SUPREME COURT OF QUEENSLAND

CITATION:	*Eatts v Gundy* [2014] QCA 309
PARTIES:	**JOSLIN EATTS as administrator of the Estate of the late DOREEN 'DOLLY' MARY-ANN EATTS** (appellant) **v** **BRADLEY GUNDY** (respondent)
FILE NO/S:	Appeal No 11448 of 2013 SC No 6631 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2014
JUDGES:	Muir and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed with costs.** **2. The orders made in the Trial Division on 1 November 2013 and 13 December 2013 are set aside.** **3. Instead of those orders, the appellant's application in the Trial Division filed on 11 February 2013 is granted and the respondent's originating application is struck out.** **4. The respondent is to pay the appellant's costs of the respondent's originating application, including the costs of the appellant's application to strike out that originating application. This order does not entitle the appellant to recover any reserved costs.** **5. The parties are at liberty to apply on seven days notice in the Trial Division for orders in relation to costs which were reserved in the Trial Division.**
CATCHWORDS:	SUCCESSION – INTESTACY AND DISTRIBUTION ON INTESTACY – where the appellant is the administrator and parent of the deceased, who died intestate, and the respondent is the biological son of the deceased's sister – where there was evidence of a parent/child relationship between the deceased and respondent according to Aboriginal tradition –

where the respondent argued he was a surviving child of the intestate pursuant to the *Succession Act* 1981 and sought a declaration that he take the whole of the estate under Pt 3 – where the appellant applied to strike out the respondent's originating application – where the primary judge dismissed the application to strike out and the appellant appeals on the ground the respondent has no arguable case – whether there is an arguable case that the respondent is the intestate's surviving "issue" and "child" within the meaning of Pt 2 of Sch 2 and s 36A of the *Succession Act*

SUCCESSION – FAMILY PROVISION – ELIGIBLE APPLICANTS – CHILD – where the respondent argued he was a "child" of the deceased under Pt 4 of the *Succession Act* and is entitled to make a claim for family provision out of the deceased's estate under Pt 4 – where the appellant applied to strike out the respondent's originating application – where the primary judge dismissed the application to strike out and the appellant appeals on the ground the respondent has no arguable case – whether there is an arguable case that the respondent is the intestate's "child" within the meaning of s 41(1) of the *Succession Act*

Acts Interpretation Act 1954 (Qld), Pt 4, s 36
Adoption Act 2009 (Qld), s 214, s 216, s 218
Child Protection Act 1999 (Qld), s 8, s 11(3)
Legislative Standards Act 1992 (Qld) s 3, s 4(3)(j), s 7, s 24
Status of Children Act 1978 (Qld) Pt 3, s 6, s 8, s 10
Succession Act 1981 (Qld), s 5, Pt 3, s 34, s 35, s 36A, s 40, s 41, Sch 2

Antill-Pockley v Perpetual Trustee Co Ltd (1974) 132 CLR 140; [1974] HCA 52, cited
Bamgbose v Daniel [1955] AC 107; [1954] UKPC 24, considered
Coleman v Shang [1961] AC 481, cited
GE v KM [1995] 1 VR 471; [1995] VicRp 31, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, cited
Jones v Public Trustee (Qld) (2004) 209 ALR 106; [2004] QCA 269, considered
Mason v Tritton (1994) 34 NSWLR 572, cited
Popple v Rowe [1998] 1 VR 651; [1997] VSC 13, considered
Slater v Dangerfield (1846) 15 M & W 263; [1846] EngR 432, cited
The Commonwealth v Australian Capital Territory (2013) 250 CLR 441; [2013] HCA 55, cited

COUNSEL: D A Savage QC, with A J Moon, for the appellant
P W Bates for the respondent

SOLICITORS: Roberts Nehmer McKee Lawyers for the appellant
Gerard Malouf & Partners for the respondent

[1] **MUIR JA:** I agree with the reasons of Fraser JA and with his proposed orders.

[2] **FRASER JA:** The appellant is the administrator of the estate and the only surviving parent of the late Doreen Mary-Ann Eatts, deceased. The deceased did not have any biological children. The respondent is the biological son of another of the appellant's children, Roslyn Eatts. The respondent adduced evidence in proceedings in the Trial Division that Roslyn Eatts and the deceased made an arrangement that the respondent would be brought up by the deceased as her son. There was evidence that the appellant and her descendants are members of a native title claim group called the Maiawali Karawali People, and that, according to Aboriginal tradition practiced by those people, the relationship between the respondent and the deceased was a permanent relationship which amounted to a mother and son relationship. The primary judge found that the respondent had at least an arguable case that he was the child of the deceased under Aboriginal tradition.

