Australia Wills Estates Monthly Summaries November 2017 No 30

Proprietary estoppel unbound by limitation

McNab v Graham [2017] VSCA 352. Tate JA, Santamaria JA and Keogh AJA agreeing. 30.11.17.

The Court of Appeal rejected the executors' appeal against County Court Judge Smith holding the respondents entitled by constructive trust to the whole interest in residential realty at Moonee Ponds, inner Melbourne, where they had resided since 1974.

Mr and Mrs Graham moved to the house to render care to the testator and his wife, who lived in the house next door and owned both.

The testator's wife died in 1980 and the testator died late 1997. His will provided Mr and Mrs Graham a conditional life interest, then over to the Freemasons Hospital in East Melbourne, now the Epworth Hospital.

The executors challenged the trial finding of proprietary estoppel and re-agitated limitations imposed by Limitation of Actions Act 1958 (Vic).

To **proprietary estoppel**, in her leading judgment, Tate JA assayed authorities including *Sidhu v Van Dyke* [2014] HCA 19; 251 CLR 505, drawing on *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101.

"In my view, the McNabs' reliance on *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189 is misplaced. An immediate and obvious difference between the circumstances of *Williams* and those here is that *Williams* was concerned with a stranger to an express trust who is party to a fraudulent breach of that trust and not with an interest acquired in accordance with the principles of proprietary estoppel. The **critical distinction** the Court drew in *Williams* is between those who have voluntarily assumed the responsibilities of a trustee, either expressly or in a de facto way, who fall within the orthodox meaning of a 'trustee', and those who are liable to account in equity as a 'constructive trustee' because they are a dishonest assister in a breach of trust or a knowing recipient of trust assets. A proceeding brought against the latter, but not the former, is subject to a limitation period," Tate JA said [95].

At [97] "The circumstances that establish proprietary estoppel are different; they depend upon the legal owner of an interest in property

Ranges west of Guthega, September 2017 - Picture by Mrs Sharni Monaghan

Christmas & New Year

The publisher & editor wish you and your family a joyful Christmas and a peaceful, prosperous 2018. Thank you for your reading.

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making a promise, or assurance, of a proprietary interest upon which the promisee relies to his or her detriment. What lies **at the heart of the estoppel** is the encouragement of an acquisition of an interest in property: *Donis v Donis* [2007] VSCA 89; (2007) 19 VR 577, 582 [19]. This critical difference renders the judgment in *Williams* distinguishable. It is a difference recognised by the High Court in *Giumelli*," her Honour said.

In [101], "I reject the view that the constructive trust declared by the judge here has the character of a purely remedial constructive trust criticised in *Nolan v Nolan* [2004] VSCA 109. This is because the judge found that there was a proper foundation for proprietary estoppel in the circumstances of the case; the relief granted was not an exercise of equity's remedial jurisdiction in respect of an ancillary liability. The interest of the Grahams created by the estoppel is '**an interest in the land itself**': *Hamilton v Geraghty* (1901) 1 SR NSW 81, 89; in the circumstances, the constructive trust protected that interest.

"Furthermore, I reject the view that the constructive trust declared had no independent existence apart from the order of the Court and that it came into existence when it was imposed by the Court after the commencement of the proceeding. There is considerable authority for the proposition that, where detrimental reliance upon a promise gives rise to a constructive trust, in the context of an estoppel, the **constructive trust comes into existence before a court makes any order**. It comes into existence at the time of the conduct which gives rise to the trust. As Ward J said in *Varma v Varma* [2010] NSWSC 786, 6 ASTLR 152, 259 [507]: 'As a matter of general principle, it seems to be the accepted position under Australian and English law that a constructive trust will be treated as coming into existence at the time of the conduct which gives rise to the trust'," Tate JA said [102].

In [109] "As is apparent from *Hamilton v Geraghty* and *Giumelli*, discussed above, the **equitable interest in land created by an estoppel is not dependent upon a prior court order**. It is not a matter of a court engaging in 'backdating' the trust arbitrarily, or, as the McNabs would have it, to defeat a limitations period; it is a matter of the court declaring, as with all applications of the maxim nunc pro tunc, the appropriate date on which that which ought to have been done is to be regarded as having been done. Once so declared, the effect of the maxim is that it was done at that time. There is no room for a further inquiry as to whether the constructive trust 'really existed' at a time before the order is made," Tate JA said then quoting Deane J in *Muschinski v Dodds* [1985] HCA 78, 160 CLR 583 614 [7]: constructive trust subsists curial declaration.

"... equitable interest in land by estoppel is not dependent upon a prior court order"

At [132] The appellants "... submit that the Freemasons/Epworth Hospital had already obtained an interest as residuary beneficiary under the Will before the proceeding commenced and that the imposition of a constructive trust over the property was in effect harshly inequitable to that interest.

"In my view, this submission must be rejected. The interest of the Freemasons/ Epworth Hospital arose because it was a beneficiary under the Will. It was a volunteer with no other claim: *Delaforce v Simpson* [2010] NSWCA 84; 78 NSWLR 483, 497 [93] (Handley AJA) [168] and equity does not assist a volunteer: *Milroy v Lord* [1862] EngR 951; 45 ER 1185. That being so, it could have no greater interest than that held by Mr Turner at the date of his death: *In re Diplock* [1948] 1 Ch 465, 539, *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102, 130, 132-3 (Lord Millett, with whom Lord Browne-Wilkinson and Lord Hoffmann agreed). As discussed, **the property was impressed with a constructive trust from the time** when there was reliance upon the promise which rendered it unconscionable for Mr Turner to resile from the representation. On any account, this occurred before the commencement of the proceeding, either before Mr Turner's death or at the time of his death. Any interest the Freemasons/Epworth Hospital gained under the Will is subject to the constructive trust over the property in favour of the Grahams. Given the status of the Freemasons/Epworth Hospital as a volunteer, there was no need for the judge to consider the effect of his

determination upon the hospital before making the orders he did," Tate JA said [133].

Ultimately, "In my view, for the purposes of the Act, the meaning of 'constructive trust' under s 3 of the Trustee Act 1958 (Vic) extends to a constructive trust that arises in accordance with the principles of proprietary estoppel. I consider that there is no error in the judge's determination that, at the time the proceeding was commenced, it was a proceeding 'to recover ... trust property' within the meaning of s 21(1)(b) of the [Limitation of Actions] Act and thus that no limitation period applied. I would dismiss the appeal," her Honour said [139]. Santamaria JA and Keogh AJA agreed.

A: Ms WA Harris QC, Mr R Moore ins McNab McNab & Starke. R: Messrs MF Wheelahan QC, M C McKenzie, J McComish ins Constable Connor & Co Pty Ltd.

Amateur trust fails

Re Lauer; Corby & Anor v Lyttleton [2017] VSC 728. McMillan J. 30.11.17.

McMillan J declared failed a trust referred to in the will.

Executors of the $1/4m estate sought administration advice, the will of the late Ms Elizabeth Lauer, who died without issue at age 88 in May 2011, devising the residue to "... the Trustee for the time being of the Elizabeth Lauer Family Trust for the Trustees to apply as capital contribution to the Trust".

The defendant, Mr George Nagy, was a long time friend of the deceased and had averred he was such trustee, having amateurishly drawn a deed of trust from another instrument in about 2002, which had been signed by the testatrix and witnessed by other people who had died before being contacted about the proceedings.

Mr Nagy had thereafter operated bank accounts as trustee, about which accounts there had been transactions in the tens of thousands of dollars before closure in mid 2008.

The testatrix had become demented. VCAT had ordered conditions to Mr Nagy's prior appointment as the lady's attorney by power.

After the proceedings had commenced, Mr Nagy suffered stroke, causing him aphasia, the Court appointing Port Melbourne practitioner Ms Suzanne Lyttleton his litigation guardian until he died, thereafter his family unresponsive to correspondence, by r 16.03(1)(b) her Honour appointing Ms Lyttleton to represent Mr Nagy's estate's interest in the absence of a legal personal representative.

Several similar but differing versions of the trust deed were produced to the Court.

At [87] "The issues and evidence before the Court require consideration of whether a trust by the name of the 'Elizabeth Lauer Family Trust' was created and possibly terminated," McMillan J said.

Her Honour considered trust fundamentals, citing *Korda v Australian Executor Trustees* (SA) [2015] HCA 6; (2015) 255 CLR 62, 70 [5] (French CJ), the text Principles of the Law of Trusts (H A J Ford and W A Lee, Thomson Reuters) at [1.010], then exposing further incidents [88]-[101].

"Ultimately, on the evidence of the funds in the Trust Account alone, albeit funds realised from the sale of the Eastbourne Road property, the Court cannot conclude that the funds were transferred by the deceased to be held on trust on the terms of the defendant's version of the deed. To draw such inferences would be verging upon speculation, which, as touched on by Gummow and Hayne JJ in *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253, 273–4 [54]–[56] is particularly inappropriate when potentially creating property rights enforceable against third parties," McMillan J said [112].

"As such, the answer to the first question is 'yes'; that is, a trust by the name of the Elizabeth Lauer Family Trust **failed to come into existence**," [113].

Later, "As the 'Elizabeth Lauer Family Trust' failed to come into existence, there was no trustee to take at the time of her death. Consequently, the gift in residue lapses and there is a partial intestacy: *Re Pugh's Will Trusts* [1967] 3 All ER 337. In the present circumstances, the residue of the estate ought to be distributed to Klaus Alfred Lauer," her Honour said [125].

And in [129] "While this outcome is inconsistent with the deceased's intentions as expressed in her will and as such, is not entirely satisfactory, the conclusions of the Court are drawn upon significantly limited evidence. These circumstances serve as a reminder that the **need for contemporaneous objective evidence** cannot be overstated on the issue of the creation of a trust," McMillan J said.

P: Ms E Coates ins Roberts Beckwith Partners. D: Mr P Pascoe ins Suzanne M Lyttleton.

Literary executor appointment

The Estate of Nicholas Paul Enright [2017] NSWSC 1646. Rein J. 29.11.17.

On consent separate questions, Rein J affirmed author and plaintiff Mr David Marr was appointed an executor under the will of Mr Enright, a well-known Australian playwright who died in March 2003, probate granted later that year, valued at $2.1m, including literary estate $325,698.

The defendant, Mr Ian Enright, was the continuing executor, the grant subject to the condition "...save and except the property of which David Marr is the literary executor".

Will clause 7.3: "I APPOINT DAVID MARR of 122 Denison Street, Camperdown in the State of New South Wales as my LITERARY EXECUTOR".

The will directed estate royalties income two thirds to the National Institute of Dramatic Art and one third to the Actors' Benevolent Fund.

"The main contest between the parties revolves around the following point: was the Testator's appointment of the Plaintiff as his 'Literary Executor' effective to make him an Executor for the purpose of s 41 [Probate to one or more executors, reserving leave to others to prove subsequently] of the Probate and Administration Act 1898 (NSW)," Rein J noted in [18], detailing the provision.

His Honour went to will construction authorities, *Fell v Fell* [1922] HCA 55; (1922) 31 CLR 268, 273-276, Isaacs J: 10 incontestable propositions; and noted references on *Perpetual v Wright* (1987) 9 NSWLR 18, 33; *Muir v Winn* [2009] NSWSC 857 at [3], [4], [23] and [24]; *Coorey v Coorey* (22/02/1986 NSWSC Unreported); *Re Estate Polykarpou* [2016] NSWSC 409; and *Carroll v Perpetual Trustee Co Ltd* [1916] HCA 78; (1916) 22 CLR 423, p 433 per Isaacs J and Rich J; in *Polykarpou*, at [64], Lindsay J iterating construction principles.

To **literary executor** construction, Rein J [25]+ considered *In re Orwell's Will Trusts, Dixon & ors ats Blair* [1982] 1 WLR 1337: whether literary executor entitled to charge; *Woodhouse v Cohen* (1950) 198 Misc, 1000, 101 NYS 2d 675 (Eder J): will may appoint literary executor, but here not appointed; *Sharp v A-G (NSW)* [2015] NSWSC 1580, Stevenson J: literary executor in will but charity in point; *In the Estate of Holland* [1936] 3 ALL ER 13: number of executors limited by statute.

His Honour quoted [29]+ from Lindsay J's paper The Literary Executor and the Lighthouse, Society of Trust & Estate Practitioners NSW Branch, 16.11.16, including:

[**Lindsay J**] "The general rule is that effect is given to the expressed intention of a testator; if an executor is appointed for portion only of an estate, the probate granted to him will be limited to that portion: *Re Wills of Mary Clark* [1903] NSWStRp 83; (1903) 4 SR (NSW) 248 at 250".

Rein J: "I have referred to the fact that whilst the Will appoints the Plaintiff as Literary Executor, it does not appoint him as Trustee. This difference is one of the arguments to which the Defendant refers on construction of the Will. It led me to enquire of the parties what would be the position if, as the Plaintiff contends, he is the Executor of the Literary Estate, since the Will expressly contemplates that the literary works will not be sold and the Testator must have envisaged that there would be ongoing management of the literary works. **Copyright subsists** for a period of 70 years from the death of an artist or writer: see s 33 of the Copyright Act 1968 (Cth)," [35].

Then his Honour detailed [37] propositions advanced by Mr Lancaster SC for the plaintiff in additional submissions, particularly:

"(1) An executor who has performed all of his or her executorial functions in respect of ascertained property may become a trustee of that property merely by continuing to hold the property after those duties have been performed: see *Pagels v MacDonald* [1936] HCA 15; (1936) 54 CLR 519 at 526.

(2) After the executorial functions are over the **executor becomes a constructive trustee**: see *McCaughey v Commissioner of Stamp Duties* [1945] NSWStRp 25; (1945) 46 SR (NSW) 192 at 209 (Jordan CJ, Halse Rogers and Roper JJ) and see *Re Rogowski (decd); Estate of Biesiada* (2007) 248 LSJS 274 at [22] per Gray J.

(3) Beneficiaries only have **beneficial interest in specific property** once the estate has been administered: see *Official Receiver in Bankruptcy v Schultz* [1990] HCA 45; (1990) 170 CLR 306 pp 312-314 and *Commissioner of Stamp Duties (Queensland) v Livingston* [1964] UKPC 2; [1965] AC 694.

(4) An executor could, pursuant to s 11 of the Trustee Act 1925 (NSW), **declare** that he or

she has ceased to hold the property as executor and will thereafter hold it as trustee. Section 11 is not limited to executors who are expressly named as trustees. Mr Lancaster refers to *Official Trustee in Bankruptcy v Robin Ann Jones* [2003] NSWSC 343 at [9]-[10] in which Gzell J held that s 11 was permissive and not a prerequisite for an executor to become a trustee.

(5) Alternatively, he submitted, the executor can apply for directions relying on s 63 of the Trustee Act, which provides by s 63(1)" [a judicial advice faculty].

His Honour: "Whilst I accept that an executor can become a trustee even if the will does not expressly provide for this to occur, it seems to me that the absence of an express appointment of the Plaintiff as a Trustee is, on the issue of construction, a matter that supports the Defendant's contention that the Testator did not intend to appoint the Plaintiff as his Executor and Trustee to administer the Literary Estate. I take it into account, but I do not think it is decisive," [39].

"In my view the Will, taken as a whole, reflects a scheme by which relevantly:

(1) The literary property was to be treated as quite distinct from all other property in the Estate.

(2) The literary property, according to the Testator's wishes, was not to be sold, but the royalties, or other earnings from the literary property, were to provide the outcome to be distributed to the beneficiaries NIDA and ABF (in the specified proportions).

(3) The literary property was to be controlled or managed by the Literary Executor ie the Plaintiff."

Only the third proposition was controversial, in [41] Rein J supporting his determination by reference to the will separating literary property from other, and:

"(2) The phrase '**Literary Executor**' either means executor of the Literary Estate or something else. The few cases of wills in which the phrase has been used and the Oxford English Dictionary cited in the Lighthouse Paper suggest different possible meanings or functions of the person appointed as a literary executor ie

(a) The person who is "entrusted with a dead writer's papers, copyrighted and unpublished works" (see [26] of the Lighthouse Paper citing the Oxford English Dictionary) who will bring together all of the writings of the deceased whether published of not and, in respect of the latter, who will decide what should be destroyed and what should be the subject of an attempt to publish;

(b) The person who will manage the literary works – giving instructions to a literary agent if there is one, liaising with publishers, licensing and/or selling copyright works if the testator has not expressed a wish against sale;

(c) The person who will deal commercially with the literary works and manage the income and distribution by sale, assignment or licensing of the literary property or income from the literary work that has been sold;

(d) All of the above".

