

WHAT'S NEW IN SUCCESSION LAW

What's in a name? Lost beneficiaries, birth certificates and human rights

Re Mac [2020] QSC 342
30 November 2020



By [Christine Smyth](#)



***Re Mac* [2020] QSC 342¹ involved a seemingly narrow and specifically factual circumstance.**

It entailed a quest for lost beneficiaries and the impact of that on the distribution of an intestate estate. Its nexus to Vietnam later takes us to the Convention on the Rights of the Child² and its relationship to the status of birth certificates and the right to acquire and access one.

The points of law the decision addresses are:

- the rights of acquisition by a spouse of the shared home on the death of the other spouse under Part 3 Division 3 *Succession Act 1981*
- how that may be paid for in the context of the meaning of the word ‘money’
- the exemption under the *Duties Act 2001* (Qld) with respect to property acquired on death, and
- an analysis of the rules of statutory interpretation, in circumstances where there are lost beneficiaries, specifically children of the deceased in Vietnam.

So let's explore those matters.

Lost beneficiaries & acquisition of shared home under Division 3 *Succession Act 1981*

Re Mac involved a Vietnamese man who died intestate sometime in November 2019.³ He was survived by his de facto spouse,⁴ and possibly some children. He co-owned a property as tenants in common with his de facto.⁵

On intestacy, she was entitled to the first \$150,000 of his estate, with the balance to her and any children by which he was survived. It was known he did once have children in Vietnam from a former marriage. But those children could not be located.⁶

His small estate was being administered by the Public Trustee of Queensland (PTQ). The PTQ, aware of the intestacy provisions, undertook a fruitless search for those children.⁷ This gave rise to how they ought to deal with his share of the property in the context of his de facto's rights on intestacy and her right of priority to acquire his interest in the real property.⁸

So the issue the PTQ posed to the court was whether a spouse could acquire the deceased's interest in the shared home by means of set-off of their interest in the estate under s39C(4) of the *Succession Act 1981*?

The reason this question arose was because the wording of the provision referenced “money that may at the time of the transfer be distributed to the resident”.⁹ How the term ‘money’ was to be interpreted in the context of the provision was a question of statutory interpretation. That required the court to consider rules related thereto, specifically the ability of a court to have “regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure”.¹⁰

In considering the Queensland Law Reform Commission's report, ultimately the court found that in the context of the provision:

“[27] The words ‘money that may at the time of the transfer be distributed to the resident’ should not be construed as being confined to money or cash that is in the hands of the resident. The word ‘may’ should be construed in its permissive sense, that is, it identifies money which is able to be distributed to the resident at the relevant time but need not be distributed if it is used as a set off against the amount of the transfer value.

“[28] This construction is further informed by the word ‘money’. The term ‘money itself is commonly regarded as being one which does not bear a single precise meaning in the eyes of the law. The meaning of the term depends on the context in which it is used.⁴ *Lean as liquidator of Trison Australian Pty Ltd (in liq) v Commissioners of the Rural & Industries Bank Ltd (1991) 5 ACSR 455 at 459.* For example, in the context of testamentary instruments (not this context) the term can take on a number of possible meanings to include all the testator’s personal property and sometimes, even all real and personal property.⁵ *Perrin v Morgan [1943] AC 399.*”

“[29] In the light of the QLRC Report and the Explanatory Note it would be inconvenient, let alone improbable, if Ms Vu could not obtain sole ownership of the shared home by setting off the statutory legacy due to her. The only way for her to generate the funds necessary to pay the transfer value would be to sell the house. That would be a nonsense. The construction proposed by the applicant avoids the inconvenience or improbability of result which a strict construction might impose.”

The court therefore ordered that the PTQ was justified in transferring the deceased share in the property to his de facto for \$156,000 and that value be set off against her entitlement in the estate.¹¹

Convention on the Rights of the Child

So, having considered that decision, how then does it relate to the Convention on the Rights of the Child (CRC)?

Article 7 of the CRC states:

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”

Vietnam was the second country in the world to sign and ratify the CRC. Yet the rate of child mistreatment, abuse, violence or neglect remains high compared to other countries in the region.¹² This can lead to difficulties in locating children in that country. Similarly, in Australia there are sectors of our community which are, or become, invisible arising from an inability to access life event registration and certificates.¹³

Having had matters where I’ve had to investigate the whereabouts of missing beneficiaries, and the status of the relationship of the deceased person, one of the first steps is to undertake a search of Birth, Deaths and Marriages registers.¹⁴

You might think a search of our life events registers in Australia would be a simple and economic process; however, it is not. One of the main reasons for this is that the registers are each state-based and are not linked. Further, the registers rely on the informant providing truthful and accurate information, and this does not always occur. Importantly, changes and alterations to the life event certificates can occur which can impact the search for relatives.

