Australia Wills Estates
Monthly Summaries
October 2017 No 29

$3.2m statutory will

R, J [2017] SASC 153. Stanley J. 31.10.17.

Statutory will by Wills Act 1936 (SA) s 7 [Will of person lacking testamentary capacity pursuant to permission of court].

Stanley J noted authorities to testamentary capacity.

"In finding whether the proposed will accurately reflects the likely intentions of the proposed testator, the **law distinguishes between** 'lost capacity', 'pre-empted capacity' and 'nil capacity' cases. That is a distinction between, in the first two categories, proposed testators who once had testamentary capacity and then lost it, and, in the third category, proposed testators who never enjoyed testamentary capacity," his Honour said [12], then quoting Palmer J in *Re Fenwick* [2009] NSWSC 530; 76 NSWLR 22 [172]-[173]: Court makes objective assessment of likelihood.

Later, "The proposed testator, JR, was born on 11 July 1986. He is currently 31 years of age. He was diagnosed with autism, intellectual impairment and obsessive-compulsive disorder at a young age. There is a long history of behavioural issues with aggressive outbursts prior to JR being accommodated in the Strathmont Centre in July 2005. In January 2010, he escaped from the Strathmont Centre and fell from a bridge suffering a severe traumatic brain injury and a severe spinal cord injury. There is no prospect he will recover from his injuries, nor will his intellectual functioning improve. Professor McFarlane considers that JR does not have the intellectual reasoning capacity to understand the nature of property, its ownership or its administration. Even at the most basic level, he does not have an understanding of his assets and the extent of his property," Stanley J said [20].

"As a result of a settlement with the State of SA in relation to the injuries suffered in the fall from the bridge, JR now has an estate currently valued at $3.2 million," his Honour said [21].

The plaintiff was the gentleman's 65yo mother. The father had never any engagement, JR thinking he was dead, and declined opportunity to be heard on this application. JR had formed a an enduring active unromantic friendship with a 46yo single man LAT.

"While provision for a non-family member is unusual, it is plainly contemplated by the Act. Section 7(4)(d)(iv) provides that in considering an application for an order the court must take into account the interests of any other person who has cared for or provided emotional support to the person. In *In the Matter of Pickles* [2013] SASC 175, Gray J made a specific bequest to a carer who provided significant support to a person under a disability for many years," Stanley J said [36].

"In my view it is likely that the distribution of JR's estate would reflect the fact that the plaintiff has cared for him for his entire life and is his biological mother. While LAT is not a blood relative he has been involved in JR's life for some 13 years. I consider that a division of his estate on the basis of 75 per cent to the plaintiff and 25 per cent to LAT is likely to reflect his actual testamentary intentions if he had testamentary capacity," [37].

"I am also satisfied that, in the event that all these gifts fail, JR's likely intentions, if he had testamentary capacity, is that his estate should be divided amongst the three proposed charities. Each of those charities have meaning to him because they are dedicated to supporting persons with the particular disabilities from which he suffers," [40].

Order. Judgment annexes the will form.

Appearances unannounced.

INSIDE THIS EDITION

Unexecuted will rejected

Wood v Trudinger; in the will of Alan Stewart Trudinger [2017] QSC 325. Brown J. 20.10.17.

Rejected an unexecuted will prepared by a solicitor shortly before the testator's death early 2016, Brown J unpersuaded to testamentary capacity, and admitting a May 2015 will, indemnity costs from the estate.

To testamentary capacity her Honour quoted Applegarth J in *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107 at [21]-[22], noting *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 per Cockburn CJ, and restatement of Powell JA in *Read v Carmody* [1998] NSWCA 182, affirmed in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308, [24]; also *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558 at 570 (Isaacs J).

At [39], "There was a dispute between the applicants and the respondent as to whether the *Briginshaw* principle applied. The applicants contend that the *Briginshaw* principle does not apply to the assessment of evidence in this case. Their counsel contends that the *Briginshaw* principle only applies where the nature of the matters to be established warrant special caution in dealing with the evidence. He contends there are no such circumstances in the present case. That is contrary to present authority," Brown J said.

"Habersberger J in *Fast v Rockman* [2013] VSC 18 at [48], stated that in the context of determining **whether to make a declaration in favour of an informal will**, the evidence needs to be evaluated with great care, in accordance with the *Briginshaw* principle. The relevant passage from *Fast v Rockman* was referred to by both Dalton J in *Re Spencer* [2014] QSC 276 at [18] and by Boddice J in *Lindsay v McGrath* [2017] QSC 220, [18]," her Honour said [40].