"... a grant of probate in respect of the copyright and intellectual property"

His Honour: "There was no need to appoint the Plaintiff as 'Literary Executor' if his only role was limited to a consultative one. I draw from the appointment of the Plaintiff as the ' Literary Executor' that the Testator had in mind a larger scope for the Plaintiff than the merely consultative role".

An executor's appointment could be limited to class of property.

The will executors and trustees appointment provision was expressed subject to clause 7.

The will trustee powers were expressed subject to specific provisions, and did not instance copyright or licensing.

"Clause 7.6 provides for the Literary Executor to be remunerated for his reasonable cost and expenses as Literary Executor. That suggests that the Testator thought there would be costs of the Literary Executor ..." yet in [41].

At [42] "It follows that the Testator intended to appoint the Plaintiff as Executor of the Testator's Literary Estate, ie the copyright and intellectual property in the Testator's works, thus permitting a grant of Probate to be made to the Plaintiff in respect of that property, pursuant to s 41 of the PAA. It follows also that the answer to questions 1 and 2 are 'yes' and the matter should proceed to a hearing. Question 3 [if not literary executor] does not arise," Rein J said. Costs for submissions.

P: R L Lancaster SC ins Arnold Bloch Leibler. D: J Needham SC ins Holman Webb Lawyers.

Nephew fails appeal

Yee v Yee [2017] NSWCA 305. McColl JA, Gleeson & Simpson JJA agreeing. 28.11.17.

The Justices dismissed, with costs, appeal against Slattery J - [2016] NSWSC 360, 1.4.16 - refusing a nephew's claim for family provision.

In her leading reasons, McColl JA extensively surveyed the evidence and first instance holdings.

"In my opinion, when one has regard to all the circumstances of the case (s 59(1)(b)), the primary judge did not err in concluding William was not in [testator] Norman's 'inner circle' or in any 'middle class' such as he sought to identify. In reaching that conclusion, his Honour considered all circumstances such as were relevant to William's claim. Rather, as the respondents submitted, the overall picture of William and Norman's relationship was that of people who had an incidental family relationship," McColl JA said [174].

"The matters which rendered William an eligible applicant by virtue of s 57(1)(e) (dependency while a youth and membership of Norman's household) had ceased, in my view, to have any **real significance over the period of their relationship as a whole**. The question had to be determined as a matter of substance and not, in my view, as William sought to do by invoking labels such as that he should have been regarded as Norman's foster child. In any event, in my view, seeking to invoke that descriptor in the circumstances is inapt. A foster child is a child raised by someone who is not his or her natural or adoptive parent. While I have no doubt that loving relations exist in foster families, such a relationship carries no necessary connotation such as William seeks to establish that the foster child is one who might be expected to be a natural testamentary object of the foster parents," her Honour said [175].

"In this case the tenor of the relationship such as it was which developed in the period William lived in Norman's home was reflected in their engagement after that period. Their encounters after William left the home were infrequent and almost always in a family context, rather than in a context signifying a desire on either man's part for personal communication," [176].

"Whether or not William may once have regarded Norman as a father figure, (and even that is not, in my view, clearly established) that emotion had clearly dissipated to the extent that he made no attempt to see Norman while he was dying. This was **telling evidence** which sounded loud against the proposition that William was a person who Norman should regard as a natural object of testamentary recognition. The fact that William lied about trying to contact Norman during that period indicated a consciousness on his part that the truth in that respect would not have assisted his case: *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [60] per Meagher JA (Basten and Campbell JJA agreeing). As the primary judge found, William's behaviour during this period was hardly consistent with a person who had a close relationship with Norman," [177].

"In my opinion, William has not established that the primary judge erred in a *House v R* sense in concluding that William had not established there were factors warranting his application," [178].

With tconcurrence of McColl & Simpson JJA, Gleeson JA remarked obiter to questions of **notional estate**.

Gleeson JA: " If a notional estate order is proposed to be sought under s 80 [Notional estate order may be made where estate affected by relevant property transaction] of the Succession Act 2006 (NSW) with respect to property to be designated as notional estate, it is **usual to join the legal owners of the notional estate** as defendants, in addition to the joinder of the representative of the deceased's estate. As Handley JA remarked in *Smith v Dayman* [1994] NSWCA 286, '[a] court could not ordinarily make orders designating property as notional estate without the owners being parties to the proceedings'," [196]

"The statement by Handley JA in *Smith v Dayman* accords with the governing principle upheld by the High Court in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 at [131]: '..... that where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined'. See also *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870; (1996) 64 FCR 410 where the Full Federal Court stated, at 524-525: 'Where the orders sought establish or recognise a proprietary or security

interest in land ... all persons who have or claim an interest in the subject matter are **necessary parties**. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest',” Gleeson JA said [197].

Later, “Although s 92(2) speaks in terms of 'a person', rather than 'a party', the subject matter of s 92(2) is directed to whether a substitution order with respect to the property designated, or proposed to be designated as notional estate, is appropriate. The provision directs attention to whether the **substitution of replacement property** offered by the person affected by the notional estate order or proposed order, is appropriate. The provision does not reveal an intention that notional estate orders can be made against non-parties, let alone that such an order can be made without giving the affected person the opportunity to be heard in the first instance in opposition to the making of such an order. Section 92(2) is not concerned with the identity of the proper or necessary parties to family provision proceedings,” his Honour said [209].

Appeal dismissed with costs.

A: M Thompson ins Gerard Malouf and Partners. R: AD Crossland ins Low Doherty & Stratford.

Cattle not plant

Graham v Klenk [2017] WASC 342. Master Sanderson. 24.11.17.

Will construction pursuant to Administration 1903 (WA) s 45 [Court may settle all questions arising in administration], the learned Master holding a gift of land “including all plant and machinery thereon” but not the farming business nor cattle.

Master Sanderson described the estate of the late Gerhard Anton Frey, probate of whose will was granted September 2014, as substantial, including the farm in question at East Munglinup, on the West Australian south coast south east of Ravensthorpe, valued at $1.5m, cash at bank $1.5m, shares $430,000 and 512 Murray Grey Cross cattle valued at about $236,000, as well as property in Germany.

In [8], “...the fact remains the deceased was running a cattle farm. Yet he made no mention of the cattle or the farming business in his will,” the Master said.

“In my view the proper construction of the will was clear. The gift to the first defendant is the gift of the farmland and the 'plant and machinery'. There is no warrant for extending that to the farming business as a whole. To do so would extend the words used beyond their **plain and natural meaning**. In fact it is somewhat difficult to find a definition of the phrase 'plant and machinery'. But given its natural meaning it would not include livestock. Cattle are neither plant nor are they machinery. Furthermore, there is nothing to suggest the plaintiff intended to give the first defendant a 'working farm'. Once again if that had been the deceased's intention it would have been easy enough to include words to that effect in the relevant clause. That was not done and the words should be given their plain and obvious meaning,” [9].

“As to the money found on farm, that too in my view falls into the residuary estate. It cannot fall within the definition of plant and equipment,” Master Sanderson said [10].

Costs from the estate.

P: Ms WF Gillan ins EW Gray Lawyers. D: Mr AP Rumsley ins Western Legal.

Worker's estate gains permanent loss money

Hunter Quarries Pty Ltd v Alexandria Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587. Schmidt J. 22.11.17.

Schmidt J refused the application for judicial review brought by the workers compensation insurer fund agent of the plaintiff to overturn a finding by a NSW Workers Compensation Commission Medical Appeal Panel that the late Mr Messenger, as well as being entitled to statutory benefit more than $500,000 for work injury causing death by virtue of Workers Compensation Act 1987 (NSW) s 25 [Death of worker leaving dependants], was also entitled to $220,000 compensation on 100% whole person impairment under the Act s 66 [Entitlement to compensation for permanent impairment].

The insurer fund agent and the Authority were urging a construction requiring hypothesising additional words into the statute to forbid the worker's estate recovering the s 66 money in addition to the death benefit.

Schmidt J granted leave to the State Insurance Regulatory Authority, the ultimate funds holder for the unfortunately failing NSW Government workers compensation scheme, as

"... The medical specialist clearly erred in concluding he had suffered 0%"

amicus curiae, her Honour noting *Carson v Legal Services Commissioner & Anor* [2000] NSWCA 308, [289] and *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309, and holding "... satisfied that the authority's appearance as amicus would assist the court", in [16].

To the s 66 term "permanent impairment" in [24] Schmidt J said: "When a worker suffers an injury which causes an impairment so serious that her or she cannot recover from it, even with treatment, there is 'permanent impairment'."

Her Honour noted authorities to the complex of prior versions of s 66 of the 1987 Act, and noted too the Workplace Injury Management and Workers Compensation Act 1998 (NSW).

This legislative morass, apart from the two Acts, each with complex gazetted regulations, and rules, also includes Permanent Impairment Guidelines, from the Authority, as well as the American Medical Association Guides to the Evaluation of Permanent Impairment Fifth Edition, published in November 2000, and indeed, further official references, which are frequently amended.

Schmidt J: "That the Guidelines also make no reference to death as a consideration in assessing the degree of impairment which a worker has suffered, is also relevant to the conclusion that permanent impairment resulting in later death is not excluded from compensation. Nor, it would appear, does AMA 5, to which the Guidelines variously refer, although AMA 5 was not in evidence," [86].

Later, referring to the single medical assessor, Dr Phillipa Harvey-Sutto, finding antecedent referral to the appeal panel, "The medical specialist found that the crush injuries to Mr Messenger's chest had impaired his ability to breathe, but were not so severe that they killed him instantly. His heart continued to beat, but his death was likely to have followed within minutes, during which he was likely to have been unconscious. His spinal injuries alone would not have been fatal," Schmidt J said [110].

"In other cases such spinal and crush injuries may be instantly fatal. In others, they may inevitably be fatal, but death may not be quick, especially if help is to hand. In some cases such help may save the injured worker's life. With continuing medical advances it is likely that prospects of survival of even very serious impairment, for at least a period, may be considerable and over time, prospects of survival may increase," her Honour said [111].

"As I have explained, the term 'permanent impairment', as it is used in this statutory scheme, is not concerned with any of these possibilities, but rather with the question of whether the injury has resulted in permanent, rather than temporary impairment. It is only if a worker has not survived the injury, so that no impairment has been suffered, that the question of whether there has been 'permanent impairment' does not arise," [112].

"It follows that the Appeal Panel was correct to conclude that the permanent impairment which had resulted from Mr Messenger's injuries did entitle him to compensation under s 66, that entitlement arising under s 9 [Liability of employers for injuries received by workers - general], when he suffered the injuries caused by the accident," [113].

"The medical specialist clearly erred in concluding, as she finally did, that he had suffered a 0% degree of permanent impairment. Mr Messenger's impairment was permanent, there being no suggestion that he could recover from it. The assessment that its degree was 100% reflected that it had later resulted in his death. It follows that there was no error in the Appeal Panel's conclusion that the medical specialist had erred," [114].

Again later, "The medical specialist also erred in concluding as she did on reassessment, that Mr Messenger had suffered no permanent impairment. As the Appeal Panel found, the evidence established that when he was injured, Mr Messenger suffered a permanent impairment which gave rise to an entitlement to compensation under ss 9 and 66 of the 1987 Act, even though his death followed shortly afterwards. It was his death which then gave rise to his dependants' separate entitlement to compensation," Schmidt J said [124].

Proceeding dismissed with costs.

P: Ms SE Pritchard SC, Mr BK Lim ins Hicksons. Estate: Mr M Robinson SC, Mr C Tanner ins Caroll & O'Dea. Amicus (SIRA): Ms A Rao.

Half uncle huffs nephew executor ...

Molnar v Butas (No 3) [2017] VSC 711. McMillan J. 22.11.17.

McMillan J refused this application to remove an executor. Mrs Rozalia Wright died September 2015 at age 78, her $850,000 estate comprising principally house and land at Bundoora, a north Melbourne suburb, and cash, the will appointing her son the defendant executor and bequeathing the estate to him, his wife and the plaintiff, a half brother of the testatrix, in equal shares as tenants in common. As well as this application, heard concurrently was the plaintiff's application to amend his constructive trust suit over the realty: please see summary following.

McMillan J: "A court may remove an executor at its discretion pursuant to s 34 [Discharge or removal of executor or administrator] of the Administration and Probate Act 1958 (Vic). Under s 34, the grounds for removal in a contested application are that an executor has been absent from Victoria for two years or refuses to act or is unfit to act. On any removal application, the Court should have regard to a testator's wishes as to the identity of an executor or trustee," [21].

Her Honour quoted Habersberger J in *Manocchio v Wilson* [2012] VSC 76 [38]: conflict likely to endanger administration sufficient ground.

At [24], McMillan J: "The authorities demonstrate that an executor or trustee will not necessarily be removed where there is a conflict between duty and interest, but in some cases it may be sufficient. Proof of **actual misconduct is not required** for the removal of a trustee. Examples of cases where executors or trustees have **not been removed** when in a position of conflict between duty and interest can be seen in *McKenna v Lowe* (1878) 1 SCR (NSW) Eq 10 and *Porteous v Rinehart* (1998) 19 WAR 495.

"Examples of cases where a trustee **has been removed** when in a position of conflict between duty and interest are *Passingham v Sherborn* (1846) 9 Beav 424; 50 ER 407, *Hunter v Hunter* [1938] NZLR 520, *Titterton v Oates* (1998) 143 FLR 467, *Hill v Fry* [2008] VSC 13 and *Hobkirk v Ritchie* (1934) 29 Tas LR 14. These examples demonstrate that each case depends on the facts and it is a matter of what is best for the welfare of the trust or estate as a whole."

Then, "As the executor of the estate, the defendant should administer the estate in accordance with the deceased's wishes as contained in her will. **In retaining solicitors to advise him** in relation to the plaintiff's claims against the estate, the defendant has acted prudently and reasonably. The defendant had every reason to defend the claim. The plaintiff's claim as pleaded was the subject of an application for summary dismissal by the defendant. If that application had been heard, it would have succeeded," her Honour said in [28]. See summary following.

"After the deceased's death, the defendant made arrangements to sell the Bundoora property. It was placed on the market for sale by public auction. In June 2016, the plaintiff lodged a caveat over the Bundoora property. In August 2016, he commenced the trust proceeding. The consequences of the plaintiff's actions were that the proposed auction was postponed, then when the proceeding became prolonged, it was cancelled. While the trust proceeding remains on foot the plaintiff's caveat cannot be removed and until the trust proceeding is resolved by agreement or court order, the Bundoora property cannot be sold. A further consequence of the cancellation of the auction is that the estate incurred approximately $6,000 in fees," [29].

Then, "The plaintiff's allegation that the defendant has failed to pay an interim distribution of $64,723.17 is misconceived. The interim distribution was sent to the plaintiff before the plaintiff lodged a caveat on the title to the Bundoora property and before the trust proceeding was issued against the estate. The plaintiff did not present the cheque at the bank until six months later. It is reasonable that the defendant's then solicitors stopped the cheque on 27 October 2017 when it had not been banked and in refusing to reissue the cheque when they no longer acted for the estate and did not have instructions from the defendant's new solicitors to do so," McMillan J said [32].

"The grounds relied upon by the plaintiff for the removal of the defendant as the executor of the estate are **contrived** and without substance. There is no proper basis for the removal of the defendant. Accordingly, the plaintiff's application is dismissed," [35].

Costs for submissions.

P: Mr M S Goldblatt ins Ian G Hone. D: Ms U Stanisich ins Griffin Law Firm.

... & attracts indemnity costs order

Molnar v Butas (No 2) [2017] VSC 710. McMillan J. 22.11.17.