An example of one such change is the decision of *A & B v C* [2014] QSC 111. There a same sex couple successfully obtained orders to remove the name of the child's biological father from the Register of Birth Deaths and Marriages and consequently from the birth certificate of their child.

There, Lyons J found:

“...a Register of Births, Deaths and Marriages is, as has been discussed in the NSW decisions, a register of statistical and evidential information mainly for the purposes of succession law. It is not a register of genetic material.”¹⁵

Lyons J noted that, irrespective of biology or genetic makeup, amendments to birth certificates are produced as a means of recording accurate records; particularly for succession law purposes.¹⁶ A similar process is involved in the adoption process. In those circumstances an amendment to the birth certificate is made replacing the details of the biological parents with the names of the adoptive parent(s) as the parent(s) of the child.

Access to life event certificates

Australia has signed and ratified the CRC,¹⁷ yet somewhat concerningly, not all persons born in Australia have a birth certificate.¹⁸ According to UNICEF:

“An analysis of birth-related data conducted by Queensland Health in 2014 found that, in Queensland, Indigenous births were being registered at a significantly lower rate than non-Indigenous births. That is, approximately 15-18 per cent of births to Indigenous mothers were not registered compared with an under-registration rate of 1.8 per cent for births to non-Indigenous mothers.”

Last week marked the anniversary of the CRC and commentators are raising questions about the ease with which we can access our birth certificates,¹⁹ given their importance. In undertaking a review of our life events register system, former Attorney-General Yvette D'Ath recognised the significance of a birth certificate, stating:

“Birth registration creates a permanent legal identity for each person. A birth certificate allows people to enrol in school, obtain a passport and driver licence, to vote and access government benefits and services. As it is vitally important that each Queensland birth is registered, identifying options to overcome any barriers to birth registration is a key focus for the review.”²⁰

In Queensland, while no fee is charged to register the life event, there is, however, a fee to access a life event certificate. The current fee charged by the Queensland Registry of Birth, Deaths and Marriages is \$50.40 for a birth certificate.²¹ Further, it seems Queensland is the only state where the registry office does not have the power to waive the fee.²² The process instead relies on the discretion of the Registrar.²³

While \$50.40 may not be a lot of money to some, there is a vast sector of our community for which \$50.40 is a prohibitively large amount²⁴ and as such a significant barrier to accessing essential services. This seems inconsistent with the principles espoused both by the CRC and the former Attorney-General's commentary above.

Demographer Liz Allen argues that access to birth certificates is a fundamental human right and questions why they are not easier to obtain, and argues that they ought to be provided free of charge.²⁵

Given the far-reaching impact of having these certificates, on the anniversary of the CRC ought our legislatures make them more readily accessible for all of our community?

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, a QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the Proctor Editorial Committee, STEP and Deputy Chair of the STEP Mental Capacity SIG Committee.

Footnotes

¹ **Re Mac.**

² Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49, referred to as 'CRC', the anniversary of which occurred last week.

³ At [1].

⁴ At [4].

⁵ At [1].

⁶ At [6].

⁷ At [6].

⁸ Under Division 3 **Succession Act 1981**.

⁹ S39C(4).

¹⁰ At [24] citing **CIC Insurance Ltd v Bankstown Football Club Ltd** (1997) 187 CLR 384.

¹¹ At [30].

¹² cdrvietnam.org/en/convention-on-the-rights-of-the-child-and-vietnam-child-law/.

¹³ theconversation.com/a-birth-certificate-is-a-human-right-why-arent-they-free-and-easier-to-get-146834.

¹⁴ Birth, death and marriage certificates are now referred to as life event certificates.

¹⁵ At [48].

¹⁶ See [37], [42] and [48].

¹⁷ humanrights.gov.au/our-work/childrens-rights/publications/un-childrens-convention-and-australia-1991.

¹⁸ unicef.org.au/about-us/media/december-2019/despite-significant-increase-in-birth-registration.

¹⁹ theconversation.com/a-birth-certificate-is-a-human-right-why-arent-they-free-and-easier-to-get-146834.

²⁰ Registering life events: Registration and access Review of the **Births, Deaths and Marriages Registration Act 2003** (Qld) discussion paper 3 February 2019.

²¹ **Birth, Deaths and Marriages Registration Regulation 2015**, Schedule 3.

²² theconversation.com/a-birth-certificate-is-a-human-right-why-arent-they-free-and-easier-to-get-146834.

²³ Registry of Births, Deaths and Marriages Fee Waiver Policy.

²⁴ For example:

Jobseeker recipients single with no children, receive \$282.85 per week (sans COVID-19

supplement): servicessaustralia.gov.au/individuals/services/centrelink/jobseeker-payment/how-much-you-can-get

13% of Queenslanders live below the poverty line: qcross.org.au/more-queenslanders-are-living-in-poverty-new-report-finds/.

²⁵ theconversation.com/a-birth-certificate-is-a-human-right-why-arent-they-free-and-easier-to-get-146834.