[3] The respondent's application, as it was amended by leave after judgment in the trial division, claimed:

1. A declaration that the respondent took the whole of the estate of the deceased as the "surviving child of the intestate" pursuant to the *Succession Act* 1981 (Qld), s 36A(3);
2. Further or in the alternative, a declaration that adequate provision was not made from the estate of the deceased for the respondent's proper maintenance and support and an order that the estate make adequate provision for the respondent's proper maintenance and support in the proper exercise of the Court's discretion.
3. A declaration pursuant to the *Status of Children Act* 1978 (Qld) that the respondent was a "child" of the deceased and that the deceased was the respondent's "parent" under Aboriginal tradition within the meaning of the *Child Protection Act* 1999 (Qld) and for the purposes of Pt 3 and Pt 4 of the *Succession Act*. Consequential orders and costs were sought.

The respondent also sought consequential orders (including an injunction to restrain distribution of the estate) and costs.

[4] The primary judge held that the evidence showed that the respondent might be able to prove at a trial "that he is a child or descendant and therefore the 'issue' of" the deceased.[1] The primary judge also found that the evidence showed that the respondent may be able to prove at a trial that, because according to Aboriginal tradition the respondent was in the relationship of being the child of the deceased, the respondent as a "child" of the deceased was entitled to make a claim for family provision out of the estate of the deceased under Pt 4 of the *Succession Act*.[2] The primary judge found that there appeared to be no good reason why the respondent was disentitled to seek a declaration under the *Status of Children Act* that he was the child of the deceased, that the respondent's reliance on the *Child Protection Act* was misplaced because it applied only to children under the age of 18 (the respondent is an adult), and that it was not necessary for the respondent to rely on the *Child Protection Act* for a declaration to be made under the *Status of Children Act* or for the purposes of his claims pursuant to the *Succession Act*.[3]

---

1 [2013] QSC 297 at [40].
2 [2013] QSC 297 at [38].
3 [2013] QSC 297 at [43]–[45].

[5] The primary judge dismissed the appellant's application to strike out the originating application, granted an injunction restraining the appellant from distributing the estate of the deceased until further order, and ordered the appellant to pay the respondent's costs of the application. Subsequently, on 13 December 2013, the primary judge amended the order for the injunction by the addition of a restraint against payments by or for the estate from the appellant's solicitors' trust account or from a designated bank account until further order.

[6] The appellant's interlocutory application for an order that the respondent's originating application be struck out was pursued on the basis that the originating application was an abuse of process. As the primary judge held, there must be a very clear case to justify summary intervention of that kind. In *General Steel Industries Inc v Commissioner for Railways (NSW)*,[4] Barwick CJ referred to the various expressions of the relevant tests: "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 … [the pleadings] … to stand would involve useless expense". The primary judge referred also to the holding in *Agar v Hyde*[5] that it is necessary to 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".

[7] For the reasons which follow, I accept the appellant's argument that these tests were satisfied. I would hold that the construction the respondent propounded in each case is unsustainable. Putting at its highest for the respondent the evidence that he was in a parent/child relationship with the deceased according to Aboriginal tradition, his claims must fail upon the correct construction of the statutory provisions. The appellant does not have "more than a 'fanciful' prospect"[6] of success.

The *Succession Act*

[8] The rules for distribution of a deceased estate on intestacy are set out in Pt 3 of the *Succession Act*. Section 35(1) provides, with exceptions which are not presently relevant, that the persons entitled to take an interest in the residuary estate and the interest which 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". Part 1 of Sch 2 sets out the distribution rules where the intestate is survived by a spouse. That is not applicable here. Part 2 sets out the distribution rules for four different circumstances where the intestate is not survived by a spouse:

"

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.

[4] (1964) 112 CLR 125 at 129.

[5] (2000) 201 CLR 552 at 576 [57].

[6] *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 at 132 [25] (French CJ and Gummow J) to which the primary judge also referred.

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.
3	Where the intestate is not survived by issue or by a parent but is survived by next of kin	The next of kin are entitled to the residuary estate in accordance with section 37.
4	Where the intestate is not survived by issue, by a parent or by next of kin	The residuary estate shall be deemed to be bona vacantia and the Crown is entitled to it."

[9] Rule 1 refers to s 36A. It relevantly 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.
> (4) If the intestate had 2 or more children, all of whom survived, the children take in equal shares."

[10] As the respondent acknowledged at the hearing of the appeal, his claim under Pt 3 of the *Succession Act* is maintainable only if he is the intestate's surviving "issue" and "child" within the meaning of Pt 2 of Sch 2 and s 36A of the *Succession Act*. Because the deceased did not have any biological children and there was no suggestion that there was any adopted child or any person other than the respondent who might claim to be a child according to Aboriginal tradition, upon the respondent's case he is entitled to the whole of the residuary estate. If the respondent is not the intestate's surviving "issue" and "child", then under item 2 of Sch 2, Pt 2, the appellant, as the deceased's only surviving parent, is entitled to the whole of the residuary estate.