McMillan J: "After 14 months, the plaintiff now seeks to amend his constructive trust claim. The plaintiff's proposed amendment substantially alters the factual basis of the plaintiff's claim and is, in essence, a new claim. This only occurred as a result of the defendant determining that the plaintiff's pleaded case had no prospect of success, after an arduous discovery process by the defendant. The plaintiff has **not provided any realistic explanation for his delay** in seeking to amend his claim. The explanation is found in the defendant's summary judgment application. This was the catalyst for the plaintiff's substantial and material change to his claim," [17].

"The authorities provide that justice is the paramount consideration on an amendment application. The Court must consider the extent to which the interests of justice require that a party should be allowed to have a judicial determination on the merits of his or her claim. If the amendment were not allowed, the plaintiff would be deprived of a determination of the merits of his claim. In allowing the proposed amendments, the defendant has a somewhat a clearer understanding of the case against him and time to prepare his defence," [18].

"As set out above, the procedural history of this proceeding to date has been unsatisfactory, with significant delays caused by the plaintiff and his advisers. In addition to the history set out, some months after the plaintiff issued his proceeding, his then solicitors, Erhardt & Associates, filed a summons on 27 October 2016 seeking to restrain the defendant's then solicitors from acting for the defendant on the basis of alleged conflict of interest. To avoid unnecessary costs being incurred, the defendant instructed his solicitors to cease acting for him. The Court found the application to restrain the defendant's former solicitors should not have been made and dismissed the plaintiff's application for costs," [19].

"With the proposed amendments, the interlocutory steps in the proceeding must re-commence for the new claim. The defendant is prejudiced by the amendment as he has incurred significant costs in defending the claim to date, including the application to amend the claim. These costs are wasted costs as they were incurred in defending a claim that has now been abandoned," [20].

"The defendant is the executor of the estate of the deceased. An executor or trustee is entitled as of right to indemnity out of the trust for expenses properly incurred, that is, all costs except to the extent that they are of an unreasonable amount or have been unreasonably incurred. The defendant has acted reasonably and prudently in conducting the defence of the proceeding and is **entitled to his costs on an indemnity basis**. In the absence of a realistic explanation from the plaintiff about the delay in applying for leave to amend his claim the plaintiff should pay the defendant's costs personally," [21].

Leave to amend, "The plaintiff personally pay the defendant's costs of and incidental to the proceeding to date, including the hearing of the plaintiff's application to amend his claim, on an indemnity basis, to be taxed in default of agreement", "The plaintiff bear his own costs without indemnity from the estate of the deceased".

P: Mr M S Goldblatt ins Ian G Hone. D: Ms U Stanisich ins Griffin Law Firm.

Rectification reduces brother's legacy

The Estate of Stephen Michael Tester [2017] NTSC 83. Hiley J. 21.11.17.

Hiley J allowed the estate's application by Wills Act 2000 (NT) s 27 [Court may rectify will] to correct a clerical error in the will to alter a legacy to a brother of the deceased from $25,000 to $1,000.

"The Application was accompanied by documents that usually accompany applications for probate, and two affidavits in support of correction to the Will, one by the solicitor who prepared the Will, Ronald Edwin Lawford, the other by the applicant, Irene Lorraine Bruninghausen, who was appointed executor under the Will. The Registrar has referred the Application to the Court. The applicant has subsequently provided the Court with written submissions, amended affidavits in support of correction to the Will, and a copy of email exchanges between Mr Lawford and [the legatee brother] Mr Tom Tester (the emails)," Hiley J noted [2].

The testator had prepared an informal

document, given that to the eventual executrix, who was a former practitioner, and who provided it to Mr Lawford who had the formal document drawn and presented to the testator in hospital in late April 2017.

"Mr Lawford says that he drafted the Will under extreme pressure of time, believing that Mr Stephen Tester was likely to be further medicated that afternoon and be left semiconscious at best. He drove to Royal Darwin Hospital and arrived there at about 2.45pm. He interviewed Mr Tester and concluded that he had testamentary capacity. Mr Tester appeared to just skim through the draft will over a period of ten seconds, made the one correction and then signed both of the two copies provided to him. The correction was in relation to one of the 14 individual gifts, replacing the words "My Brother Nick" with the words "My sister Nicola". After both copies were signed and witnessed, Mr Lawford handed one copy to Mr Tester, which he immediately handed to Ms Bruninghausen. Mr Lawford asked Mr Tester whether he wished to have a copy of the will left with him and, in response, he shook his head," Hiley J said [9].

The testator died on 5 July 2017. The executrix noted the apparent error that night.

"On 19 July 2017 Mr Lawford sent an email to Mr Tom Tester advising him that he had made an error when preparing the formal will and requesting him to accept the $1000 instead of $25,000 and agree to the Will being corrected accordingly. This would avoid the additional expense and necessity of a formal application to the Court. After Mr Lawford had sent two more emails, Mr Tom Tester replied, on 11 September, that he had spoken to his father and 'he is not overly happy that the will is to be edited and changed as Steve was alive for 10 weeks after the date the will was signed and thinks the current official will should stand'," [15]. His Honour noted similarity between the NT Act s 27(1) and the Administration of Justice Act 1982 (UK) s 20 each rectification on clerical error, etc.

To clerical error, Hiley J noted *Wordingham v Royal Exchange Trust* [1992] 3 All ER 204 at 210 (Evans-Lombe QC J):

[**Evans-Lombe J**]: "... an error made in the process of recording the intended words of the testator in the drafting or transcription of the will. That meaning is to be contrasted with an error made in carrying his intentions into effect by the drafter's choice of words and with a mistaken choice of words because of a failure to understand the testator's instructions, a circumstance covered by sub-s (l)(b)".

Hiley J noted authorities including *Rawack v Spicer* [2002] NSWSC 849 (Campbell J)at [26]: "What one must look for is an error which has occurred in the transcription of the will", and [27] "It is the intention of the testator at the time of making the Will that matters, not the intention at some later time".

"I agree that when the formal will was prepared there was a clerical error and, also, it did not give effect to the testator's instructions. The informal will clearly shows an amount of $1,000 to be gifted to Mr Tom Tester. Mr Lawford, the testator's solicitor, has acknowledged that the relevant entry of $25,000 in the formal will does not accord with his instructions. That is supported by the affidavit evidence of Ms Bruninghausen," [22].

Then, "In addition to the fact that the informal will only allowed for a gift of $1,000 to Tom Tester, there is **other evidence** to the effect that a clerical error was made and that the Will did not give effect to Mr Tester's instructions. There was only a matter of hours between the handing over of the informal will and its transformation into a formal will, making any change of mind much less likely. Secondly, there were differences as between the gifts given to Mr Tester's siblings. While $25,000 was given to each of Sam and Toby, only $3,000 was given to Nicola and $1,000 to Jane. Mr Tester's executrix, Ms Bruninghausen, states that a week or so after signing the Will, Mr Tester told her that of his siblings he had always been closer to Toby and Sam and that is why the amounts that he had left to them were so much greater than the amounts he had left to the others. Thirdly, Ms Bruninghausen also states: 'I am certain that if Steve had intended to make such a substantial change in the amount to be left to Tom Tester he would definitely have talked to me about it and he did not'," Hiley J said [24].

"Accordingly I am satisfied that the Will does not carry out the intentions of the testator because a clerical error was made. I am also satisfied that the Will does not give effect to the testator's instructions to his solicitor. I consider it appropriate to make an order rectifying the Will," his Honour said [25].

Rectification ordered, and grant referred to Registrar.

A: N Aughterson.

Requiring solemn form without costs risk

Chapman v Garrigan [2017] WASC 336. Master Sanderson. 21.11.17.

Master Sanderson: "The relevant facts can be shortly summarised. On 30 May 2016 Phyllis Garrigan (the deceased) died leaving property situated in Western Australia. The plaintiff is the executor named in the will of the deceased dated 11 July 1989. The first defendant is an adult son of the deceased and is not named as a beneficiary in the will. The second, third, fourth and fifth defendants are adult children of the deceased and are named as beneficiaries in the will. On 3 August 2016 the first defendant lodged a caveat against a grant of probate of the deceased's estate. Relevantly that caveat alleged the will to be invalid on the grounds the deceased 'did not have capacity and/or was subject to undue influence or that the will was made in suspicious circumstances ...'," [2].

The first defendant deposed to conversations with the deceased in which she had told him he would inherit her entire estate, so was surprised when informed he was not a beneficiary.

Master Sanderson noted Administration Act 1903 (WA) s 63 [Caveat] and detailed Noncontentious Probate Rules 1967 (WA) r 33 [Caveats], and made certain observations about the rule.

"In this case the proper operation of r 33 is important. It was the plaintiff's contention that a caveat should never have been lodged. Rather, it was submitted, some form of action should have been initiated by the first defendant which challenged the will of the deceased. With respect that approach seems to me to be misconceived. A combination of s 63 of the Administration Act and r 33 gives a person in the position of the first defendant a right to lodge a caveat. The first defendant cannot be criticised for taking that step," his Honour said [10].

"In this case there seems to have been some reluctance on the part of the executor named in the will to provide the first defendant with **a copy of the will**. This is an issue which not infrequently causes problems both in relation to probate matters and particularly in relation to Family Provision Act 1972 (WA) matters. There is nothing in the Administration Act which entitles any party to a copy of the deceased's will before probate is granted. That is not the case in Victoria where under s 66A of the Administration and Probate Act 1958 (Vic) a variety of persons are entitled to a copy of the will. As long ago as 1998 the New South Wales Law Reform Commission as part of the project to develop uniformed succession laws for Australia recommended such a provision be adopted nationally. Be that as it may, the position remains in this State there is no statutory requirement for a named executor to provide anyone with a copy of a will prior to a grant. Of course once probate is granted both the grant and the will are public documents and can be inspected under r 43(a)," [11].

"It is also difficult to see that there is some inherent power in the court to order that a copy of a will be provided to an interested party. Under O 73 r 20 of the Rules of the Supreme Court 1971 (WA) a person can be ordered to bring in 'a will or other testamentary paper'. But that rule is only of use once proceedings have been issued. There appears to be no reported case in which a party has sought, let alone obtained, a copy of a will not yet admitted to probate," [12].

"This is one of those areas where **practitioners should exercise common sense**. It is difficult to envisage any circumstance where it would be inappropriate for a party who may have an interest in an estate to be denied a copy of the will.

"Even if a potential beneficiary were to object to that course of action the named executor would be justified in providing a copy of the will upon request. Of course discretion would apply.

"A party who does not have and could not conceivably have any interest in the estate should not have access to the will.

"But otherwise the administration of estates would run more smoothly if access was provided as a rule rather than as an exception to some assumed rule," the Master said [13].

"In this case access to the will had been denied to the first defendant prior to his lodging the caveat. In the circumstances it is not difficult to understand why he should have taken the step of lodging the caveat," [14].

"Once the plaintiff became aware of the existence of the caveat he issued proceedings seeking proof of the will in solemn form.

"He had every right to take that step: see *Wheatley v Edgar* [2003] WASC 118 [19] and [22]. The first defendant in his affidavit to

which I have referred earlier says proceedings were issued without notice to him. That was quite proper. No criticism can be levelled at the plaintiff for taking proceedings when he did," [15].

Master Sanderson detailed Rules of the Supreme Court 1971 (WA) Order 73 rr 15 [Defendant may require only proof in solemn form] and 16 [Pleadings].

Rule 15: "In a probate action a party opposing a will may, with his defence, give notice to the party propounding the will that he merely insists on the will being proved in solemn form, and only intends to cross examine the witnesses produced to support the will and he may thereupon do so and, if he does not participate further in the action, he shall not be liable to pay the costs of that other party unless the Court considers that there was no reasonable ground for opposing the will".

Master Sanderson: "The plaintiff's statement of claim was in what might be described as classical form. The date of death of the deceased is pleaded and the fact of the will is pleaded. It is alleged the deceased knew of and approved the contents of the will, that it was not revoked in any manner and that at all material times the deceased was of sound mind, memory and understanding," in [17] before replicating the short pleaded defence, which stated no knowledge of the will and required proof in solemn form.

"The question is whether a defence in this form satisfies the requirements of r 15 and really does no more than require the plaintiff to prove the will in solemn form. On balance I think it does. No allegation of unsoundness of mind or undue influence are raised by the defence and there is nothing which would satisfy the requirements of r 16. If this matter had gone to trial and the plaintiff had, for instance, produced the witnesses who saw the deceased sign the will then even if counsel for the first defendant had cross examined these witnesses there would be no basis for awarding costs against the first defendant. So in this case the rules actually prevent an award of costs against the defendant let alone the indemnity costs sought by the plaintiff. When the matter was listed for hearing the trial bundle contained copies of correspondence passing between the parties on the issue of costs and six separate affidavits dealing with that question. In his written submissions counsel for the plaintiff submits this was not a case which fell within r 15. He submitted that was the case for two reasons. First, the first defendant by his defence did not require any witnesses to be produced for cross examination and second, he did not, until a day or two before trial, withdraw his opposition to the will. In my view neither of these two points count against the operation of r 15. I need not repeat again what I have said above," [18].

Ordered plaintiff's costs from estate, no order to costs in relation to the first defendant.

P: Mr CV Eastwood ins Eastwood Sweeney Law. 1D: Ms EC Hensler ins Contested Wills and Probate Lawyers. 2, 3, 4, 5D: Selves.

Payments under power

Mezzapica v Mezzapica [2017] NSWSC 1553. Emmett AJA. 20.11.17.

Brothers and co-executors of their mother's $3.6m estate in dispute over cheques drawn from the mother's accounts under power of attorney before she died.

After commencement of hearing, many other drawings were resolved.

Defendant "Renato contends that an inference should be drawn that the payments were made with the authority of Giuseppa by reason of the dates on which the cheques were drawn. I would not be prepared to draw such an inference in circumstances where Renato gave evidence, both by affidavit and viva voce, but did not offer any specific evidence as to the circumstances in which the cheques were drawn. For example, it might have been possible for him to give evidence that, on the occasions when the cheques were drawn, Giuseppa had told him to draw the cheques by way of gift to himself. However, **the Court should not draw inferences favourable to Renato** as to the circumstances of the cheques being drawn when no attempt was made by him to prove those matters by direct evidence and no question was asked of him when he gave evidence viva voce," Emmett AJA said [23].

Then, "Notwithstanding the unsatisfactory state of the evidence, I am persuaded that it is more likely than not that the six impugned cheques were drawn and the payments were made to Renato with the consent and authority of Giuseppa. The cheques were not drawn in the exercise of the power conferred by the Power of Attorney. Rather, the payments were made **at the request and with the express authority** of Giuseppa. In the light of that

conclusion, there is no basis upon which Renato should be required to repay the amounts of the six cheques," his Honour said [26].

"The letter from Messrs John Fisicaro & Co referred to the Trust Account. The beneficiaries, Daniel, Alessandra and Matthew Mezzapica, are Giuseppa's grandchildren, being Robert's children.

"It is common ground that the Trust Account was a trust account, although the circumstances in which the Trust Account was created are not in evidence. It is also common ground that three payments were made from the Trust Account into the CBA Account by cheques drawn by Renato and that those payments constituted a breach of trust on the part of Giuseppa, such that Giuseppa's estate has a liability to her three grandchildren for the amounts that were paid away. However, there was no suggestion that any claim has been made by or on behalf of the grandchildren. Further, it has not been suggested that Giuseppa suffered any loss as a consequence of the payments. Rather, she received the benefit of the funds," [27].

"In the circumstances, Robert seeks a declaration that the three payments totalling $62,010 represented funds held on trust by Giuseppa for each of her grandchildren, Alessandra, Daniel and Matthew Mezzapica. Such a declaration may serve to avoid dispute in the future and it is appropriate to make it," [28].

"Apart from such a declaration, Robert has not established that the estate of Giuseppa is entitled to any relief against Renato. However, Robert contends that it was necessary for these proceedings to be brought in order to obtain the information that has now been made available as to the items that have been in dispute between the parties. That is relevant to the question of the costs of the proceedings. The parties requested that I make no determination of the question of costs until after publishing the reasons for my conclusions as to the six impugned payments and that they be given the opportunity of making further submissions and, if need be, adducing further evidence, as to the question of costs and, in particular, whether any costs should be paid from Giuseppa's estate," Emmett AJA said [29].