"**No medical evidence** was given at the hearing. Lois Trudinger deposes to her solicitors having written to the hospital to obtain such evidence and to being told by her solicitors that the Princess Alexandra Hospital had denied requests for a confirming report due to a privacy policy. That is relied upon as an explanation for the lack of medical evidence and to address any *Jones v Dunkel* inference. Given the reliance by [solicitor] Ms Ceric upon the medical opinion, it is surprising that the hospital records were not subpoenaed nor the treating doctor, since the onus of satisfying capacity is borne by the applicants," Brown J said [45].

"That is not to say that medical evidence is required in every case to establish capacity. What is required depends on the circumstances of the case. The Court must assess the lay evidence available to determine whether that is sufficient to satisfy the onus on the applicants," [46].

The solicitor had no recollection of taking instructions. Her file notes showed she had queried the testator to his knowledge of the instant date, of why he had been admitted to hospital, his recollection of his friends.

"No specific evaluation was carried out by Ms Ceric of the testator's knowledge of the value of the assets which he held nor the full extent of the assets which he held, in accordance with the principles in *Banks v Goodfellow* although she stated that he volunteered information about the assets while giving the instructions," Brown J said [49].

"In her file note she recorded that the testator's instructions were clear and even though the testator was experiencing breathing difficulties, she did not consider his capacity to think through his instructions was affected in any way," her Honour said [50].

The respondent had advanced there was no explanation for certain preferences in the later residue.

"The **inconsistency between the testator's instructions** as to the residue and the previous will does raise a real question as to whether the testator was confused or his memory was impaired such that it affected his ability to clearly determine and articulate his instructions. That, together with the percentage of the proceeds of sale and the gift to Jason, bring into question whether the testator had the capacity to assess and determine the matters referred to in the third and fourth requirements of *Banks v Goodfellow*," Brown J said [52] then detailed incidents of the evidence.

At [81] "While I can accept that the omission of any reference to his daughter in his instructions may have been an oversight, the gift of the vehicle to Jason spontaneously on the basis of a phone call, the belief that his previous will divided the residue equally between Daniel Trudinger, Lois Trudinger and Peter Trudinger, the unexplained reduced gift to Daniel Trudinger and the absence of

reference to his daughter are evidence that the testator's capacity was impaired such that his faculties were not fully functioning and he could not understand and appreciate the competing claims to which he ought give effect," Brown J said.

Then, "Given there is no evidence that the residue clause was altered upon the testator's instructions, there is also a lack of evidence satisfying the second requirement adopted by *Lindsay v McGrath*, namely that the document reflected the testator's testamentary intentions," [86].

"In any event, given the draft will read to the testator did not reflect the testator's instructions to Ms Ceric as to his testamentary wishes, it was also necessary for the testator to have capacity at the time the draft will was read to him. Even if he had testamentary capacity when he gave instructions, the draft will sent on 18 February did not accord with the instructions that he had apparently given to Ms Ceric, the principle in *Parker v Felgate* (1883) 8 PD 171 does not apply. However, even if it did apply, the outcome of my decision would be no different because I am not satisfied on the evidence that the testator was capable of forming an intention that the draft will was to operate as his will by the time it was being read to him," [87].

The application was nonetheless appropriate in the circumstances, applicants and respondent costs from the estate on the indemnity basis.

No question to incapacity in the earlier will, admitted to probate.

A: A Stobie ins Beenleigh Legal Solicitors. R: D Skennar ins Quinn & Scattini Lawyers.

Certification for derivative suit

Butcher v Balog [2017] NSWSC 1409. Parker J. 19.10.17.

In this interlocutory judgment, Mr Butcher died aged 56 years in August 2016, his will appointing as executors his solicitor, Mr Balog, and his brother Mr Butcher, and bequeathing his modest estate, principally a $216,000 house at Cessnock, one third to his de facto widow and the other thirds to two young grand children, children of the testator's only issue, his daughter, the 26yo plaintiff, granted a legacy of $100.

The children were in custody of a son of the de facto, the plaintiff having had problems with drugs, a social security recipient without assets.

The plaintiff brought family provision suit.

Here in question was firstly whether the plaintiff should be permitted to proceed against the parents of the deceased in respect of asserted interest in two other realty lots, one at Brooklyn where it was contended the deceased had done much construction work between 2007 and 2010, and the other, at Mount View Rd, Cessnock, which had been acquired shortly after the deceased had given his parents a little more than $100,000.