[11] In relation to the respondent's application for family provision, s 41(1) in Pt 4 of the *Succession Act* relevantly provides:

> "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 spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant."

[12] The respondent's claim under Pt 4 was advanced on the basis that he is a "child" of the deceased within the meaning of that provision.

Summary of the primary judge's reasons

[13] In relation to the claim under Pt 4 of the Succession Act, the primary judge referred to the following definitions in the *Acts Interpretation Act* 1954 (Qld):

> "***Aboriginal tradition*** 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.
>
> …
>
> ***child***, if age rather than descendancy is relevant, means an individual who is under 18.
>
> …
>
> ***descendant*** includes—
>
> (a) in relation to Aboriginal people—a descendant under Aboriginal tradition; and
>
> (b) in relation to Torres Strait Islanders—a descendant under Island custom."

[14] The primary judge considered that it followed that if the respondent was able to prove that he was in the relationship of being the child of the deceased according to Aboriginal tradition, then the respondent was arguably entitled to make a claim for further provision under Pt 4 of the *Succession Act*. The primary judge distinguished *Jones v Public Trustee (Qld)*[7] on the ground that, unlike the position in that case, the respondent's claim was supported by rather than being in contradistinction to, Queensland's statute law. The primary judge noted also that Aboriginal "traditional adoptions" were recognised in Canada[8] and referred to provisions of the *Legislative Standards Act* 1992 (Qld), including the reference to Aboriginal tradition in s 4(3)(j) of that Act.[9]

[15] In concluding that the respondent had an arguable claim that he was "a child" and "issue" of the deceased for the purposes of Pt 3 of the *Succession Act*, the primary judge observed that "issue" was not defined in the *Succession Act* or the *Acts Interpretation Act* but was generally understood and was defined in dictionaries as comprehending children and descendants, and if the respondent could show that he was "a child or descendant" of the deceased under Aboriginal tradition then he was arguably "within the definition of 'issue' extended by the Aboriginal tradition referred to in the *Acts Interpretation Act*".[10]

Consideration

[16] In the context of succession, the ordinary and prima facie legal meaning of "issue" is descendants or progeny[11] and the word "child" usually connotes a descendant in the first generation.[12] In *Slater v Dangerfield*[13] Baron Parke said of the word "issue" used in a will that it "prima facie means the same thing as heirs of the body, and is to be construed as a word of limitation; but this prima facie construction will

---

7 (2004) 209 ALR 106.

8 [2013] QSC 297 at [38], footnote 8, referring *Re Tagornak Adoption Petition* [1984] 1 CNLR 185; *Re BC* [1998] 4 CNLR 7.

9 [2013] QSC 297 at [39].

10 [2013] QSC 297 at [40].

11 *Matthews v Williams* (1941) 65 CLR 639 at 650 (Rich ACJ, Dixon and McTiernan JJ).

12 *Sidle v Queensland Trustees Ltd* (1915) 20 CLR 557 at 560 (Isaacs and Powers JJ).

13 (1846) 15 M & W 263 at 272.

give way if there be on the face of the will sufficient to shew that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time." (The term "heirs of the body" referred to descendants related by blood, being the children or grandchildren and, only if the bloodline ran out, the nearest relative traced back to the original owner. That term has had no place in succession law in Australia since reforms in the nineteenth century.)

[17] In *GE v KM*[14] Phillips J cited *Matthews v Williams* and other cases as authority establishing the ordinary meanings of "child" and "issue". Phillips J also referred to established extensions of those terms to include a person who, although not the natural child of the husband, was born during the subsistence of the marriage[15] and a person adopted under foreign law if that law was made relevant by the principles of private international law. The first extension resulted from the presumption of legitimacy; this part of the law is regulated in Queensland by the *Status of Children Act* (see [28] – [31] of these reasons). In relation to the second extension, the recognition of overseas adoptions is regulated by detailed provisions in Pt 13 of the *Adoption Act* 2009 (Qld). The existence of those established extensions does not advance the respondent's case based upon Aboriginal tradition.

