginal traditional adoptions are similarly recognised in Canada: see *Re Tagornak Adoption Petition* [1984] 1 CNLR 185; *Re BC* [1998] 4 CNLR 7.

9 See also the definition in the Encyclopaedic Australian Legal Dictionary.

10 The New South Wales Law Reform Commission in its Report 116 on *Uniform Succession Laws*: *Intestacy* said of this provision at [14.21]: "The original Queensland provisions were part of a raft of provisions introduced in 1934 which rendered the will of an Indigenous person invalid if entered into without the consent of the Protector of Aboriginals; prevented Indigenous people from purchasing on credit without similar permission; and sought to appropriate monies otherwise belonging to certain Indigenous people for the welfare of Indigenous people generally. According to the Queensland

[42] The originating application seeks a declaration that Bradley Gundy takes the whole of Doreen Eatts' estate as "next of kin" under s 36A(3) of the *Succession Act*. Section 36A(3) is the apposite section to which to refer if Bradley Gundy is to seek a declaration, but it would not be as "next of kin", but, as s 36A(3) provides, as the surviving child of Doreen Eatts. The originating application would need to be amended but I would not regard this defect as fatal.

Status of Children Act

[43] Section 10(1) of the *Status of Children Act* 1978 provides:

> "(1) A person who —
>
> (a) alleges that any named person is the parent of her child; or
>
> (b) alleges that the relationship of parent and child exists between the person and another named person; or
>
> (c) having a proper interest in the result, wishes to have determined the question whether the relationship of parent and child exists between 2 named persons;
>
> may apply to the Supreme Court for a declaration of parentage and the Supreme Court may, if it is proved to its satisfaction that the relationship exists, make the declaration whether the parent or the child or both of them are living or dead."

[44] The applicant seeks that declaration in his originating application. There appears to be no good reason why he is disentitled to see such a declaration from the court. He calls in aid the *Child Protection Act* 1999 because of its definition of who is a parent found in s 11, in particular s 11(3). Section 11 provides:

> "(1) A ***parent*** of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child.
>
> (2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
>
> (3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
>
> (4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.
>
> (5) A reference in this Act to the parents of a child or to 1 of the parents of a child is, if the child has only 1 parent, a reference to the parent."

[45] However as the respondent Joslin Eatts submitted, reliance on the *Child Protection Act* may be misplaced given that it applies in its terms only to children under the age of 18 (s 8). However it is not necessary to rely on the *Child Protection Act* for the declaration to be made under the *Status of Children Act* or for the purposes of the *Succession Act*.

Home Secretary, who introduced the bill, the provision was chiefly about raising revenue to support Indigenous welfare programs."

[46] The respondent to the originating application, Joslin Eatts, has failed to satisfy me that Bradley Gundy has only a fanciful prospect of success. This is particularly so where to strike out the application summarily could stultify development of the law.

Conclusion

[47] The application to strike out the originating application on the basis that it is an abuse of process of the court is without merit and should be dismissed. I would however grant leave to amend it to accord with these reasons. It would be inappropriate in the circumstances for the administrator to distribute or further distribute any of the estate of Doreen Eatts until the originating application can be determined at trial and the administrator should be restrained from doing so. It would be appropriate in the circumstances for the administrator to provide a copy of the sealed letters of administration and I will order her to do so. It is appropriate in the circumstances to order that the administrator pay the applicant's costs of and incidental to the application on a standard basis as she has been entirely unsuccessful in her application to strike out the originating application. I will give the parties the opportunity to make submissions as to the directions which should be given to prepare the matter for trial.