The second question was whether the plaintiff's subpoenas to the parents should be set aside.

Of the Brooklyn property claim, Parker J noted: "According to the plaintiff, the deceased told her that the house was costing him a lot of work and expense, but it would be his home and she could expect to inherit it from him. The plaintiff's contention is that the deceased's estate has, or may have, an equitable proprietary interest in the property, or part of it, by way of proprietary estoppel, or under the 'failed joint endeavour' equity recognised in *Baumgartner v Baumgartner* [1987] HCA 59; (1987) 164 CLR 137," in [8].

At [15], "If successful, the claim concerning the Mount View Road property would result in the deceased's estate having a proprietary interest in the property by reference to the amount of the payment made by the deceased. But, in the alternative, the plaintiff wishes to seek an order designating the monies paid as **notional estate** for the purposes of her family provision application. The payment was made more than a year before the deceased

died and, accordingly, the Court could only designate the monies as notional estate if satisfied that the payment was made for the purposes of 'denying or limiting' potential claims against the deceased's estate: Succession Act 2006 (NSW), s 80(2)(a). Although the deceased by that stage had been diagnosed with cancer, there is no direct evidence to support the idea that he was seeking to put assets beyond the plaintiff's reach. However, it is ultimately a question of fact and the plaintiff is entitled to pursue the allegation if she is so advised. Accordingly, leave should be granted to the plaintiff to amend, at least so as to seek a notional estate order in relation to the monies, and for that purpose to join the deceased's parents as additional defendants. Counsel for the deceased's parents did not submit to the contrary," Parker J said.

Then, "The quantum of the estate is relevant to the ultimate question which arises in the plaintiff's family provision claim, namely, whether the provision made in the will was 'proper'. But the liabilities alleged are liabilities to the deceased's estate, not to the plaintiff. If the claims were sustained, the deceased's parents would be required to account to the estate. Accordingly, the Executors, on behalf of the deceased's estate, are the appropriate parties to bring the claim and they have declined to do so. However, there is a recognised exception in the area of trusts which, in my opinion, is **equally applicable to deceased estates**. Where a trustee declines to pursue a claim against a third party, the Court may permit a beneficiary of the trust, if there are 'special circumstances', to bring a suit for the benefit of the trust in the beneficiary's own name, joining the trustee as an additional defendant: *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 at 129 [55]-[56]," his Honour said [17].

The pleading would require order for account, in addition to the Supreme Court Act 1970 (NSW) s 75 declarations proposed, Parker J noting *El Sayed v El Hawach* [2015] NSWCA 26; (2015) 88 NSWLR 214 at 225 [58]: broad authority to declare does not obviate necessity for standing.

"In *Alexander*, the High Court spoke of **a derivative suit by a beneficiary**. As matters stand, the plaintiff is not a beneficiary in the relevant sense. But in *Lewis v Condon* [2013] NSWCA 204; (2013) 85 NSWLR 99, the Court of Appeal decided that it was appropriate to authorise one of a class of potential beneficiaries under a discretionary trust to bring a derivative suit for the benefit of the trust. Subsequently, in *El Sayed v El Hawach*, the first instance Judge raised some questions about this. On appeal, the Court of Appeal stated that the decision in *Lewis* was binding. Although it did not ultimately prove necessary to deal with the appellant's argument that *Lewis* should be reconsidered, the Court of Appeal pointed out that there was ample authority to support the proposition that a discretionary object, as opposed to a beneficiary stricto sensu, might be permitted in special circumstances to bring a derivative suit: at 223 [47]," Parker J said [20].

"The present case is not one of a discretionary object under a trust. The plaintiff's interest in the pursuit of the claims is contingent. If the plaintiff's family provision claim fails, she will receive no financial benefit even if the claims against the deceased's parents succeed. But, in my opinion, **the analogy is close**. A discretionary object equally has no vested right to receive income or assets out of the trust and may not ultimately benefit from the success of the proceedings. In my opinion, **it is open to the Court in a proper case** to authorise a person who is seeking to establish an entitlement to a share of a deceased estate to bring a derivative claim on behalf of the estate where the executors refuse to do so," his Honour said [21].

The contended resulting trust over the Mount View Rd lot sale proceeds was sustainable depending on evidence.