P: J Raine ins Hall Partners. D: A S Maroya ins Photios Vouroudis & Co.

Peskiness costs plaintiff

Re Bovill; Bovill v Boviall [2017] VSC 697. McMillan J. 20.11.17.

Sibling executors in dispute, the plaintiff obtaining consent orders for accounts, McMillan J denying him costs and refusing his application to leave the proceedings on foot.

McMillan J: "Although there was conduct on all sides that appeared to fuel the broader dispute among the parties to some degree, it was the plaintiff who initiated and maintained the proceeding. This was despite the fact that before the proceeding was initiated, the defendants endeavoured to comply with the plaintiff's many requests for documents and explained their challenges with gathering the relevant documents from third parties, such as the family accountant, and invited the plaintiff to make his own inquiries in this regard. The defendants made it known to the plaintiff that they were seeking to minimise the involvement of third parties in order to preserve the assets of the estate. The defendants explained their difficulties in compiling the documents and the futility of the activity in light of their previous disclosures to the plaintiff. They were trying to provide the requested documents and they explained the reasons for the delays in producing them. This was in circumstances where they were not legally represented in an attempt to save costs to the estate and the other entities," [40].

"Before the proceeding was issued, the defendants informed the plaintiff that the orders sought by the plaintiff would be agreed and the foreshadowed proceeding would not hasten their efforts in producing the documents for the reasons already given to the plaintiff. The plaintiff nevertheless commenced the proceeding," her Honour said [41].

Later, in [55], "The plaintiff now wishes to keep his proceeding on foot so that he may bring some later claim amounting to unspecified allegations against some or all of the defendants. This does not accord with the overarching purpose under the Act, which mandates a purpose to identify and resolve the real issues in dispute."

Then, in [57], "The defendants have consistently endeavoured to satisfy the plaintiff over the years and in this litigation and the plaintiff's proposal to continue some unspecified litigation is unmeritorious. Whether the application has an ulterior motive

or not may only be surmised. In my view, the plaintiff's application to continue the proceeding in this unsatisfactory manner is an overreach. It misconceives the overarching purpose of the Act and his own obligations under that Act," McMillan J said.

"The plaintiff's application to allow the proceeding to continue so that he may make further unspecified claims against the defendants is dismissed," [58].

Ordered the plaintiff to pay the defendants' standard costs personally without estate or trust indemnity, the plaintiff's own costs similarly, proceedings dismissed.

P: Mr AJ Verspaandonk ins HWL Ebsworth Lawyers. 1-4D: Mrs S Newton ins Bernie O'Sullivan Lawyers.

Five codicils, three good

Re Matiasz (deceased) [2017] VSC 677. Zammit J. 20.11.17.

Zammit J determined for a will and three codicils, but against two later amendments for want of testamentary capacity.

Mrs Maria Matiaz died mid 2013 aged 101 years, leaving an estate of about $650,000, her will appointing as executors her long-standing GP, Dr Igor Jakubowicz, the plaintiff, and a friend, Mr Collins, who had prepared the testamentary documents.

The testatrix had suffered Lewy body dementia in her later years.

The Court earlier appointed an independent contradictor, Ms Ursula Stanisich, of counsel, instructed by solicitor Ms Suzanne Lyttleton.

There was no contest to the will.

Of each codicil, the questions were: (i) did the deceased have testamentary capacity: *Nicholson v Knaggs* [2009] VSC 64 [95]-[100] (Vickery J); *Timbury v Coffee* [1941] HCA 22, 66 CLR 227, 283 (Dixon J); and (ii) did she know and approve of its contents? *Nicholson* [151]-[155]; *Veall v Veall* [2015] VSCA 122, 46 VR 123 [169]-[179].

"Any determination on these issues will be binding on not only the parties to this proceeding but also any person whose interests are affected by this proceeding and who could have made themselves a party by intervening," Zammit J said [23], citing *Osborne v Smith* [1960] HCA 89, 105 CLR 153, 158-159 (Kitto J, Menzies & Windeyer JJ agreeing); *Fry v Georges* [2009] VSC 220 (Mandie J); *Re Sanders* [2016] VSC 694 (McMillan J).

"Proof of **testamentary capacity** requires the Court to be satisfied that, at the relevant time, the testator: (a) understood the effect of making the will (or codicil); (b) was aware of the general nature and value of their estate; (c) was aware of those who would have a natural claim to their estate; and (d) was able to evaluate and discriminate between such claims: *Bailey v Bailey* [1924] HCA 21, 34 CLR 558, 566-7 (Knox CJ and Starke J); *Kantor v Vosahlo* [2004] VSCA 235 [37] (Buchanan and Phillips JJA, Ormiston JA agreeing). The relevant time is the time at which the will or codicil was executed: *Veall* [167]," her Honour said [24].

If a demented testator had lucid moments, the inquiry would direct to those moments: *Veall* [167].

"A testator need not have perfect mental balance and clarity in order to have testamentary capacity: *Estate of Griffiths (deceased); Easter v Griffiths* (1995) 217 ALR 284, 289-290 (Gleeson CJ). Rather, testamentary capacity requires the testator be of sound mind, memory and understanding," her Honour also said in [25], then quoting Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, 565: no insane delusion shall influence his will, such endorsed in Australian courts, eg *Timbury*; *Brokenshire v The Equity Trustees Executors & Agency Co Ltd* [1998] VSC 183, 8 VR 659, 662 [7]-[8] (Smith J); *Flynn v Roccisano* [2004] VSC 346 (Teague J).

At [27] "What is relevant is the testator's capacity to 'remember, reflect and reason'; the first as to the relevant property and those who have claims upon it; the second as to the relative weight of their claims; and the third so that 'he can judge, having regard to his assets, how far, if at all he should give effect to them': *King v Hudson* [2009] NSWSC 1013 [51] (Ward J). In each case, it is **not necessary that the testator has actually remembered, reflected and reasoned**, only that he or she has the capacity to do so. Further, the test does not require the possession of these faculties to the highest degree, only to a sufficient degree. Indeed, even where a testator is of unsound mind, it may be possible to show that the will was made in a lucid interval: *Kantor* [67]-[73]," Zammit J said.

"In relation to the need to understand the nature of the act and its effects, what is required is **an understanding of engagement in a testamentary act**. In

other words, a testator must be aware in general terms of the nature, extent and value of the estate over which he or she has a disposing power," her Honour said [28].

"Old age and infirmity does not, by and of itself, establish want of capacity: *Bailey* 570 (Isaacs J, Gavan Duffy and Rich JJ agreeing); *Vukotic v Vukotic* [2013] VSC 718 [18] (McMillan J). Nor does extreme ill health, *In the estate of Kelli Maree Rushton* [2015] ACTSC 342 [43]-[45] (Mossop AsJ), including the onset of dementia, *Tavendale v Hargreaves* [2013] NZHC 2374 [lucid interval], *In the Will of Ruth Barlow, Deceased* [2014] QSC 7 [71]-[73] (Byrne SJA) although these may require the propounder of the will to provide evidence of testamentary capacity. Medical evidence as to whether a person has testamentary capacity may be useful, but the question is ultimately a practical one, to be determined by considering all the facts of the case: *Boughton v Knight* (1873) LR 3 P & D 64, 67 (Hannen J). As Lindsay J put it, in *Estate Sue* [2016] NSWSC 721," her Honour said [29] quoting *Sue* same at [100]: whether Court satisfied document was last will of free and capable testator, then, Zammit J: "The important point is that **the test is a legal rather than a medical one**: *Romascu v Manolache* [2011] NSWSC 1362 [200] quoting from *Key v Key* [2010] EWHC 408 [98]".

Standard of proof, as exposed by Ormiston JA in *Kantor* [22]: balance, vigilant.

To knowledge and approval, Zammit J [31]: "If the Court is satisfied that the testator possessed testamentary capacity at the relevant time, it must then ask whether he or she knew and approved the contents of the will (or codicil): *Hastelo v Stobie* (1865) LR 1 P & D 64, 68-9 (Wilde J).

"Where there is proven capacity and a duly executed will, knowledge and approval will be assumed: *Nock v Austin* [1918] HCA 73; 25 CLR 519, 528 (Isaacs J); *Re Fenwick (deceased)* [1972] VicRp 75; [1972] VR 646, 651 (Menhennitt J). However, where **suspicious circumstances** surround the making or execution of a will the assumption does not arise, in which case the propounder must remove the suspicion by proving affirmatively that the testator knew and approved of the contents of the document: *Barry v Butlin* [1838] EngR 1056; (1838) 2 Moo PC 480, 482, 485 (Parke B); *Nock* 528 (Isaacs J); *McKinnon v Voigt* [1998] 3 VR 543, 556 (Tadgell JA, Phillips JA agreeing). In other words, the effect of suspicious circumstances is to cast the onus on the propounder to 'demonstrate, over and above proof of the formal validity of the will, what has been called "the righteousness of the transaction"; and a court of probate is bound to refuse a grant if not satisfied that the onus has been discharged: *Robertson v Smith* [1998] 4 VR 165, 173 (Tadgell JA, Phillips and Kenny JJA agreeing)," her Honour said [32].

"**Suspicious circumstances are proven facts surrounding the preparation or execution of the will**, 'not of mere assertion or allegation of forgery, but of a well-grounded suspicion engendered in the mind of the court acting judicially': *McKinnon* 551," Zammit J said [33].

"**Factors** to consider in determining whether suspicious circumstances exist include: (i) the circumstances surrounding the preparation of the document; (ii) the extent of any physical and mental impairment of the purported testator; and (iii) whether the purported will makes rational sense: *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 [259] (Hallen AsJ); *Romascu v Manolache* [2011] NSWSC 1362 [205] (Hallen AsJ). One specific circumstance that will excite a court's 'anxious suspicion' is where a will is 'prepared or obtained by persons having a benefit under it': *McKinnon* 552," her Honour said [34].

"In short, circumstances deemed to be suspicious will be those that somehow bear upon the question of whether the testator knew and approved the contents of the will, whereas those that do not will not. Axiomatically, circumstances not in existence at the time of execution will be unlikely to do so, and so will be irrelevant: *Robertson* 173-174," Zammit J said [35].

"The circumstances which create the suspicion should be considered as a whole rather than individually," her Honour said [36].

Her Honour collated proofs to the circumstances of each of the testamentary documents.

"The plaintiff's evidence in relation to the **fourth codicil** was that the deceased no longer had testamentary capacity. He opined that by 30 November 2012 the deceased's mental state was 'significantly impaired'. He based this view, apart from his own observations, on two cognitive assessments

(the 'psychogeriatric assessment scale' and 'mini-mentals') and the fact that Box Hill Hospital had diagnosed her with Lewy body dementia," Zammit J said [75].

The fifth codicil was later.

Her Honour noted submissions, and held against the fourth and fifth codicils.

Orders for minutes, costs for submissions.

P: Mr R Phillips ins Suzanne Jones Lawyers. Contradictor: Ms U Stanisich ins Ms S Lyttleton.

Hospital handwritten, signed note admitted

In the Estate of Holtkamp [2017] ACTSC 346. McWilliam AsJ. 16.11.17.

McWilliam AsJ declared an informal document the will of Mr Lyle Edwyn Holtkamp who died late 2016.

Her Honour detailed Wills Act 1968 (ACT) s 11A [Validity of will etc not executed with required formalities], and Court Procedure Rules 2006 (ACT) Rule 3092 [Division 3.1.9 proceeding – starting], and noted requisites of (a) document, (b) purporting to embody testamentary intentions, and (c) the deceased intended the document to constituted a will, noting *Re Letcher* (1993) 114 FLR 397, 401; *Re Estate of AJ (deceased)* (1996) 131 FLR 413, 414-415, *In the Estate of SAS* [2017] ACTSC 289, [4] (Mossop J), 20.9.17; *In the Estate of Elaine Lilian Mitchell-Reynolds* [2017] ACTSC 269, [3].

"By way of further explanation of the third requirement, it is not sufficient if a document exists which does no more than express the testamentary intention of the deceased, such as instructions for the drawing up of a will. The **evidence must establish** that the deceased intended the specific document to constitute the will: *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535 cited in *Re Estate of AJ (Deceased),*" [9].

McWilliam AsJ noted affidavits of solicitor Ms Rehana Leah Richard, who took instructions to the will, as well as another, a long time neighbour of the deceased.

The plaintiff was a niece of the deceased, nominated as executor and sole beneficiary.

Her counsel, Mr Davey, mentioned the defendant's appearance by consent, and also tendered report of Associate Professor Schanaka Wijeratne, consultant psychiatrist, to testamentary capacity.

Her Honour also admitted a deed of settlement between the plaintiff and the defendant which proved the defendant's consent to the application.

McWilliam AsJ detailed the document and held it plainly purported to state testamentary intentions.

The solicitor proved the deceased had presented responsively to inquiries to making the will, and on being shown the handwritten the document, the deceased and she had signed sign as it was, but without a second witness, Ms Richard undertook to have the documents typed for return the following day, but Mr Holtkamp died.

Ms Richard had deposed: "It was my clear understanding that the deceased intended that the Handwritten Note should operate as his Will in the event that he did not ultimately sign the proposed type-written Will. This understanding is based on the fact that he wanted me to write out his instructions and then signed them in my presence".

McWilliam AsJ: "Given the very detailed instructions and communications between Ms Richard and the deceased, and the fact that the deceased indicated he had no changes to make, I am satisfied that the document was **not merely a step along the way to a concluded document**. Rather, it was the final document. I am satisfied the deceased intended the document to constitute his will at the time that it was brought into existence," [25].

The neighbour had proved from conversations with the deceased that the deceased had intended to exclude the defendant from the will.

On Dr Wijeratne's proof, her Honour was satisfied Mr Holtkamp had testamentary capacity at the time of signing.

Declaration, application costs from the estate on solicitor-client basis.

P: Mr P Davey ins Dobinson Davey Clifford Simpson Lawyers. D: Mentioned by consent.

Mother's murderer denied brother's estate

Public Trustee (WA) v Mack [2017] WASC 325. Master Sanderson. 14.11.17.

Brent Mack murdered his mother, Ah Bee Mack, in late 2008, later convicted and sentenced.

Ah Bee Mack's only other child, Adrian Earnest Mack, died mid 2014 intestate, leaving a half brother Gary Mack, not a child of Ah Bee Mack.

The Public Trustee was granted administration of both estates, here seeking directions to distribution, Master Sanderson noting Administration Act 1903 (WA) s 12B [Relationships of whole and half blood] and s 14 [Entitlements on intestacy] and its table.

"The question is does Brent by the murder forfeit any right to any identifiable part of Ah Bee Mack's estate even after the identifiable estate passes to the Estate [of Adrian Mack]," Master Sanderson said in [3].

To the **forfeiture rule**, Master Sanderson quoted from *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, 709 (Dixon, Evatt & McTiernan JJ), with authorities: rule embraces murder and manslaughter.

In [5], "Brent's entitlement to a share of the [Adrian] Estate does not arise directly from his crime committed in December 2008. It arises from the fact of the deceased's death in 2014, the fact that he died intestate and the effect of the Administration Act. There is no suggestion that Brent was responsible for the deceased's death. However, the deceased, and subsequently his estate, would not have acquired any interest at all in Ah Bee Mack's estate but for Ah Bee Mack's death. Furthermore, the deceased would not have had an entitlement to the whole of the assets of Ah Bee Mack's estate but for her death at Brent's hand," Master Sanderson said.

"There appears to be no Australian authority directly on point. Intuitively it would seem to be a logical extension of the rule of forfeiture to hold that a person in the position of Brent, a convicted murderer, could not benefit directly or indirectly as a consequence of his crime. It is difficult to see that any principle of law is offended by that extension. But, as I have said, there is no Australian case on point. The diligent research of counsel has thrown up three American decisions which support the proposition that a person should not benefit directly or indirectly as a consequence of the crime," his Honour said [5], then noting *In Re Estate of Vallerius* 259 Ill.App.3d 350 (1994), *In Re Estate of Macaro* 182 Misc.2d 625 (1999) with authorities, *Matter of Edwards* 2012 NY Slip Op 22102.