[18] Importantly, in *Popple v Rowe*[16] the Victorian Court of Appeal held that the word "children" in s 91 of the *Administration and Probate Act* 1958 (Vic) (which empowered children to bring a proceeding seeking provision for their maintenance and support out of the estate of a deceased person) meant the natural children of the deceased and did not comprehend stepchildren. Brooking JA held that the word "children" was "not used…as a popular, loose and flexible expression" but "means issue in the first generation – sons and daughters, children of the blood or 'natural children' as I shall call them…"; it was "not to be expected that, in a statute authorising judicial interference with distribution of the estates effected by will or by the operation of the law concerning distribution on intestacy, Parliament, in enabling applications to be made by the deceased's 'widow widower or children', would use those expressions as popular, loose and flexible ones." Winneke P agreed with Brooking JA and observed that "the word "children" does have a fixed, rather than protean, meaning and it is confined to applicants who have a blood relationship to the deceased unless statutory provision has been made to the contrary."[17] Hayne JA agreed and observed that, "[b]iological connection between the 'parent' and the 'children' has always been, and still is, central to the meaning of the word "children" when it is used… to identify a relationship with another (in this case the deceased)";[18] it could not be accepted that "the central element of the definition of the word "children" should be ignored and those who have no biological, or as I have put it, "blood" connection with another, should be regarded as being the children of that other". If a more liberal construction of the word "child" may be adopted in the construction of a will or other instrument, it does not follow that such a construction may be applied to the word "child" in a statute of general application such as the *Succession Act*.[19]

---

14 [1995] 1 VR 471 at 475.

15 All children born in wedlock are regarded as the lawful issue of the husband: *Re Clark Trust* [1946] 3 WWR 490 at 491 – 493 (Dysart J).

16 [1998] 1 VR 651 at 653.

17 [1998] 1 VR 651 at 659.

18 [1998] 1 VR 651 at 662.

19 See *Harris v Ashdown* (1985) 3 NSWLR 193 at 199 (Kirby P) and *Popple v Rowe* [1998] 1 VR 651 at 657 (Brooking JA).

[19] That the word "child" bears its ordinary meaning in the *Succession Act* is also suggested by the definition of that term in s 40 of that Act, which distinguishes a "child" from a "stepchild" and an "adopted child" (a term which does not extend to a person adopted as a child in accordance with Aboriginal tradition). It is also consistent with the provisions which make it plain that a person is only a "child" if the person is the intestate's "issue" (see s 36A, and the references to "issue" and "child" Sch 2, Pt 1, item 2). The Act's focus upon biological relationships is also evident in the provisions for distribution on intestacy to the "next of kin" (see Sch 2, Pt 2, item 3, the definition of "next of kin of the intestate" in s 35(1A) of the Act, and the reference in s 34(2) to it being "immaterial whether the relationship is of the whole blood or of the half-blood".) Putting aside the statutory definition, "next of kin" strictly means "nearest in proximity of blood" or "nearest blood relations" but is sometimes extended in colloquial usage to mean "most closely related by blood or marriage".[20] The presence in the *Succession Act* of specific provisions which provide for succession beyond biological relationships (such as for spouses and adopted children) tends to support the conclusion that other relationships fall outside the rules for distribution on an intestacy.

[20] Furthermore, that the *Succession Act* does not use the word "child" in a sense which comprehends persons claiming to be children under an adoption in accordance with Aboriginal traditional which is not accompanied by an adoption under relevant statute law is strongly implied by the definition of "adopted child" in s 5 of the *Succession Act*. The term is confined to an adoption "in accordance with the law of the State or Territory, or country, where the adoption takes place…". That definition is expressly made relevant to Pt 4 by the reference to "adopted child" in the definition of "child" in s 40. There is no definition of "child" in Pt 3, but the *Adoption Act* applies of its own force to require a child adopted in accordance with that Act to be regarded as a "child" for succession purposes. The effect of a final adoption order under that Act is that the adopted child "becomes a child of the adoptive parent and the adoptive parent becomes a parent of the adopted child" and the adopted child "stops being a child of a former parent and a former parent stops being a parent of the adopted child" (s 214(2), (3)). Those provisions are expressly given effect in relation to dispositions of property and devolutions of property in respect of which a person dies intestate (s 216). The same Act protects against liability a trustee who transfers or distributes property to persons who appear entitled to it without finding out whether or not adoption has happened which would have the consequence that the person to whom the property is transferred was not entitled to it (s 218).