"As mentioned, the potential claim with respect to the Brooklyn property is put on the basis of proprietary estoppel. Such a claim would depend upon a promise having been made by the deceased's parents to the deceased that the deceased had, or would be granted, some sort of interest in the Brooklyn property. On the plaintiff's evidence, the deceased believed when the house was being built that he would have some form of interest. However, there is no direct **evidence of the dealings between the deceased and his parents** in this regard. Taken on their own, the circumstances do not necessarily suggest that any such promise was made. The deceased's conduct would be explicable on the basis of some sort of arrangement falling short of his

receiving a proprietary interest, or even on the basis of natural love and affection. Nevertheless, if the plaintiff's evidence is accepted, there is some basis for thinking that at the time the deceased either had, or would receive, some sort of interest, and that may provide some basis for an inference that such a promise was made to him. To the extent that the potential claim is put on the basis of a 'failed joint endeavour' equity, it likewise ultimately depends upon the nature of the understanding (if any) between the deceased and his parents when the building work was done," Parker J said [24].

The pleading required specification of promise, and to detriment, particulars of outlays of the deceased.

"Legitimate to issue subpoena for evidence to quantum of estate"

"The deceased's parents are **entitled to such particulars in order to defend the case**, not only because the plaintiff must establish that the detriment was in fact incurred, but also because it may be necessary for the Court to consider the extent to which any improvements undertaken have depreciated in value: *Milling v Hardie* [2014] NSWCA 163 at [55(3)], [69]. A 'failed joint endeavour' equity claim would give rise to similar considerations. In my opinion, it would only be proper to let a derivative claim go forward if a proper set of particulars were provided," [30].

To **special circumstances for a derivative suit**, Parker J noted analysis of Powell J in *Ramage v Waclaw* (1988) 12 NSWLR 84 at 90-93, and "Over time, the requirement of 'special circumstances' has been relaxed and, on one view, it is enough that a potentially valid claim which would benefit the estate will not be pursued: see at 92E, 94A," in [32].

In [33] "A derivative suit is an instance of equity making available its flexible procedures to avoid injustice in cases where procedures at law are non-existent or inadequate," Parker J noted.

Costs risk to the parents required protection.

Further, "I am also concerned as to whether proper consideration has been given to the proposed claims' **prospects of success**. As I have mentioned, neither proposed claim is supported by direct evidence. Each potential claim is ultimately based on inference and, while the inference is open in each case, I do not see it as being particularly compelling in either case. If the deceased's parents give a contrary account of their dealings with the deceased, it is hard to see how the plaintiff could ever discharge the onus of proof. If filed, the Statement of Claim would not be required under the Court's rules to contain a solicitor's certification to the effect that there are reasonable grounds for believing that the claims against the deceased's parents have reasonable prospects of success: Legal Profession Uniform Law Application Act 2014 (NSW), Sch 2 cl 4(2), which applies only to claims for damages. When I asked counsel for the plaintiff whether the plaintiff would accept the imposition of a term that the Statement of Claim contains such a certification, I was told that it was a matter for instructions. That only reinforces my concerns," Parker J said [38].

To the **subpoena**, "In general, in a family provision application the size of the deceased's estate is a material factor in determining whether adequate provision has been made for the 'proper' maintenance, education or advancement of the plaintiff. Generally speaking, therefore, it is **legitimate for a plaintiff to issue subpoenas** for evidence which is likely to bear **on the quantum of the estate**. But in the present case, it is clear that the deceased's parents deny any liability to the estate. The estate could only benefit from the potential claims in relation to the Brooklyn and Mount View Road properties if those claims are pursued against the deceased's parents by means of court process. At the time the subpoena was issued, the Executors, who were the proper plaintiffs, had decided not to pursue any such claims. In those circumstances, I consider that there was no legitimate forensic purpose in the plaintiff issuing the subpoena," [42], such circumstance changeable on proper pleading.

Order subpoena set aside, costs payable and assessable forthwith by the plaintiff.

Ordered the parents joined as additional defendants, leave to amend to seek order on notional estate, other motion adjourned.

P: K Morrissey ins GHS Legal Lawyers Pty Ltd. 1&2D (executors): JT Johnson ins DC Balog & Associates. Subpoenaed parties: M Castle ins Peninsula Law.

Estoppels fail daughter

Lafferty v Waterton (No 4) [2017] WASC 302. Allanson J. 19.10.17.

The London-domiciled plaintiff failed in a complex of claims against her brother and sister respect of their father's and mother's estates.

The plaintiff asserted a letter from her mother in 2004 was promise to her of one third share of her estate.