At [14] "It would appear then that the principle that a wrongdoer cannot benefit even indirectly as a consequence of his misdeeds is well established in the United States. It does appear as though there may be some doubt whether if a long period of time has passed between the commission of the offence and the passing of an asset to the wrongdoer whether the principle would hold good. But that is not this case. The estate of Ah Bee Mack was quite discrete on her death and with the disqualification of Brent from participating in a distribution of her estate the property passed to the deceased [Adrian]. There is nothing in the evidence to suggest there was any significant modification to the deceased's estate either by the flux of time or otherwise which made identification of the asset held by the deceased consequent upon the death of Ah Bee Mack difficult. Accordingly, directions should be made so as to ensure Brent does not benefit by his criminal conduct," Master Sanderson said.

In Ah Bee Mack's estate, the whole to the administrator of Adrian's estate. Costs from the estate.

In Adrian Mack's estate, no distribution to Brent Mack of any part of Ah Bee Mack's estate and such to Gary Mack. Indemnity costs from estate.

Ah Bee Mack's estate: P: Ms W F Gillan ins Public Trustee (WA). 1D: NA. 2D (Gary Mack): Mr M H Solomon ins Solomon Hollett Lawyers.

Adrian Mack's estate: P: Mr R J Nash ins Public Trustee (WA). 1D: Ms W F Gillan ins Public Trustee (WA). 2D: NA.

Eight days too late

Brooks & Anor v Young & Ors [2017] SASC 162. Stanley J. 14.11.17.

Summary dismissal of adult sons' late family provisions claim against their sister and her sons, the executors, the testator Mr Leslie Brooks, of Berri, in South Australia's Riverland about 240km north-east of Adelaide, having died 27 September 2014, leaving an estate of value about $435,000, principally his home, and cash.

Probate granted 23 February 2015.

"On 17 August 2015, the plaintiffs issued proceedings in this Court pursuant to s 7 [Spouse and persons entitled may obtain order for maintenance etc out of estate of deceased person] of the Inheritance (Family Provision) Act 1972 (SA). The proceedings were served on the executors' solicitors on 31 August 2015, eight days after the expiration of the limitation period prescribed by s 8(1) of the Act," Stanley J noted [5].

His Honour noted the executrix had given the plaintiffs notice of the estate solicitor in October 2014, which solicitor, Mr Victor Kudra, after probate having written to the plaintiffs early the following April notifying intention to distribute, the distribution having occurred soon after, including registering the realty to the executrix, yet holding $30,000 legacies for each of the two plaintiffs.

One of the plaintiffs instructed solicitor Mr Westley who corresponded with Mr Kudra and obtained undertaking against further distribution, then further correspondence foreshadowing proceeding.

"On 31 July 2015, Mr Westley's firm forwarded by express post to the Supreme Court Civil Registry Raymond's originating Court documents to commence proceedings pursuant to the Act. On or about 12 August 2015, the originating proceedings were returned to Mr Westley's office unfiled and subject to a requisition. On 14 August 2015, Mr Westley's firm again forwarded by express post Raymond's amended originating proceedings for filing. On 17 August 2015, the Supreme Court Civil Registry telephoned Mr Westley's office to confirm that the originating proceedings had been successfully filed. At this point there was six days until the limitation period was to expire," his Honour noted [23].

Stanley J detailed ss 8 [Time within which application to be made] and 14 [Liability of administrators after distribution of estate].

"If an application for provision is made within the time prescribed in s 8(1) of the Act, the Court has the power to make an order for provision out of any part of the estate, irrespective of whether estate assets have been distributed: *Blunden v Blunden* [2008] SASC 286 [30]; *Broadhead v Prescott* [2015] SASC 34 [21]. Distributed assets can be subject to an order for provision under the Act. The **limitation period is six months from the grant** of probate or letters of administration. Pursuant to s 8(6), an application is deemed to be made on the day when the summons is served on the administrator of the estate," Stanley J said [32].

"Therefore, if an executor chooses to distribute assets of the estate within the prescribed limitation period or while being on notice of a claim, the executor may be personally liable to satisfy an order for provision," his Honour said in [33], before quoting *Blunden* [21] where Bleby J noted Zelling J in *In the Estate of Gough, Deceased; Gough v Fletcher* [1973] 5 SASR 559 citing *In re Simson Deceased; Simson v National Provincial Bank Ltd* [1950] 1 Ch. 38, Vaisey J: no distribution to beneficiaries should be made while possibility of suit.

Stanley J: "There is no doubt that an executor should consider very carefully before distributing the assets of an estate. However, it is not unlawful for an executor to administer an estate prior to the prescribed limitation period unless they are on notice of a claim being made," [34], noting s 14(1) and *Blunden* [24].

"In this case the executors distributed the majority assets of the estate within the limitation period, but they were not, at that time, on notice of a claim. If the plaintiffs had filed and served their proceedings within the prescribed limitation period, the Court would have been entitled to include those distributed assets in an order for provision," Stanley J said [35].

"However, the plaintiffs' proceedings were not served on the executors until after the prescribed limitation period," [36].

The plaintiffs had put on application to extend time, such pending trial determination, here Stanley J only concerned with the summary dismissal application.

"Fundamental to the determination of this application for summary judgment is the

operation of s 8(5). Even if an extension of time is granted to the plaintiffs, s 8(5) of the Act provides that any distributions that have been made before the application for the extension of time cannot be disturbed. This is regardless of whether the distributions were made before or after the six month limitation period," [38].

The plaintiffs contended the executors breached fiduciary obligations.

"It can be accepted that the defendants, as **executors, owe fiduciary duties**: *Brine v Carter* [2015] SASC 205 [124]. Where a fiduciary has profited from a breach of duty, the fiduciary is liable to account in equity where there is a sufficient connection between the breach of duty and the profit derived from the breach: *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 at 468. But a fiduciary is not liable to account for a personal benefit where the **fiduciary has been authorised** to act in the manner in which he or she acted expressly by the instrument creating the fiduciary duty or by implication arising from the circumstances of his or her appointment: *Chan v Zacharia* [1984] HCA 36; (1984) 154 CLR 178 at 204," Stanley J said [42].

There were several answers to the plaintiffs' contentions.

"First, Australian law does not recognise any duty to potential claimants under the Act not to distribute the assets of the estate within the limitation period prescribed by s 8. Further, the plaintiffs seem to suggest that the executors were obliged to inform the plaintiffs of their intention to distribute the estate or of their right to make a claim for provision under the Act. I reject that submission. **Potential claimants are not persons to whom executors owe a fiduciary duty** of that nature," in [44], and quoting McMillan J in *Robbins v Hume* [2015] VSC 128 [61], [65]: executor not fiduciary to claimant, Stanley J noting [45] equivalent position in South Australia.

"On the contrary, the existence of such obligations would contradict the duty owed by executors to administer the deceased's estate in accordance with the terms of the will," his Honour said in [45].

Section 14 protected the executors, then quoting Bleby J in *Blunden* [29]-[30], here the plaintiffs could not contend notice by s 14(2).

"Third, the defendants are not liable to account for a personal benefit where they have been authorised to act in the manner in which they acted expressly by the instrument creating the fiduciary duty: *Chan* 204. Any fiduciary duty the defendants owed as executors arose from their appointment as executors under the will. The will authorises the executors to distribute the estate in accordance with its terms. The plaintiffs' submission that Rosemary preferred her own interests, where they were in conflict with her duty is an argument without any reasonable prospect of success because she did no more than she was bound to do in distributing the estate in accordance with the terms of the will. Further, the plaintiffs' interest in the estate has been preserved by the executors for the plaintiffs' benefit. As Robert's alleged liability arises on an accessorial basis, the claim against him cannot succeed because the claim against Rosemary must fail," Stanley J said [49].

"Fourth, in any event, any breach of fiduciary or other equitable duty requires proof of causation in the form of a sufficient connection between the breach and the profit. The plaintiffs cannot make out that causal nexus. As I have explained, the fundamental obstacle to the plaintiffs obtaining an order for provision that would disturb the distribution of the estate that has already occurred is the failure to bring the claim under the Act within the limitation period prescribed by s 8. If the claim under the Act had been instituted within time, the Court could have made an order for provision which could have disturbed the distribution already made. But the claim was not made within time. That is the **cause of any loss the plaintiffs have suffered**. The plaintiffs' difficulty is demonstrated by considering their position if the executors had made the distribution on 24 August 2015, i.e. one day after the expiry of that limitation period. In those circumstances, the plaintiffs could not assert the breach of fiduciary or other equitable duty for which they contend, yet they would be in precisely the same position in which they now find themselves. Section 8(5) would prevent the Court, if it granted an extension of time, from disturbing the distribution of the estate that occurred the day after the expiry of the limitation period," his Honour said [50].

Stanley J would not accept s 8(5) would not prohibit equitable relief qua provision, for such would be contrary the scheme of the Act, be against certainty, and authorities.

"For these reasons, I am satisfied that '**disturbed**' in s 8(5) means not to be interfered with at all. Accordingly, the plaintiffs cannot obtain an order for provision under the Act greater than the undistributed assets of the estate which the defendants are, and at all relevant times have been, prepared to distribute to them. As a result, there is no reasonable basis for the plaintiffs' claim for provision under the Act," his Honour said [59].

Action dismissed.

Appearances unannounced.

Imminent tax liability spurs limited grant

Vallelonga v Sorgiovanni [2017] WASC 323. Master Sanderson. 10.11.17.

Over a contest to testamentary capacity, a residential property of the estate, at Redcliffe, in Perth's inner east, was unrented.

"The parties were really arguing about whether or not the plaintiff should be appointed as administrator or whether an independent third party should be appointed," Master Sanderson said in [3], noting the defendants' reliance on Administration Act 1903 (WA) s 35 [Court may appoint manager and receiver pending litigation].

"The appointment of an interim administrator in circumstances such as this case is referred to as a grant of administration pendente lite - that is pending suit. It is generally said, rather cryptically, that the appointment will only be made if there is sufficient reason to do so. That is a test applied by Campbell J in *Goodsall v Keen* [2006] NSWSC 1143. Here both parties are in agreement that an administrator should be appointed. That being so, there are only two real questions. The first is who should be appointed and the second is what powers the appointed person should have," his Honour said [5].

"The authorities suggest that as a general rule a party to the dispute ought not be appointed as the administrator," in [6] quoting from *Tomkinson v Hersey* (1983) 34 SASR 181, 184 (Cox J): person unconnected with the action is the most suitable person to be appointed as administrator pendente lite, such followed in *Hempseed v Ward* [2013] QSC 348 (McMeekin J).

The Master distinguished his holding in *Fazio v Naso* [2016] WASC 385, where the estate was of value about $6m comprising a shopping centre, the grant sought administration ad colligenda bona defuncti, the administrator familiar with the property, the Master satisfied the appointment would not adversely affect the estate.

"If that was the end of the matter I would have been inclined to appoint the plaintiff as administrator. But there is a complicating factor. If the Redcliffe property is not disposed of within two years of the date of death of the deceased, it will become **subject to the payment of capital gains tax**. The anniversary is fast approaching. That means someone has to make a decision as to whether the property is to be sold or retained. The course of litigation to date suggests there is unlikely to be agreement between the plaintiff and the first and second defendants. That being the case, I am of the view that an independent third party should be appointed. He can take the necessary taxation advice and if he concludes it is in the interests of the estate to do so he can conduct the sale process," Master Sanderson said [12].

"It is not generally the case that a limited grant of administration, be it administration ad colligenda bona defuncti or administration pendente lite, anticipates the sale of part of the property of the estate. In *D'Unienville v Sakalo [No 2]* [2013] WASC 469 EM Heenan J outlined the practical application of a limited grant of administration. However, it must be borne in mind that the whole purpose of an interim or limited grant of administration is to advantage the estate. In times gone by the possibility of a capital gains tax assessment may not have been an issue. But in the present day and age such matters can have a significant impact upon an estate. I see no reason to adhere blindly to past decisions when to do so would have a detrimental effect on the estate," [13].

"Having carefully considered the competing arguments I am satisfied I ought make orders in terms of the first and second defendants' minute. Mr Ian Blatchford who is proposed as the administrator is very experienced and has been appointed by this court on many occasions in the past. His charges are reasonable and there is nothing to suggest he will do anything other than what is necessary to preserve the interests of the estate. He should have the power, if he believes it is in the interests of the estate to do so, to sell the property. It is not necessary for Mr Blatchford to take steps with respect to funds (the

property of the estate) which are held in various accounts. They are not under threat and there is no need for him to deal with these funds. To that extent, the minute proposed by the first and second defendants requires amendment," Master Sanderson said [14].

Orders for minute, costs reserved.

P: Mr J C Hammond ins Hammond Legal. 1&2D: Ms S E Bruce ins Jackson McDonald. 3D: Ms L M McFarlane ins McFarlane Lawyers.

Pen stroke discarded

Linda Vera Frencken (Deceased) [2017] SASC 160. Stanley J. 9.11.17.

A kit will regularly executed and witnessed, adorned however with an unwitnessed blue ink amendment, thus referred by the Registrar.

Stanley J noted Wills Act 1936 (SA) ss 22 [In what cases wills may be revoked], 24 [No alteration in a will has any effect unless executed as a will].

"Whether the will is admitted to probate disregarding the blue mark, or is admitted to probate excluding the terms of clause 3, whether in whole or in part, or the blue mark is construed as revoking the will in its entirety, [widower] Harry will take the entirety of the testatrix's estate either as beneficiary or on an intestacy. Accordingly, the interests of the testatrix's children are unaffected. In any event, they have consented to the application by their father for the will to be admitted to probate, disregarding the blue mark," Stanley J said [14].

In [19] "On the evidence before the Court, I am not satisfied that the testatrix intended to revoke either the will or just clause 3," his Honour said.

"The evidence does not enable me to be satisfied that the mark was made by the testatrix, let alone that it was made with the intention of revoking all or part of the document. On the contrary, there is reason to find that the testatrix did not intend to revoke the document, but intended that it would have testamentary effect. That inference arises from the following facts that I am satisfied have been established: the testator did not destroy the document; the document was retained in its envelope; the document was found in a drawer at the deceased's residence years after it was executed; no other will or testamentary document has been located; the deceased knew she was dying and, nonetheless, appears to have retained the document; there are no other words in the document or markings on the document which unequivocally evidence an intention to revoke the will or clause; and it is apparent that when the testatrix made the will she appreciated the need to comply with the formalities that were explained in the will kit. Those instructions included a direction that if the testatrix wished to alter the terms of the will she must cross out the clause or clauses and the alterations must be initialled by her and attesting witnesses. The non-compliance with these directions strongly contraindicates an intention to revoke," [20].

"Insofar as any suggestion might be made that the mark evidences an intention to revoke clause 3, I consider that is contraindicated by the failure to strike through the whole of clause 3," Stanley J said [21].

"For these reasons, I am satisfied that the document should be admitted to probate in common form, disregarding the blue mark," [22].

Grant, costs from estate.

Appearances unannounced.

Yorkshire death proves WA property

Re Estate of Barry Richardson Hick (Dec); ex parte Devine [2017] WASC 317. Registrar C Boyle. 7.11.17.

Admitted an informal will, administration grant to Mr Hick's de facto wife of 30 years standing, Ms Sandra Devine.

Mr Hick, 72yo, died in Yorkshire mid 2015, apparently at his own hand, his brothers finding the document placed prominently when they went to visit him at his invitation, the police later informing them of his death.

The gentleman had a son by an earlier marriage who had placed a caveat on probate which had lapsed.

At [7], "It happens occasionally that someone antipathetic to a non-contentious application writes to the court expressing views as to why a grant should not be made. More occasionally (although not in this instance) they seek to file affidavit evidence in opposition. There is no right to do either. Since the application is ex parte until and unless directed otherwise, nobody other than the applicant has a right to be heard by way of submissions or otherwise. It seems worth making that point by publishing these reasons," Registrar Boyle said.

Registrar Boyle noted necessary elements to prove: estate in Western Australia: Administration Act 1903 (WA) s 6 [Power to grant probate and administration]; capacity, and knowledge and approval: *Wheatley v Edgar* [2003] WASC 118, per EM Heenan J at [24]; *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 [44] [48]; "Thirdly, in relation to informal wills to be proved under s 32(2) of the Wills Act 1970 (WA), it must be established that there is a document, that it was not executed in compliance with the Act, and that the deceased intended the document to constitute his or her last will: *Oreski v Ikac* [2008] WASCA 220, [50] [55]," Registrar Boyle said [12].