[21] One anomalous consequence of the construction propounded by the respondent is that a trustee, which term is defined in s 218(4) of the *Adoption Act* to include a personal representative, would have no protection of the kind which is provided by s 218. Another anomalous consequence results from the absence of any legislative provisions in Queensland in relation to adoptions under Aboriginal tradition to the effect of the provisions in ss 214(3) that the adopted child stops being a child of the biological parents (cf *Adoption Act*, s 214(3)). To take this case as an example, upon the respondent's interpretation one person may be both the "issue" and "child" (under Aboriginal tradition) of an intestate and (under the ordinary meaning of the terms in the *Succession Act*) the child of a brother or sister of an intestate who predeceased the intestate (s 35(1A)); an Aboriginal tradition could not preclude

---

[20] *Antill-Pockley v Perpetual Trustee Co Ltd* (1974) 132 CLR 140 at 146 (Gibbs J; Stephen J agreeing), and see also at 143 (McTiernan ACJ).

a person entitled to succeed as "child" within the ordinary meaning of that term from inheriting under the *Succession Act*. In any event, I note that the anthropologist's report upon which the respondent relied referred to the relevant tradition as a "system of classificatory kinship that treated a woman **and** her sisters as a common class in relation to their children" and to the practice of regarding one's "mother's sister as **another** 'mother'"; "[t]he tradition…is that of classificatory kinship in which a woman and her sisters are placed in a relationship of equivalence with both their own and their sister's children, with the expectation that a woman care for her sister's children as her own."[21] Thus the respondent's construction would cut across the carefully worked out rules for the distribution of a deceased's estate on intestacy in Pt 3 of the *Succession Act*.

[22] In relation to the definitions which the primary judge regarded as potentially extending the meaning of "child", s 36 of the *Acts Interpretation Act* makes it clear that the definitions in that Act operate (if they operate at all) to supply the meaning of the defined terms when those terms are used in an Act. Neither of the terms "descendant" or "Aboriginal tradition" are used in the *Succession Act*. I accept the appellant's submission that those definitions have no bearing upon the meaning of the words "child" and "issue" in the rules for the distribution on intestacy in Pt 3 of the *Succession Act*. The definition of the term "child" in the *Acts Interpretation Act* has no bearing upon the meaning of that term in the relevant provisions of the *Succession Act* for the different reason that those provisions concern descendancy rather than age and the *Acts Interpretation Act* definition applies only where it is age rather than descendancy which is relevant. Indeed, the express exclusion of the application of the definition of "child" in relation to descendancy was presumably included for the very purpose of ensuring that it could **not** be applied as a definition of that term in the *Succession Act*. The respondent argued that the reference to Aboriginal tradition in the definition of "descendant" in the *Acts Interpretation Act* was made relevant by the use of the word "descendancy" in the definition of "child" in that Act, that this supported the proposition that the term "child" in the *Succession Act* comprehended "descendant", and that this rendered applicable the definition of that term in the *Acts Interpretation Act*. That circular argument should not be accepted for the reasons I have given.

[23] The legislative history of those definitions tends to confirm that they were introduced into *Acts Interpretation Act* for a quite different purpose. The *Legislative Standards Act* 1992 was enacted for purposes which included ensuring that Queensland legislation was of the highest standard: s 3(1)(a). The Act established the Office of the Queensland Parliamentary Counsel (s 5) and defined the functions of that Office, which included providing advice to Ministers, members of the Legislative Assembly and units of the public sector on the application of "fundamental legislative principles" (s 7(g), (h)). The term "fundamental legislative principles" was defined to mean "the principles relating to legislation that underlie a parliamentary democracy based on the rule of law" (s 4(1)). Section 4(2) provided that the principles included requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. Section 4(3) set out a list of examples of matters on which the question of whether legislation had sufficient regard to rights and liberties of individuals depended. One such matter was whether the legislation "has sufficient regard to Aboriginal tradition and Island custom" (s 4(3)(j)).

---

21 Report of Dr McKeown at paragraphs 15, 16 and 34 (Exhibit "DRFM-1" to the affidavit of Dr McKeown). I have added the emphasis.

That no doubt explained why s 24 of the same Act introduced into the *Acts Interpretation Act* the definitions of the terms "Aboriginal tradition" and "Island custom" and the definition of terms used in those definitions, including "descendant".

[24] The respondent supported the primary judge's analysis by reference to Aboriginal tradition in s 4(3)(j) of the *Legislative Standards Act*. The respondent argued that the *Legislative Standards Act*, read together with the *Acts Interpretation Act*, the *Child Protection Act*, and the *Status of Children Act*, altered the content of the relationships described by the terms "issue" and "child" for the purposes of Parts 3 and 4 of the *Succession Act*. I am unable to accept this approach. In addition to the obstacle that the terms "child" and "issue" in the *Succession Act* are not defined by the *Acts Interpretation Act* definitions introduced by the *Legislative Standards Act*, the *Legislative Standards Act* simply has no potential application in relation to the *Succession Act*. I mentioned before the functions of the Office of the Parliamentary Counsel to provide advice to Ministers, units of the public sector and members of the Legislative Assembly in the application of fundamental legislative principles. The relevant provisions in s 7(g) and (h) qualify that function by their concluding expression "… in performing the Office's functions" under other paragraphs of s 7, referring to the functions of the Office to draft Bills, subordinate legislation, and other instruments (ss 7(a)–(f)). The Bills are those to be introduced after the commencement of the *Legislative Standards Act*. That Act is incapable of bearing a construction that it requires legislation which predated its commencement to be construed in a way which ensures that it has "sufficient regard to rights and liberties of individuals" in any of the respects referred to in s 4(3), including the requirement that legislation "has sufficient regard to Aboriginal tradition and Island custom" (s 4(3)(j)).