The father, Mr Waterton, died in Victoria in late 2003, his estate going to his widow, his son William the executor, the estate comprising subdivisible land at Gisborne, north west of Melbourne, as well as two unvalued aircraft and collected antiques. The land lots sold for about $2.7m.

Mrs Waterton, by her mother's estate in the late 1980s, had acceded with her sister to a home unit in Claremont in Perth's western suburbs. The sister later relinquished her interest to Mrs Waterton.

The plaintiff "Susan alleges that Mr Waterton was the beneficial owner of Unit 3, or an interest in it. She relies on two assertions: first, that he paid money to Ms Balston in consideration of the transfer; second, at least implicitly, that he did not intend the registration in Mrs Waterton's name as a gift to his wife. Those allegations are not admitted," Allanson J said [24].

"Susan has not established either limb of her contention. There is no evidence that Mr Waterton paid consideration for the transfer of Unit 3, other than stamp duty on the transfer. Even if Mr Waterton did pay for Unit 3, the Unit was purchased in the name of his wife. The fact that he paid raises **no presumption of a resulting trust** in his favour: see *Martin v Martin* [1959] HCA 62; (1959) 110 CLR 297, 303; *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242, 247, 256, 265," his Honour held [25].

In 1999 Mr Waterton paid $360,000 for another unit in the same block, the title to the son, the unit occupied by Mrs Waterton from 2005 until her death in 2015.

"Susan questions the circumstances in which William became the registered proprietor of Unit 9, alleging that William held the property in trust for Mr Waterton, Mrs Waterton, or both of them jointly. There is no basis either on the facts or in any relevant presumption or rule of law or equity for finding that William held title of Unit 9 on trust for the benefit of his mother or both parents jointly at the time of Mr Waterton's death. Whether William held the property on trust for his father is **a question of Mr Waterton's intention at the time of purchase**. Where a father purchases property in his son's name, there is no presumption of a resulting trust in favour of the father," Allanson J said [28].

The home units were not part of the father's estate. Incidentally, at [34] Allanson J rejected the plaintiff's valuation proofs for wanting establishment of base facts: *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705, 743 744 [85].

His Honour detailed correspondence within the family after Mr Waterton had died, including the 2004 letter from Mrs Waterton to the plaintiff, knowledge of which was denied by the other siblings. The letter generally assured the plaintiff of a one third share of the mother's estate.

Thereafter Mrs Waterton made cash gifts $200,000 to each of the children, as well as another $200,000 to the younger sister, the third defendant, Madelaine, mother of the older couple's only grandson, Oscar, whose education at Scotch College in Melbourne was also met by Mrs Waterton, who wrote to the plaintiff in 2010 commending her acceptance of her mother's wishes and warning of will consequences otherwise.

Mrs Waterton made statutory declarations to her will provision for her younger daughter, then to the titles of the home units.

The lady then transferred her home unit by deed of trust to William and Madelaine on trust for Oscar. She gave Madelaine $1m and William $298,000 and later a further $85,000.

"Susan said that in 2011, referring to a news article about a dispute between members of the Rinehart family, Mrs Waterton made an offhand comment that there would be nothing to fight about when she was gone because there would be nothing left. Susan said that only then did she consider that her mother might not treat her children equally," his Honour noted [72].

The plaintiff had confronted her mother about the home unit transfer. They had no further contact. The plaintiff's solicitors wrote to Mrs Waterton, foreshadowing challenge to the father's will for undue influence and testamentary capacity and the 2004 letter with respect to the entrusted home unit.

Lindley LJ - click to biography

Mrs Waterton made another statutory declaration, explaining her preference for her grandson.

Mrs Waterton made another will in late 2013, denying any realty interest but contingently giving such to her son William, and the residue to him and Madelaine, and at the same time, by deed of gift, to William and Madelaine all her personal property.

"In effect, at the time of her death Mrs Waterton had ensured that she had no substantial assets to dispose of by will. The inventory of her estate at her death showed assets of $261," Allanson J noted [84].

His Honour thereafter summarised the plaintiff's case, essentially for provision by Administration and Probate Act 1958 (Vic) Part IV from her father's estate, from which entitlement she had refrained by reason of the asserted representations of equal distribution in her mother's 2004 letter, of which her siblings were aware so tainting their receipts.