The applicant, Ms Devine, proved left estate in the jurisdiction, half the house he shared with the lady.

Of knowledge and approval and capacity, the Registrar [16] noted "These are distinct questions, although often conflated," footnoting "See, for explanations of the difference and why it can matter, *Hoff & Ors v Atherton* [2004] EWCA Civ 1544 [33]; and *Hobhouse v Macarthur Onslow* [2016] NSWSC 1831 [399] [474]".

"In this case, the matter of knowledge and approval can be disposed of simply. The evidence is that the informal will is in the deceased's hand. Both Sandra Devine and [brother] Trevor Hick depose to that. Its terms, described below, are plain. If the deceased had capacity, he knew and approved of the contents of the informal will," Registrar Boyle said [17].

An English GP, Dr Nigel Myers, of Brookroyd Surgery in West Yorkshire, who had seen Mr Hick in the weeks before his death proved no apparent disturbance of mind which would have tainted the deceased's understanding of the nature and effect of making a will, appreciation of the extent of the property to dispose, and comprehension and appreciation of moral claims.

The GP's affidavit included: "It is also my opinion during the period from 26 June 2015 to 4 July 2015 being the date of his Will, Mr Hick was not suffering from a disorder of his mind and/or a mental delusion that was sufficient to poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties and influence his will in disposing of his property".

"Trevor's evidence of Barry's conduct gives no reason to question Barry's testamentary capacity in the weeks before his death. The picture he paints is of a man who may have been having intimations of mortality, and may have been suffering from health problems unsurprising at his age, but who was living his life as a man of normal capacities," the Registrar said [26], such consistent with the GP's evidence.

The Registrar held Mr Hick had testamentary capacity at the time of writing.

"There is no evidence that Barry Hick ever made any formally valid will. He had produced other informal testamentary writings. They are described in the applicant's founding affidavit," and noted same, none dissuasive, and letters to his brother and estranged son.

"Barry Hick wrote in block capitals and there are some obvious spelling errors that have not been reproduced above. If Clancy's mate could communicate with a thumbnail dipped in tar, Barry Hick could make his meaning clear in ballpoint pen on a handy scrap of notepad," Registrar Boyle said [38].

"The informal will is unambiguously a testamentary document. It deals with all that Barry could think of that he owned. It would be a lawyer's quibble that it contains no explicit residuary clause. He left that document where it would be found after his death. He left it with other documents that are consistent with it. The circumstances are eloquent," [40].

"Barry Hick was an adult of sound disposing mind. He wrote the informal will and it expresses his testamentary intentions. Did he intend the document to constitute his last will? Of course he did: no other conclusion is possible. There will be a grant of letters of administration with the informal will annexed to the applicant Sandra Devine," [41].

A: McFarlane Lawyers.

Domestic relationship agreement

McCarthy v Tye [2017] NSWCA 284. The Court (Basten, Macfarlan JJA, Sackville AJA). 6.11.17.

The Court dismissed with costs the unrepresented appellant's appeal from Young AJ - [2015] NSWSC 1947 - holding not de facto but eligible as living in a close personal relationship at the time of the testatrix's death per Succession Act 2006 (NSW) s 57(1)(f), his Honour allowing provision $85,000, the estate valued about $900,000.

The Court detailed statutory provisions,

evidence, and the judgment below.

In [37], noted "...on 23 November 2016, a solicitor who had previously acted for the appellant informed the respondent's solicitors that she had obtained a judgment against the appellant and that she intended to apply for a garnishee order over the legacy of $85,000 to meet the balance of the judgment debt, amounting to $42,475.84".

Evidence inconsistent with the de facto relationship included, in [42], certain Centrelink representations, including "On 1 July 2011, at the same time as she executed her will, the Deceased signed a 'Domestic Relationship Agreement, which was to be made 'pursuant to s 44.1 of the Property (Relationships) Act 1984 (NSW)'. The Agreement recited that: 'A.The parties do not live in a de facto relationship as defined in s.4AA of the Family Law Act 1975 or s 4.1 of the Property (Relationships) Act 1984 but do live in a close personal relationship as defined in s 5.1b of the Property (Relationships) Act" of which the Court noted: "The appellant subsequently refused to execute the Agreement. Nonetheless the Deceased's signing of the Agreement indicates that at that time she did not consider that she and the appellant were in a de facto relationship."

At [45] "As the primary Judge found, the numerous medical and psychological reports in evidence also do not assist the appellant's case. It is true that care must be taken in relying on material of this kind for purposes that neither the patient nor the health practitioner may have had in mind at the time. It must also be borne in mind that the appellant cannot be expected to have been familiar with the statutory definition of the term 'de facto relationship'. Nonetheless, the histories recorded in the reports suggest that the appellant did not believe that he and the Deceased were de facto partners as that term is ordinarily understood," [45].

"In our view, the evidence is entirely consistent with the primary Judge's findings that the appellant and the Deceased were not living in a de facto relationship at the date of her death, but were in a close personal relationship at that time. The appellant had not established that the findings were erroneous," [52].

Appeal dismissed with costs.

A: Self. R: Messrs M K Meek SC, A Djurdjevic ins Stacks Law Firm Forster.

De facto defeats mother

Estate Pamplin; Irwin v Pamplin [2017] NSWSC 1477. Lindsay J. 3.11.17.

De facto defeats mother on intestacy.

Lindsay J delineated statutory bases.

"Absent a will, the deceased must be taken to have died intestate: Succession Act 2006 NSW, section 102," his Honour noted [2].

"The 'intestacy rules' governing beneficial entitlements to the estate of the deceased are found in Chapter 4 of the Succession Act 2006 (NSW) (sections 101-140)," [3].

Later, "Section 111 of the Succession Act provides that, if an 'intestate' (within the meaning of section 102 of the Act, the deceased) leaves a 'spouse' but no issue, the spouse is entitled to the whole of the intestate estate," [22].

"Section 104(b) of the Succession Act defines a 'spouse' of an intestate as a person who was 'a party to a domestic partnership with the intestate immediately before the intestate's death'," [23].

"Materially, section 105(a) of the Succession Act defines 'a domestic relationship' as 'a relationship between the intestate and another person that is ... a de facto relationship that has been in existence for a continuous period of two years'," [24].

"The term 'de facto relationship' is defined in the Interpretation Act 1987 (NSW), section 21C," in [25], detailing same.

"Critically, the defendant disputes that the plaintiff and the deceased had, during the last two years of the deceased's life, 'a relationship as a couple living together' within the meaning of section 21C(2)(a)," Lindsay J said [26].

"Leaving aside section 21C(3)(g), because of an absence of children, each of the factors identified in section 21C(3) as potentially relevant to a determination of whether the plaintiff and the defendant had a time-critical 'relationship as a couple' can be engaged. A consideration of those factors does not relieve the Court of its obligation to consider 'all the circumstances of the relationship', but they provide **a convenient checklist** against which to measure the facts of the case. Section 21C(3) serves, but does not rise above, section 21C(2); the meaning of the expression 'de facto relationship' is found in section 21C(2): *Piras v Egan* [2008] NSWCA 59 at [146]," his Honour said [27].

Further, "Ample authority demonstrates that,

although the concept of 'living together' may have locational and temporal dimensions, persons may be 'de facto partners' without living only in a single residence and without spending all their time each in the company of the other: *Vaughan v Hoskovich* [2010] NSWSC 706 at [49]- [53], [56], [58] and [65]-[67]; *Amprimo v Wynn* [2015] NSWCA 286 at [77]," [32].

And, "The statutory concept of 'a de facto relationship' is not far removed from the common understanding of such a concept in Australian society. The expression 'de facto relationship' evolved, in common parlance, as both a comparison, and a contrast, with the relationship of marriage. A 'de facto relationship' was, in ordinary parlance, a relationship which exhibited the characteristics of mutual commitment familiar in a relationship of marriage, save for the solemnities involved in a formal exchange of wedding vows: *Thompson v The Public Trustee of NSW* [2010] NSWSC 1137 at [74]. Significantly, however, the current legislation does not, in terms, refer to parties 'living together as husband and wife'; there is nothing that necessarily ties the concept of 'a de facto relationship' to that of a formal marriage," Lindsay J said [35].

"A determination about the existence, and subsistence, of a 'de facto relationship' requires an empirical investigation of facts, not merely notice of a registered or certified event such as attends a formal marriage," his Honour said [36].

Lindsay J traversed evidence, having noted at [15]: "The boys' membership of the Nomads Motorcycle Club appears to have been a factor in law enforcement agency interest in the affairs of the Pamplin family and, equally, a factor in reclusive tendencies in the Pamplin family."

His Honour iterated findings [78] in light of Interpretation Act s 21C(3) to de facto.

"In my assessment, the evidence before the Court, taken as a whole, points firmly towards a finding that, throughout the last two years of the life of the deceased, and for many years before that, the plaintiff and the deceased lived in a de facto relationship. That relationship involved them living together 'as a couple' (although neither married nor related by family) within the meaning of section 21C (2) of the Interpretation Act. It was a relationship which was 'in existence for a continuous period of two years' before the death of the deceased within the meaning of section 105(a) of the Succession Act. It was a relationship in existence 'immediately before' the death of the deceased, so as to satisfy section 104(b) of the Succession Act," Lindsay J said [79].

"For these reasons, I find that the plaintiff is entitled to the whole of the intestate estate of the deceased (pursuant to sections 102, 103, 104(b), 105(a) and 111 of the Succession Act) and, consequentially, a grant of letters for administration of the estate," his Honour said [80].

Orders, granted the plaintiff letters of administration, the defendant mother's claim dismissed, caveat ordered forthwith withdrawn, defendant to pay plaintiff's costs.

P: M Stevens ins Mersal & Associates. D: L Ellison SC, R Kako ins Ronald W Winter.

Executor should willingly disclose

Re Anthony; Rogan v Rogan [2017] VSC 668. McMillan J. 2.11.17.

Beneficiary v executor beneficiary, the estate expected to have received $816,000 from settlement of the deceased's claim against another estate.

In [3], "In January 2017, the plaintiff inspected documents, including an undated trust document, whereby the deceased appeared to instruct payment of a substantial sum to the defendant and her attorneys under power, Janice and Vicki Rogan," McMillan J noted.

Further inquiries by the plaintiff were rebuffed by the defendant's solicitor.

The plaintiff commenced seeking administration account.

Consent orders brought partial disclosure, then further.

"The defendant has now complied with the orders made 1 September 2017 and the only outstanding issue is the costs of the proceeding," her Honour noted in [8].

McMillan J noted germane costs authorities [10]-[15].

"The Court has long recognised that an executor owes a duty to account to the persons who are to take under a testator's will. This duty exists both at common law, and is enshrined in statute. Essential to this duty is the requirement that an executor keep proper account and records. These records should be

unambiguous, clear and distinct so as to provide accurate information to the beneficiaries sufficient to inform them as to the state of the administration: *Hill v Roberts* (Unreported, Supreme Court of Victoria, Ashley J, 27 October 1995) 32-3; *Yates v Halliday* [2006] NSWSC 1346 [58]. To this end, receipts, vouchers or other documentation should support each transaction," her Honour said [16], footnoting "Supreme Court (Administration and Probate) Rules 2014, r 6.03: The probate rules in Victoria reflect this requirement and empower the Court to require a personal representation to file a true and just account, verified by affidavit, of the administration of the estate".

"The correspondence between the parties prior to the issue of the proceeding establishes that the plaintiff made numerous attempts to obtain information related to the administration of the estate in circumstances where there were **questionable elements surrounding an undated document and its execution by the deceased during her lifetime**. This document appeared to transfer a substantial sum of money from a recent settlement in the estate of Kathleen Rogan. The plaintiff was also involved in that settlement and expected that those funds would be reflected in the assets of the estate of the deceased. In those circumstances, it was reasonable for the plaintiff to query why the settlement sum did not form part of the estate of the deceased and request such information as to its whereabouts. These requests were not a fishing expedition. The defendant and his solicitors failed to provide an adequate response to the requests despite the fact that the defendant was obliged to provide this information to the plaintiff," [17].

"I reject the defendant's submission that his failure to comply with the requests for information was due to a lack of knowledge and involvement in the deceased's affairs throughout her lifetime. It is well established that an executor owes a number of legal and fiduciary duties to beneficiaries of the estate. **Simply claiming lack of knowledge does not absolve these duties**. An executor is obliged to act prudently and properly in the management of the estate as a whole and is generally assessed to the standard of an 'ordinary prudent businessperson': *Austin v Austin* [1906] HCA 5; (1906) 3 CLR 516, 525 (Griffith CJ) citing *Speight v Gaunt* (1883) 9 App Cas 1 (Lord Blackburn)," McMillan J said [18].

Then, [21] "The plaintiff was unable to determine whether or not those undisclosed assets were part of the estate of the deceased without the information requested by the plaintiff. The duty to account carries with it an entitlement of the beneficiaries to view the records and supporting evidence in order to monitor the proper administration of the estate. An **executor should provide these documents willingly** rather than reluctantly as observed by Lloyd AJ in *Yates v Halliday* [2006] NSWSC 1346 [52]:

[**Lloyd AJ**] "It is not a sufficient answer to simply invite the plaintiffs or their representatives to sort through two boxes of documents to determine whether the estate was properly administered. It was Mr Halliday's duty as executor and trustee to keep and produce when requested appropriate records demonstrating how the estate was administered".

McMillan J: "In respect of a special costs order, the authorities emphasise the need for special circumstances to justify personal liability on an indemnity basis for costs. Specifically, the **failure to provide accounts when requested** may make the executor liable to pay the costs of proceedings instituted by the beneficiary to obtain the accounts: *Re Skinner* [1904] 1 Ch 289. The plaintiff would not have incurred costs to the extent he has, had the defendant complied with his obligations as the executor of the estate. The defendant has shown a want of prudence and diligence and an absence of care and diligence that justifies a special costs order against him with no indemnity for those costs from the estate of the deceased. These unreasonably incurred costs should not be borne by the estate of the deceased. This conclusion is reinforced by the fact that the defendant has failed to provide an adequate or reasonable explanation as to why the information was not provided prior to the commencement of the proceeding. Overall, the proceeding has been wasteful of the resources of both the Court and the parties," [22].

Ordered defendant to pay plaintiff's costs on an indemnity basis with recourse to the estate, the defendant to pay his own costs without indemnity from the estate.

P: Mr J Smith ins TressCox Lawyers. D: Mr S McNab ins Portfolio Law.

Amicus refusal

Morton v Williams [2017] NSWSC 1506. Parker J. 1.11.17.

Parker J refused with costs an application to appear as amicus curiae.

The applicant, Mr Paul Urquhart, was partner of Ms Cheryl Williams, a daughter and beneficiary of the estate of her father, the late Mr William Williams who died in August 2015.

Another daughter, Ms Morton, had been appointed administrator "...having been appointed to that office by orders of this Court made in earlier proceedings concerning Mr Williams' estate. In these proceedings she sues as plaintiff on behalf of the estate. The defendant is [testator's son] Mr Richard Williams. The claims made against him do not need to be given in any particular detail but, broadly speaking, concern alleged misappropriation of property and assets of the deceased before he died. Apparently, Mr Richard Williams had access to his bank accounts under a power of attorney which had been signed by the deceased in January 1997 and which was revoked by the deceased in November 2014," Parker J said in [3].

At [6] "In *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 at 129 [55] the High Court approved of the following statement of general principle from Scott on Trusts (4th ed, 1989, vol 4, at 282) in relation to trust litigation:

[**Scott**] "The interests of the beneficiaries of a trust are protected against a third person acting adversely to the trustee through proceedings brought against him by the trustee and not by the beneficiary. As long as the **trustee is ready and willing to take the proper proceedings** against the third person, the beneficiaries cannot maintain a suit against him".

His Honour distinguished minority obiter of Kirby J in *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, the Court's authoritative view expressed by Brennan CJ, including: "Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application".