[25] That the *Legislative Standards Act* was intended to operate prospectively, including in the particular respect which is now relevant, is confirmed by reference to the second reading speech for the Bill for the Act, in which the then Premier referred to the requirement "that regard should be had for Aboriginal tradition and Torres Strait Islander custom when considering introduction of new legislation".[22] In the course of explaining why that requirement should be introduced in relation to new legislation, the Premier made the following remarks:

> "The Succession Act provides for the distribution of the estate of a person who dies without a will. The distribution of the estate to an adopted child depends on the definition of 'adopted child' in accordance with State law. It does not deal with the less common position of a person adopted in accordance with Torres Strait Islander customs, and in such cases it is easy to see how Torres Strait Islanders who have been adopted according to their own customs would be disadvantaged. In recognising this in our legislation, this Government has made the first positive response in this country to the Australian Law Reform Commission's report on the recognition of Aboriginal customary laws. This provision will ensure that legislators will take account of concerns that Aboriginal and Torres Strait Island people may have insofar as they might affect their rights and interests. Parliament would, of course, retains its prerogative whether or not it accepted this principle in particular circumstances, but what would be avoided would be the unintentional disregard of tradition and custom that is currently possible."

---

22 Hansard, 6 May 1992, p 5004.

[26] The circumstance that the definition of "adopted child" in the *Succession Act* included a person adopted under the *Adoption of Children Act* 1964 (which was repealed and replaced by the *Adoption Act* 2009) but did not deal with adoption in accordance with Torres Strait Islander traditions was also mentioned in reports tabled in Parliament which preceded the enactment of the *Legislative Standards Act*: the "EARC report"[23] and a report by a Parliamentary Committee[24] which endorsed the relevant provision in the EARC report. The Parliamentary Committee report observed of the EARC report's recommendation, that the proposed statement of fundamental legislative principles should include the requirement that sufficient regard to be had to Aboriginal and Torres Strait Islander tradition, that much legislation affected such traditions without the drafters of the legislation having intended to do so or even having been aware of that impact; the Parliamentary Committee gave as an example the definition of "adopted child" in s 5 of the *Succession Act*, applicable for the purposes of the distribution of estates of persons who die intestate, noting that the definition "clearly includes a person adopted under the *Adoption Act* but does not deal with the not uncommon position of a person adopted in accordance with Torres Strait Islander traditions".[25]

[27] The potential for injustice resulting from the non-recognition of Aboriginal and Torres Strait Islander tradition in the definition of "issue" and "child" in the *Succession Act* was thus clearly drawn to the attention of Parliament, but it was plainly not a purpose of the *Legislative Standards Act* to effect any amendment to the relevant provisions of the *Succession Act*. An attempt to avoid such injustices would require resolution of fundamental policy issues such as, for example, would be involved in defining the elements of an Aboriginal tradition for the purposes of succession. There is no such statutory definition for succession purposes.

[28] As to the *Status of Children Act*, I am respectfully unable to accept the primary judge's conclusion that there appeared to be no good reason why the respondent was disentitled to seek a declaration from the court as to his parentage under that Act. Section 10, to which the primary judge referred, is in Pt 2 of the *Status of Children Act*. In that part, s 6 effectively abolishes for the purposes of Queensland law the distinction between legitimate and illegitimate children. Section 8 is the only provision which concerns parentage in relation to succession to property. Section 8(1) provides:

> "The relationship of father and child and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of a will or other testamentary disposition or of a document creating a trust or for the purpose of an application under Part 4 of the *Succession Act 1981*, be recognised only if—
>
> (a) the father and mother of the child were married to each other, or in a registered relationship, at the time of its conception or at some subsequent time; or
>
> (b) paternity has been admitted (expressly or by implication) by or established against the father in his lifetime and, if that purpose is for the benefit of the father, paternity has been so admitted or established while the child was living; or

---

23 Electoral and Administrative Review Commission Report to Parliament, 21 May 1991.

24 Report of the Parliamentary Committee for Electoral and Administrative Review, 18 July 1991.

25 Report of the Parliamentary Committee for Electoral and Administrative Review, 18 July 1991 at 3.2.12, with reference to 3.2.7–3.2.11.

(c) a declaration of parentage has been made under section 10 after the death of the father of the child."

[29] Section 10(1) provides:

"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."

[30] Section 10(2) empowers a court which makes a declaration under s 10(1) after the death of the parent or child to make a declaration "determining for the purposes of section 8(2) whether any and if so which of the requirements of section 8(1)(b) have been satisfied". Section 8(2) provides that where for the reason of s 8(1) "the relationship of father and child is not recognised at the time the child is born, the occurrence of any act, event or conduct that enables that relationship and any other relationship traced in any degree through it to be recognised shall not affect any estate, right or interest in real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event or conduct occurred". Section 11 empowers courts to make orders requiring a named person to give evidence which is material in an application under s 10 and an order directing a named person to submit himself or herself to a "parentage testing procedure" – a term which is defined to mean "a physical or other test carried on a person involving the application of medical science for the purpose of obtaining evidence about paternity". Section 12 concerns reports in approved forms about the results of a parentage testing procedure. Section 13 concerns the inadmissibility of certain acknowledgements of paternity in criminal proceedings.

[31] The focus in Pt 2 upon resolving disputed issues about biological parentage, and particularly the focus upon paternity, are inconsistent with a view that s 10 authorises a declaration of parentage for the purposes of succession to property which is based upon tradition rather than biological parentage. The same conclusion is required by the absence of any provision in the *Status of Children Act* which describes or defines what Aboriginal or Torres Strait Islander tradition is sufficient to justify a declaration of parentage for the purposes of succession. In any event, s 8 could have no application in the present case, which does not involve any issue about paternity.

[32] The respondent did not seek to support the primary judge's conclusion that there was no good reason why he was disentitled to seek a declaration of parentage under s 10(1). Rather, the respondent relied upon different provisions in Pt 3 of the *Status of Children Act*. These provisions created presumptions of parentage of a child conceived by fertilisation procedures where the child was not a biological descendent of the person presumed to be the child's parent. The respondent submitted

that these provisions indicated that the Queensland Parliament had altered the content of the "issue" and "child" relationships between the child and a deceased intestate for the purposes of Pts 3 and 4 of the *Succession Act*. In what way that occurred was not spelled out in the submission. The respondent also argued that the primary judge had accepted that this approach to construction was open and reasonably arguable. In fact the primary judge's reasons do not refer to these provisions. I am unable to detect any assistance for the respondent's argument in Pt 3 of the *Status of Children Act*. I note that in *Popple v Rowe*, Hayne JA rejected a similar argument that Victorian legislation concerning the status of adopted children and children born as a result of artificial insemination or some other form of reproductive intervention was explicable on the footing that the legislature had acted "to eliminate doubt about the construction of words or expressions that are to be regarded as having a popular and ambulatory meaning."[26]

[33] The respondent submitted that the primary judge also accepted that s 11(3) of the *Child Protection Act* made it open to construe "issue" and "child" in the *Succession Act* as comprehending such a relationship as it was defined by Aboriginal tradition Rather, the primary judge referred to the respondent's attempt to call in aid s 11(3) of the *Child Protection Act* and accepted the submission for the appellant that because (by virtue of s 8 of that Act) s 11(3) applied only to children under the age 18, the respondent's reliance on it "may be misplaced". The term "child" is defined in s 8 to mean "an individual under 18 years". The purpose of the definitions in ss 11 and 8 is to define terms used in other provisions in the Act which fulfil the expressed purpose of that Act "to provide for the protection of children". The *Child Protection Act* has no bearing upon the proper construction of "child" and "issue" in the *Succession Act*.

[34] The respondent cited *Commonwealth v Australian Capital Territory*[27] ("the same sex marriage case") for the proposition that a legislative term referring to an interpersonal status relationship may not have a fixed meaning as at the date of the enactment but may instead be a "topic of juristic classification" with an "evolving relational context". In *Popple v Rowe* Hayne JA made a similar point in the observation that in some cases "the denotation of a word used in a statute can be seen to be changed" although "the connotation" of that word had not shifted.[28] Hayne JA considered that this distinction might be applied in the construction of statutes as well as the construction of the Constitution, although a shift in denotation of the words of the Constitution might more easily be identified than a shift in the denotation of the words of a statute; but Hayne JA rejected the contention that there had been any shift in the usage of the word "children" in legislative provisions which are reflected in Pt 4 of the *Succession Act*.[29] I would respectfully adopt and apply that observation in this case.