Later, "It is conceivable that at some future point an issue will arise which might require assistance from Ms Cheryl Williams or from Mr Urquhart but, so far as I can see, their assistance is likely to be limited to answering questions and providing information which Ms Morton, as administrator, may need in order to pursue claims against Mr Richard Williams. While one can never rule out completely the possibility of Mr Urquhart participating in the proceedings as amicus curiae, I would not wish, in my remarks today, to give him any encouragement in the belief that that is ever likely to be appropriate in this case. The best thing that Mr Urquhart and Ms Cheryl Williams can do is to stand ready to provide whatever assistance Ms Morton may ask of them in pursuing the claims and otherwise to leave it to Ms Morton and her lawyers to represent the interests of the estate," Parker J said [18].

Application dismissed, applicant to pay costs of plaintiff and defendant, assessable and payable forthwith.

P: A D Crossland ins Elderlaw. D: J Pearson ins Shad Partners. A: Self.

Excluded son granted provision

Portis v Green [2017] NSWSC 1489. Kunc J. 1.11.17.

Kunc J ordered family provision to the only surviving child, a 55yo son, of the testator the greater of 60% of the net estate or $286,000.

Mr Ronald Portis died aged 80 years in early 2016.

"The defendants are, respectively, the Grand Secretary and Deputy Grand Secretary for the United Grand Lodge of New South Wales and the Australian Capital Territory, popularly known as the Masons. The defendants are the appointed executors of the Will," his Honour noted [6].

"Mr Portis had a close connection to the Masons, of which he had been a member since 1986. Most importantly for these proceedings, for five or six years before his death, Mr Portis had worked as the voluntary curator of the Museum of Freemasonry, operated by the Museum of Masonry Foundation," [7].

"Under an earlier will, Mr Portis had left the entire Estate to Paul. However, after the settlement of family provision litigation involving the estate of Paul's late brother, contact between Paul and Mr Portis ceased. Mr Portis then made the Will, by which he left the entire Estate to the Museum. Mr Portis left a detailed statement with the Will to record his reasons for the change in his testamentary intentions," [8].

"Paul's means are very modest. His marriage has recently ended and at some time in the future he and his wife will divorce. Paul is currently living in a caravan. The Court is satisfied that adequate provision has not been made for Paul under the Will. He is not responsible for the circumstances which gave rise to the cessation of contact with Mr Portis. Balancing Paul's legitimate claim on Mr Portis' testamentary bounty, the relatively small size of the Estate, and the principle of freedom of testation in circumstances where Mr Portis had a real and close connection to the Museum, the Court has concluded in the exercise of its discretion under the Act that Paul should receive provision in the amount which is the greater of $286,000 or 60% of the distributable value of the Estate," [9].

Kunc J traversed Succession Act 2006 (NSW) ss 59, 60, and pointed to his earlier judgment in *West v Mann* [2013] NSWSC 1852 at [9]-[11] indicative of approach to such applications, and detailed facts of the matter, including the testator's will statement reasons for excluding his son, such being disappointment after the settlement of the estate of another son, Ronnie, who had died some years after disabling injuries suffered in a motorcycle accident, and other matters.

His Honour assayed the plaintiff's circumstances and history, the testator's history and honours within Freemasonry.

"The law in relation to **estrangement** in family provision claims was comprehensively considered by Hallen J in *Underwood v Gaudron* [2014] NSWSC 1055," Kunc J said [55], detailing Hallen J's exposition therein at [230]-[244] with authorities.

His Honour [60] iterated five reasons by which "... the Court is satisfied that the estrangement — to the extent it can properly be called that — is not a matter which should be taken into account against Paul and his claim for provision," such being evidence the testator was unsociable, contact was more frequent than stated, "Third, given that Mr Portis had made a will in 2005 leaving everything to Paul, in my view a fair reading of the Statement is that while Mr Portis may not have liked Terrie much or approved of Paul's motorcycling activities, none of those matters was sufficient for him to exclude Paul completely from his testamentary intentions", "... whatever it was that upset Mr Portis about the settlement, it cannot be attributed to any conduct of Paul", and "Paul was entitled to leave the question of contact up to Mr Portis".

Later, in [73], "... it is clear that the Will does not make adequate provision for Paul. Either outcome leaves him with no home and limited superannuation, whether or not Terrie retains the Matrimonial Home. He is left with little to cope with the possibility of ill health and the vicissitudes of life," Kunc J said.

In [82] "... provision of at least $286,000 will leave Paul with a net sum (ie debt free) of $508,600 and $93,000 in superannuation. Based on the evidence of the value of the three properties in this case, a home can be bought in the Warragamba area for around $500,000. If he wishes, Paul could purchase a home and, over the balance of his working life, increase his superannuation and otherwise make financial provision for his retirement. In retirement he would have the security of owning his home and having some superannuation and savings," Kunc J said.

Orders for minutes, costs for submissions.

P: J E F Brown ins Turner Freeman. D: J E Armfield ins A S Brown.

Father provision after daughter's enmity

William Bkassini v Sonya Sarkis [2017] NSWSC 1487. Robb J. 1.11.17.

Family provision, father v trustee daughter, the estate of the deceased wife and mother comprising primarily a half interest in two adjoining residences in Sydney's inner west, the other half interest owned by the plaintiff.

Mrs Souad Bkassini died in May 2005, the plaintiff her widower. There were two other children apart from the defendant.

Robb J: "By her will dated 21 April 2005, the deceased appointed [defendant] Sonya to be her executor and trustee. She gave substantially all of her property to Sonya to hold on the trusts created by the will. She left nothing to [plaintiff] William," but by an associated memorandum of wishes, the trustee directed to apply estate income to benefit the plaintiff but preserve the capital for the children, which was done until 2013 when the trustee evicted the plaintiff's fiancé, Ms Lijin Zhao, from one of the houses, and ceased directing the rents to the plaintiff, who later, in early 2015, commenced for appointment of trustees for sale pursuant to Conveyancing Act 1919 (NSW) s 66G.

The trustee obtained judicial advice, Slattery J

- *Application by Sonya Sarkis* [2015] NSWSC 1369 - holding the trustee justified to bring cross claim on asserted owings of the plaintiff in respect of rents, outgoings, mortgage repayments.

The trustee resisted the plaintiff amending his summons to include a late claim for family provision, the Court later ordering such to proceed by pleading, subject to grant of leave, governed by Family Provision Act 1982 (NSW) s 16 [Time for application for provision] given the date of death, and the transition provisions of Succession Act 2006 (NSW) Schedule 1.

Here Robb J considered the money claims between the parties, given their potential bearing on the estate.

Of the plaintiff's claim, based alternatively on trust or loan contract or running account, for repayment of advances to the trustee in 2004 and 2006 totalling about $320,000, the trustee asserting gifts, Robb J noted Limitation Act 1969 (NSW) s 14(a) imposing a six year limit on simple contract.

"Where a **debt is repayable on demand**, the right of action accrues when the loan is made, and it is that time from which the limitation period begins to run, rather than some later date upon which demand is actually made: see *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 (Barrett JA; Beazley P and Ward JA agreeing), following *Young v Queensland Trustees Ltd* [1956] HCA 51; (1956) 99 CLR 560 at 566; [1956] HCA 51," Robb J said in [50].

His Honour noted *McEvoy v McEvoy* [2012] NSWSC 1494 [3]-[5] with authorities per Pembroke J: necessary to evince sufficiently clearly intention to create a trust, here not so established, nor rebuttal of presumption of advancement of father to daughter, hence gift [66], otherwise loan recovery barred by the statute.

Of various payments by the trustee to her father, Robb J considered **intention to create legal relations**, thereto noting *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 [24]-[26]: objective assessment; *McEvoy* [35]: there must be actual contractual intention by each participant as well as reasonable certainty of terms and subject matter.

"None of the conduct of the parties before 29 January 2015 is consistent with Sonya or William believing that they had made recoverable payments to the other," [92].

In balance on account of expenses reimbursement, his Honour held the plaintiff indebted to the trustee $14,302.74 [108].

The plaintiff resisted the trustee's claim for **occupation fee as co-owner**, [130]+ Robb J noting *Callow v Rupchev* [2009] NSWCA 148, the earlier judgment of Beazley JA in *Biviano v Natoli* (1998) 43 NSWLR 695 at 700, and others, then considered the instant circumstances more closely.

In [148] "It would be absurd to treat the locks in a home the same way as a padlock on a gate in a paddock. Even in cases where the new co-owner has some particular genuine need for access to the common property, the law should not necessarily recognise the right of access as being unqualified; to be exercised at will by the new co-owner at any time of the day."

To **revocation by one co-owner of licence** granted by the other, noted *State of New South Wales v Koumdjiev* [2005] NSWCA 247 [31], [40]-[41] (Hodgson JA), then held the trustee without right to terminate the licence of Ms Zhao in May 2013 "...as that was only a licence that did not prejudice whatever rights to the common property that Sonya may have had", in [151].

Of **amount of any occupation fee** when co-owner wrongly excludes another [152]+, noted *Biviano* 704 (Beazley JA), considered evidence to the ejection of Ms Zhao and the necessity of the trustee for access to the properties.

At [194] "Given Sonya's conduct towards Ms Zhao and the breakdown of the relationship between William and Sonya, I do not accept that William's conduct in securing his home by means of locks that would prevent Sonya gaining access at will constituted an ouster of Sonya sufficient to found a right to receive the occupation fee that she has claimed. I find that Sonya has not made out her claim for an occupation fee from William," Robb J said.

To **costs**, "William's solicitor on 28 April 2017 estimated William's legal costs on the ordinary basis on the assumption of a five-day hearing at $178,000 inclusive of GST," [207].

"On the same date, Sonya's solicitor estimated her legal costs on the indemnity basis as being $172,606.68 'in relation to these proceedings'," in [208] also noting the judicial advice costs were $23,442.27.

The costs component of the failed personal money claims, such not from notional estate, in [209].

To **late family provision claim**, detailed s 16 of the former Act.

Robb J said [211]: "In so far as s 16(3)(b) required, as is applicable to the present case, that William must show sufficient cause for his application not having been made within the stipulated 18 month period, **substantially the same criterion** is applied as is made relevant to a similar application by s 58(2) of the Succession Act, and the same principles apply. Hallen J has recently collected and restated those principles in *Penninger v Penninger* [2017] NSWSC 892," quoting there [97]+, and noting facts, particularly advice from a solicitor, Mr Kirk McKenzie, who had been retained by the trustee and had advised the plaintiff to obtain advice from another practitioner.

"**The primary factor**, however, is that whatever incomplete understanding William may have had concerning the manner in which he might challenge the deceased's will, he had faith in the loyalty of his daughter, Sonya, who complied with the terms of the memorandum of wishes in a manner that gave William substantially all of the benefits that he would have received from a successful application under the Family Provision Act, save for the possible legal ownership of the deceased's interests in the two properties," Robb J said [235]. Nor was the trustee prejudiced.

"I am satisfied that the strength of William's application for an appropriate family provision order is sufficient to justify the court permitting him to pursue his application out of time," his Honour said [258].

The trustee complained the plaintiff had not disclosed fully his assets nor those of his wife, Ms Zhao, who held property in China.

In [272] "Proving the nature of Ms Zhao's title to the property in which she lived in China and the value of that property to her would be a complex and probably expensive exercise. The court does not ordinarily require parties in family provision applications to go to such lengths in relation to **properties owned in foreign countries by their partners**. I am not satisfied that whatever property Ms Zhao has in China will in any readily realisable or significant way improve the financial circumstances of William and Ms Zhao," Robb J said.

"It would be wrong in all of the circumstances for the court to conclude that William's failure to disclose to the court such assets as his new wife might have in China is a proper ground for refusing him any family provision order to which he might otherwise have been entitled," his Honour said [273].

Robb J surveyed the Family Provision Act regime [274]+, **two stage process**, *Singer v Berghouse* (1994) 181 CLR 201; [1994] HCA 40, [15] (Mason CJ, Deane and McHugh JJ).

To the first stage, whether provision adequate, in [290] "This is a case where Sonya as trustee is seeking to enforce her own wishes, contrary to the expressed wishes of the deceased. Correspondingly, in substance this is a case where William as applicant is seeking by means of his family provision application to uphold the substance of the deceased's wishes, not to subvert them," his Honour said.

The memorandum of wishes was significant inasmuch as it reflected the deceased's assessment of "... any unsatisfactory conduct on William's part should disentitle him from receiving benefits under her will", in [292], Robb J then noting *Salmon v Osmond* [2015] NSWCA 42 [69]-[72], [76]-[77] with authorities (Beazley P, McColl and Gleeson JJA agreeing).

At [298], "The essential point is that the provision made for William by the will of the deceased must not simply be adequate, but it must be **adequate for the proper maintenance** of William. Given the importance of this issue to the resolution of the present dispute, it will be appropriate to set out the consideration of the authorities undertaken by Hallen J in *Hedman v Frazer* [2013] NSWSC 1915," there [97]-[104].

"Contrary to the submission made by Sonya, in the present case William has a relatively strong claim that it would be proper for him to at least be able to live at No 95 for as long as his health permits him to do so, even if he does not own it outright. Both William and the deceased acquired No 95 through their mutual hard work over many, many years and both would have had a reasonable expectation that the property would be their permanent home. That observation is founded on **the long-term efforts of both parties to the marriage** rather than the broad general rule proposed by Powell JA in *Luciano v Rosenblum* (1985) 2 NSWLR 65 at 69-70," Robb J said [299].

His Honour turned to the testamentary trust.

"In fact, William's fate in the present case is an exemplar of the proposition that

"... whether William's character and conduct in relation to the deceased was so reprehensible"

discretionary testamentary trusts will usually provide an inappropriate mechanism for ensuring that a beneficiary under a will receives adequate provision," Robb J said [304], before quoting Hallen J in *Hedman v Frazer* [180]-[185], authorities.

Then addressed discretionary factors, FPA s 9 (3)(b).

"So far as I am concerned, it is the deceased who should be the final judge of William's conduct, his entitlement to forgiveness (in so far as it may have been needed), and the appropriate measures that should be adopted to protect the deceased's estate for the benefit of her children from the consequences of any character flaw of William that was a matter of concern to her," Robb J said [310], then quoting Hallen J in *Underwood v Gaudron* [2014] NSWSC 1055 [242]: testator's judgment respectable.

Trust assets were about $1.67m, primarily the half interest in each of the Sydney houses.

"For the sake of this assessment, I will deduct the trust's share of the loan secured by mortgage over No 93 ($55,352), the full amount of the expenses of the trust paid personally by Sonya ($107,406.77), the administration fee claimed by Sonya ($168,162.50) and 90% of the legal costs of Sonya ($148,247.04) and 90% of the legal costs of William ($160,200). The deduction of 10% for the failed personal claims is arbitrary, and is more justifiable in Sonya's case than William's because of the work that was done in quantifying Sonya's claim. On this basis the total amount to be deducted would be $639,368.31, say $640,000," Robb J said [324].

"Sonya will be liable to pay capital gains tax if No 93 is sold. The Joint Submission contained a calculation of the amount of CGT payable as being $153,296.38 upon certain assumptions. I will adopt $150,000. Sonya would also have to pay CGT if No 95 was sold. The parties did not include the amount payable in the Joint Submission, but I infer it would be slightly more than the amount of CGT payable on the sale of No 93," his Honour said [325].

"I will therefore adopt $880,000 as the present net value of the trust's assets, on the assumption that I will make that it will only be necessary to sell No 93 to raise cash to meet the trust's liabilities," [326].

His Honour assayed the plaintiff's position [328]+, rejecting the trustee's contention that Ms Zhao "has access to any significant readily realisable wealth", in [341], noting receipt of pensions and lodger rents, calculating cash assets about $439,000 [346] if No 93 were sold, he continuing to live in No 95.

The trustee urged as disentitling conduct **violence by the plaintiff** on the deceased and infidelity.

Robb J reviewed evidence of violence from witnesses called by the trustee, and William's rebuttals and concessions and his witnesses, and submissions.

At [378] "In the usual case, the significance of the applicant's character and conduct towards the deceased will arise at both stages of the process of determining the applicant's claim, in circumstances where the applicant's case is that the testator has made a provision for the applicant that is less than the provision that is adequate for the proper maintenance, education and advancement in life of the applicant and in circumstances where that outcome is what was intended by the testator. In that context **the question will be whether the testator was justified** in making the provision that he or she did by reason of the testator's consideration of the significance of the applicant's character and conduct. If that is the issue, it may generally not be necessary for the court to engage in a thorough investigation of the character and conduct of the applicant over a period that may run into decades. Speaking generally, it may be sufficient if relatively isolated examples of character and conduct are established that are judged to be sufficient to support the testamentary determination made by the testator," Robb J said.

"In my view the issue of William's character and conduct has been raised in the present case in a different context. That context is whether William's character and conduct in relation to the deceased was so reprehensible as to disentitle him from any family provision order, and to leave him to survive on the adequacy of his own resources, notwithstanding that the deceased expressed

an intention that he enjoy the whole of her estate during his lifetime, without having access to the capital, subject to the discretionary judgment of her trustee to be exercised on the expressed wish that she would use her best endeavours to implement the memorandum of wishes," [379].

"The difference may be thought to be subtle, but in my view **the forensic consequences are significant**. The question is not whether there is sufficient evidence of bad character or conduct to justify the provision made by the testator and to decline to alter the effect of the will. The question is whether the character and conduct is sufficiently reprehensible to deny the applicant what the testator intended," [380].

In [382] "William admitted to one incident of infidelity many years before the deceased's death, and the evidence before the court does not justify a positive finding that William engaged in further infidelity. William did not deny that there were instances of domestic violence, and it is likely that he has minimised the frequency and seriousness of his violent conduct. The court has no real basis for judging the extent to which William's recollection is genuine, even if it is false. It is probable that there were a significant number of serious cases of violence that would individually be described as reprehensible. However, this conduct should be measured against the evidence of the many witnesses who gave what I accept to be genuine evidence that over long periods of time they had not experienced or become aware of improper conduct by William in his relationship with the deceased. I cannot see how the court can make any sound judgment about the overall seriousness of the delinquent conduct engaged in by William, balanced against the long passages of time when the many people close to him and the deceased did not experience that improper conduct.

"That is why I have come to the view that the proper judge of this issue can only be the deceased," [383].

To other competing claims, the trustee and her husband were wealthy, one of her brothers did not wish distribution in preference to his father, and the other brother, Sid, had needs.

"However, for present purposes it is significant that there is no evidence that Sonya has used her trustee's power to distribute any of the trust's assets to Sid at any time after the death of the deceased in 2005, or that she has any proposal to do so," Robb J said [388].

Provision was not adequate [389]+.

To **amount**, "First, I am satisfied that an adequate provision for the proper maintenance and advancement in life of William should include that William be entitled to live in No 95 for his lifetime if he chooses to do so, or in equivalent accommodation if he becomes unable to," [397].

In [398], Robb J: "Secondly, the wishes stated by the deceased that William should be able to live at No 95 for life, and that her capital should be used for his benefit, should be respected, but so should her wish that her capital should be preserved for the benefit of her children. Consequently, the family provision order should not involve a gift of the deceased's half interest in No 95 to William. It should be in the nature of a **Crisp order**. A Crisp order is an order that ensures that a person who is granted a life estate is not disadvantaged if they have to leave the property that is subject to the life estate, for example, if through old age they become unable to maintain the property and need to move into something smaller or into an aged care facility. In *Dimic v Djekovic* [2014] NSWSC 1502, Hallen J described the effect of a Crisp order," therein at [172], noting *Crisp v Burns Philp Trustee Co Ltd* (Supreme Court (NSW), Holland J, 18 December 1979, unrep), and description of such order as creating a portable life interest.

To **notional estate**, [408]+ given the whole estate had been distributed to the trustee, and the proposed family provision order would not interfere with the reasonable expectations of any person, appropriate to make notional estate order over the deceased's interest in No 93.

Orders for minutes, costs for submissions.

P: G McNally SC ins Colin Daley Quinn Solicitors. D: C D Wood ins MJM Lawyers.

Will charity fails

Re Marks; Letcher v Indian & Anor [2017] VSC 665. McMillan J. 1.11.17.

Of the $2m estate of the late Miss Joyce Marks, who died aged 85 years in March 2015, without issue, the executor's query whether a will clause sufficed to establish a charitable trust for housing indigenous ex-servicemen.

The first defendant was joined to represent 15 first cousins. The Attorney-General for the State of Victoria was joined, made written passive submissions but did not appear.

McMillan J noted expertise obtained by the executor pointing to difficulties with developing the housing scheme of the will.

Her Honour noted Charities Act 1978 (Vic) s 7M [Inclusion of non-charitable purposes not to invalidate trust] then traversed the competing submissions, replete with authorities, particularly *McCracken v Attorney-General (Vic)* [1995] VicRp 4; [1995] 1 VR 67, 81; *Downing v Federal Commissioner of Taxation* [1971] HCA 38; (1971) 125 CLR 185; *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] UKHL 1; [1891] AC 531; "the leading High Court case" *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* [1940] HCA 12; (1940) 63 CLR 209.

"In the event that the Court does find that the deceased had a general charitable intention, the plaintiff submits that the capital of the deceased's estate can be applied cy-près as provided in s 2 [Occasions for applying property cy près] of the Charities Act 1978. An appropriate application of the estate capital is said to be for the funds to be applied to be paid to Carry On (Victoria)," McMillan J noted [35].

At [38] "The parties diverge, however, on whether paragraphs 3(d) and (e) of the will evidence a general charitable intention such that the funds can be applied cy-près. The first defendant contends that the deceased's intent is specific, and, as a consequence, the trust fails at the outset. The trust does not 'vest in charity' as that phrase was used in *Beggs v Kirkpatrick* [1961] VicRp 116; [1961] VR 764, 767,"and quoted therefrom, and then from Lindsay J in *Estate Polykarpou; Re a Charity* [2016] NSWSC 409 [4].

In [40] "In distinguishing between a general and particular charitable intention, the first defendant relies upon *Attorney-General (NSW) v Perpetual* [1940] HCA 12; (1940) 63 CLR 209 and *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* [1938] HCA 39; (1938) 60 CLR 396," and further cases.

Extrinsic evidence was admissible given ambiguity arising on the face of the will: Wills Act 1997 (Vic) s 36.

McMillan J: "Creation of a **charitable trust requires** certainty of intention, certainty of subject matter, and identification of a charitable a purpose. That purpose must both fall within one of the four classifications of charitable purposes identified by Lord Macnaghten in Pemsel's Case, and ordinarily, be beneficial to the public. The **four purposes** espoused in Pemsel's Case are: 'trusts for the relief of poverty, trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the proceeding heads'. To come within the latter category, a purpose must also be within the spirit of the Preamble to the Statute of Charitable Uses 1601," [49], her Honour citing G E Dal Pont, Law of Charity (LexisNexis, 2nd ed, 2017) 235.

"In construing a will, **the court leans in favour of charity**: *Estate Polykarpou* [64]. This is evident in multiple respects: 'if the text of a will is capable of a meaning which supports a finding of charity, that construction ordinarily should be adopted': *Polykarpou*; the rule against perpetuities does not apply: *Barby v Perpetual* [1937] HCA 64; (1937) 58 CLR 316, 323; and 'little is...required' to infer a general intention such that a charitable trust can take effect: *A-G (NSW) v Perpetual* 228. Such approaches are in addition to the general principle of construction that a court will, if possible, adopt a construction that avoids intestacy," McMillan J said [52].

Then, "Although the charitable purpose regarding ex-servicemen can be disentangled from the non-charitable purpose, the Court accepts that it is impracticable to carry out. Specifically, the trust funds are insufficient to construct, fit out and maintain the units, and there is significant uncertainty as to the availability of tenants in the particular location. Although selling a portion of the Melbourne Road property to generate sufficient funds has been identified as an option, issues regarding cl 3(c) of the will specifying that the Melbourne Road property is to be retained are raised, and the option involves substantial financial risk. The

submission by the plaintiff that the charitable purpose may not have been impracticable at the date of the deceased's death is rejected, as no evidence was adduced on this point and, prima facie, it is not clear how the relevant circumstances would have differed in 2015," her Honour said [59].

McMillan J assayed "...the more difficult question of whether the will evinces a general charitable intention such that the estate funds can be applied cy-près", in [60], and considered same [61]-[73].

"Construction of the will of the deceased discloses a charitable purpose, albeit expressed in the form of a particular plan. That plan was impracticable to effect from the outset, such that the intended charitable trust could avoid failing ab initio only through **identification of a general charitable intent**. The language and structure of the will, however, do not disclose such a wider, dominant charitable intent. Rather, the essential element of the will is that the Melbourne Road Property be developed in the form of a private library to display certain chattels and the construction of rental units. In such circumstances, the **trust fails ab initio and cannot be applied cy-près**. While such an outcome is not entirely satisfactory, the Court cannot apply the estate funds toward an organisation such as Carry On (Victoria) in circumstances where the will does not disclose that it was the deceased's intention to leave funds for the general purpose of benefiting ex-servicemen. Consequently, the **residuary estate is to fall to the deceased's next of kin** in accordance with s 53 [Application to cases of partial intestacy] of the Administration and Probate Act 1958 (Vic)," McMillan J said [74].

Questions answered.

P: Mr S F McNab ins BJT Legal. 1D: Mr R Boaden ins Harwood Andrews. 2D: NA.

Happily demented couple

Mr PL v Mrs R [2017] QSC 249. Brown J. 1.11.17.

Brown J: "This is an application pursuant to s 22 of the Succession Act 1981 (Qld) that the applicant be granted leave to apply pursuant to s 21 [Court may authorise a will to be made, altered or revoked for person without testamentary capacity] of the Act for an order authorising a will to be made for Mr L. The application is made on Mr L's behalf by his son, Mr PL, who holds Mr L's power of attorney. The respondent is Mrs R, Mr L's wife, for whom Ms A has been appointed litigation guardian," [1].

"Mr L suffers from dementia. Mrs R also suffers from Alzheimer's disease and dementia. Mr L and Mrs R were married in May 2001. It was a second marriage for each of them," her Honour said [2].

"The evidence demonstrates that their marriage is a happy one. Indeed, despite the impairment that they each suffer, they now reside in the same nursing home and still happily enjoy each other's company. To the extent that there is tension between Mr L's children and Ms A, it does not appear to be shared by Mr L and Mrs R, and one hopes that in this late stage of their lives the present dispute is not escalated such that the two of them are drawn into it," [3].

Her Honour detailed statutory provisions and facts. Noted expertise to capacity from geriatricians Drs Sanmarie Duddridge, Jane Mikli, Someswara Attoti, Helen Siddle: the gentleman lacked capacity.

Mr L's estate was valued about $3m.

At [85] Brown J: "The requirement that an order under s 21 may be appropriate, is also, in this instance, satisfied given that:

(a) Mr L has executed a Will where there is real doubt that he had the capacity to do so;

(b) It is likely that there will be a dispute as to whether the 2004 Will should be the operative Will or the 2016 Will is valid;

(c) There have been orders made by the Federal Circuit Court in the family law proceedings.

"It is not disputed and I am satisfied, having regard to the medical evidence and particularly the report of Dr Siddle, that Mr L lacks testamentary capacity. Section 21(a) and (c) of the Act are therefore satisfied," her Honour

said [86].

"If leave is granted and the other requirements of s 21 are satisfied, the Court exercises a broad and flexible jurisdiction: *GAU v GAV* [2016] 1 Qd R 1 at [48], and is not constrained by express statutory criteria. Given the beneficial purpose of the legislation and the protective nature of the jurisdiction, an important consideration in the exercise of the discretion under s 21 is the Will the person probably would have made if he or she had testamentary capacity," [87].

Later, "Given that there has been a subsequent Will been made by Mr L in November 2016 which is of uncertain effect given the position as to Mr L's testamentary capacity, it is appropriate that the Court order a Will be made," [131].

"Given that Mr L is in a nursing home and this judgment deals with his personal and medical details, I consider that it is appropriate that reasons be published in **de-identified form so as to protect his privacy, dignity and vulnerability**: *Re JT* [2014] QSC 163 at [40]," Brown J said [135].

Orders [137]:

1. Leave is granted to the applicant, Mr PL, pursuant to s 22 of the Succession Act 1981 (Qld) to apply for an order authorising a will to be made on behalf of Mr L;

2. Pursuant to s 21 of the Succession Act 1981 (Qld) a will be made for Mr L in the terms stated by the Court in a form of will to be submitted by the applicant;

3. The applicant draft a form of will in accordance with these reasons, provide a copy of the draft will to the respondent to the application and submit the same within five days for the purpose of the will being approved by the Court pursuant to s 21(2)(c) and then executed in accordance with s 26 of the Act;

4. Liberty to apply as to the form of the will submitted in accordance with paragraph 3 prior to the execution of the will;

5. The issue of costs be the subject of short written or oral submissions on a date to be fixed;

6. Any copy of these reasons to be published on the judgment website or in any other publication made to, or accessible by, the general public or a section of the public, be in an anonymous form.

A: P E Sorensen ins Cornford-Scott Lawyers. R: R D Williams ins Springwood Lawyers.

Backyard

"After obtaining quotes from law firms and being surprised at their cost, the defendant instead decided to copy and amend the 'family trust' of his friend, Mr Larry Callaghan," - **McMillan J, *Re Lauer*, 30.11.17.**

"These circumstances serve as a reminder that the need for contemporaneous objective evidence cannot be overstated on the issue of the creation of a trust," **- McMillan J, *Re Lauer*, 30.11.17.**

"The diligent research of counsel has thrown up three American decisions which support the proposition that a person should not benefit directly or indirectly as a consequence of the crime," - **Master Sanderson, *Public Trustee (WA) v Mack*, 14.11.17.**

"If Clancy's mate could communicate with a thumbnail dipped in tar, Barry Hick could make his meaning clear in ballpoint pen on a handy scrap of notepad," **- Registrar C J Boyle, *Re Estate of Barry Richardson Hick*, 7.11.17. See Clancy of the Overflow, by Banjo Paterson, next page.**

"Events have proven that advice to be completely correct,"**- Kunc J, *Portis*, 1.11.17.**

"The court has no real basis for judging the extent to which William's recollection is genuine, even if it is false," **- Robb J, *William Bkassini*, 1.11.17.**

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Clancy of the Overflow
by A B Paterson

I had written him a letter which I had, for want of better
Knowledge, sent to where I met him down the Lachlan, years ago,
He was shearing when I knew him, so I sent the letter to him,
Just 'on spec', addressed as follows, 'Clancy, of The Overflow'.

And an answer came directed in a writing unexpected,
(And I think the same was written with a thumb-nail dipped in tar)
'Twas his shearing mate who wrote it, and verbatim I will quote it:
'Clancy's gone to Queensland droving, and we don't know where he are.'

In my wild erratic fancy visions come to me of Clancy
Gone a-droving 'down the Cooper' where the Western drovers go;
As the stock are slowly stringing, Clancy rides behind them singing,
For the drover's life has pleasures that the townsfolk never know.

And the bush hath friends to meet him, and their kindly voices greet him
In the murmur of the breezes and the river on its bars,
And he sees the vision splendid of the sunlit plains extended,
And at night the wond'rous glory of the everlasting stars.

I am sitting in my dingy little office, where a stingy
Ray of sunlight struggles feebly down between the houses tall,
And the foetid air and gritty of the dusty, dirty city
Through the open window floating, spreads its foulness over all

And in place of lowing cattle, I can hear the fiendish rattle
Of the tramways and the 'buses making hurry down the street,
And the language uninviting of the gutter children fighting,
Comes fitfully and faintly through the ceaseless tramp of feet.

And the hurrying people daunt me, and their pallid faces haunt me
As they shoulder one another in their rush and nervous haste,
With their eager eyes and greedy, and their stunted forms and weedy,
For townsfolk have no time to grow, they have no time to waste.

And I somehow rather fancy that I'd like to change with Clancy,
Like to take a turn at droving where the seasons come and go,
While he faced the round eternal of the cash-book and the journal --
But I doubt he'd suit the office, Clancy, of 'The Overflow'.