[35] The respondent relied upon an observation by McPherson JA in *Jones v Public Trustee (Qld)*[30] that it is "possible (I say no more) that for succession purposes relationships are capable in some circumstances of being understood in ways that are broader than would ordinarily be the case at common law". McPherson JA

---

26 [1998] 1 VR 651 at 661.
27 (2013) 250 CLR 441.
28 [1998] 1 VR 651 at 661.
29 [1998] 1 VR 651 at 662.
30 (2004) 209 ALR 106 at 114 [20].

referred to two cases *(Bamgbose v Daniel*[31] and *Coleman v Shang*[32]) in which the application of provisions governing succession according to English law would have been inconsistent with relevant provisions in a legal system of a different jurisdiction. For example, in *Bamgbose v Daniel* the Privy Council on appeal from the West African Court of Appeal held that if the respondents established their status as legitimate children of polygamous marriages which the deceased had made consistently with applicable local law, the respondents were within a class of persons entitled to succeed to the estate under the Statute of Distributions; the children were within the class of persons entitled to succeed under the Statute of Distributions because they were legitimate children of the deceased according to the law of their domicile of origin.

[36] Those decisions are not analogous to the present case, in which the only relevant body of law is found in the *Succession Act*. In my respectful opinion, in the absence of any definition or even any reference in that Act to Aboriginal tradition, the well-understood terms "child" and "issue" are not open to a construction which comprehends a biological nephew of an intestate on the basis that, in accordance with an Aboriginal tradition, the nephew is treated as a child of the deceased. Assuming in the respondent's favour that the tradition which he invoked was relevant to succession of property upon intestacy (a topic which was not touched upon in the evidence), the tradition obviously differs radically from the scheme established by the *Succession Act*. In this case, for example, the effect of the respondent's construction would be to deprive the appellant (who evidently does not regard herself as bound by the Aboriginal tradition for which the respondent contends) of the right to the whole estate apparently conferred upon her by the *Succession Act*. That tradition is not recognised by the common law of Australia because it does not concern a traditional Aboriginal right in relation to land or water of a kind which the High Court held in *Mabo v Queensland (No 2)*[33] was recognised. For the same reason, the tradition is not recognised or protected by s 10 of the *Native Title Act* 1993 (Cth). Whatever legal rights, if any, the respondent has to succeed on intestacy, depend upon the provisions of the *Succession Act*.[34] Because the tradition that the respondent invoked is not recognised in the *Succession Act*, the court has no power to apply it.[35]

[37] I would respectfully hold that the respondent's construction is not open. Upon an assessment of the respondent's evidence which is most favourable to him, his claim for a declaration that he takes the whole of the estate of the intestate as her surviving "child" and "issue" cannot succeed. Similarly, his claim under Pt 4 of that Act is unsustainable upon the proper construction of the word "child" in s 41 of that Act. His claims for declarations pursuant to the *Status of Children Act* and the *Child Protection Act* are also misconceived. It follows also that the respondent was not entitled to the injunction or any of the other consequential orders which he sought.

Disposition and orders

[38] The appeal should be allowed and the orders made in the Trial Division on 1 November 2013 and 13 December 2013 should be set aside. Instead of those

---

31 [1955] AC 107.

32 [1961] AC 481.

33 (1992) 175 CLR 52.

34 See *Jones v Public Trustee (Qld)* (2004) 209 ALR 108 at 112 [14].

35 *Mason v Tritton* (1994) 34 NSWLR 572 at 594 (Kirby P); *Jones v Public Trustee (Qld)* (2004) 209 ALR 106 at 112 [15] (McPherson JA; Williams and Jerrard JJA agreeing).

orders, the appellant's application in the Trial Division filed on 11 February 2013 should be allowed and the respondent's originating application should be struck out.

[39] The Court heard submissions about costs upon assumptions about the result of the appeal. Upon the assumption that the appeal succeeded, the respondent resisted an order for costs on the grounds that he had been raised by the intestate since he was young, he had a strong sense of moral concern at being excluded from any distribution of the estate, the deceased had not willed her property away from the respondent, the respondent had had a hard life, and he had no assets. These considerations do not justify departure from the general rule that costs should be awarded to the successful party. The respondent should have her costs of the appeal and, subject to one exception concerning reserved costs, the costs of the proceedings in the Trial Division. The respondent sought to be heard after judgment in the appeal in relation to costs which were reserved at interlocutory hearings in the Trial Division. For that reason, I would remit the disposition of those reserved costs to the Trial Division.

[40] I would make the following orders:

1. The appeal is allowed with costs.
2. The orders made in the Trial Division on 1 November 2013 and 13 December 2013 are set aside.
3. Instead of those orders, the appellant's application in the Trial Division filed on 11 February 2013 is granted and the respondent's originating application is struck out.
4. The respondent is to pay the appellant's costs of the respondent's originating application, including the costs of the appellant's application to strike out that originating application. This order does not entitle the appellant to recover any reserved costs.
5. The parties are at liberty to apply on seven days notice in the Trial Division for orders in relation to costs which were reserved in the Trial Division.

[41] **MARTIN J:** I agree with Fraser JA.