At [101], Allanson J: "It is difficult to ascertain the breadth of Susan's claim. The claim relies on either proprietary estoppel or promissory estoppel. **Both forms of estoppel are based on the principle** that the conduct of a promisor in engaging the promisee to change his or her position to their detriment on the basis of the promise, when acted upon by the promisee, creates an equity which binds the promisor to make good the expectation the promisor has created. Promissory estoppel and proprietary estoppel are intended to protect the promisee against the detriment which would flow from the promisee's change of position if the assumption (or expectation) that led to it were deserted: *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505 [1] (French CJ, Kiefel, Bell & Keane JJ)," Allanson J said [101], then noted *Harrison v Harrison* [2011] VSC 459 [371] (Kaye J), and reliance on *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26 [38], and quoted therefrom at [35]: representation must be clear to found estoppel, French CJ, Kiefel and Bell JJ noting *Low v Bouverie* [1891] 3 Ch 82 (Lindley LJ). There was no instant need to consider further distinction of the estoppels.

After sub heading "The promise and the assumption or expectation", in [106] Allanson J said: "It is important to identify the assumption or expectation which Mrs Waterton's estate is said to be estopped from denying", discerning three alternatives.

Then, "The claim as pleaded is unrealistic. The letter cannot be reasonably understood as promising one third of the assets Mrs Waterton then held, including the estate of Mr Waterton, subject only to expenditure for 'proper maintenance and support'. Mrs Waterton asserted her right to 'go through the lot', writing that there may not be anything left on her death. She did not promise to act frugally or even reasonably in using or expending her property in her lifetime only for 'proper maintenance and support'. If there is a promise, it is confined to one third of what may remain, with no representation about how Mrs Waterton would use her property during her life," [109].

"At best, for Susan's case, Mrs Waterton said that it was not her nature or her desire to 'go through the lot'. **That statement is not promissory**. Quite simply, there is no promise to preserve assets, and Susan did not understand that such a promise had been made. In cross examination, Susan accepted that, on her understanding of the letter, her mother had not promised that she would not dispose of assets, or make gifts, or pay for her grandchild's education, or perhaps make substantial donations to charity. She accepted that she understood that her mother might use up her property during her lifetime, and not just on basic necessities. Her evidence is not consistent with her having any assumption or expectation, as a result of the letter, that Mrs

Waterton's expenditure during her life would be confined to proper maintenance and support," [110].

After replicating transcript, Allanson J said: "While Mrs Waterton did give an assurance that she would distribute what was left on her death equally, that is not sufficient for Susan to establish any claim against William and Madelaine. **To succeed against them**, she must establish the representation she has pleaded so that she may 'undo' the gifts made by Mrs Waterton during her life. If she cannot undo the effect of those gifts, Susan is left with the claim which (somewhat surprisingly) her counsel maintained in his final address, for one third of the $261 that remained in Mrs Waterton's estate at the date of her death," [114].

To **reliance and detriment**, at [116], "The next two factors are conveniently dealt with together. Did Susan rely on the assurances in the letter in acting, or refraining from acting, to her detriment? And did Mrs Waterton know or intend that Susan would rely on the letter in that way?

"It is **the conduct of the plaintiff in acting on the expectation to which the promise gives rise that invites the intervention of equity**: *Giumelli v Giumelli* (1999) 196 CLR 101 [35] [65]. The onus is on Susan to establish that she suffered detriment by changing her position in reliance on Mrs Waterton's promises: see *Sidhu v Van Dyke* [58], [61]. Susan's evidence, which I accept, is that her husband told her that she may be entitled to make a family provision claim, and if she was unhappy she should obtain advice from a Melbourne solicitor. She does not say that she was going to make a claim, or even that she was going to seek advice," Allanson J said [117]. His Honour was not satisfied the plaintiff would have made a claim on her father's estate without the 2004 letter.

"The **unconscionability which would attract equitable relief** in the present case has a further element: that Mrs Waterton induced or acquiesced in Susan's adoption of the assumption or expectation, intending or knowing that her assurances would be relied on: *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, 423 (Brennan J). I am not satisfied that it would be unconscionable for Mrs Waterton to proceed to exercise testamentary freedom when she did not know, and could not have known, that Susan would treat her letter as an assurance inducing her to refrain from legal action. Susan does not plead that Mrs Waterton knew that she would rely on the letter, or knew that she might be contemplating a claim against the estate. And there is no evidence that Mrs Waterton knew, or could have known, that Susan was considering a claim against the estate, or that she would materially change her position on the basis of any promise or assurance in the letter. The terms of the letter are not directed to present or future legal relations between mother and daughter, but to family relationships, the death of the husband and father, and the circumstances that called for the family to develop and sell [the family home at Gisborne] Mulguthrie while Susan was expressing disquiet about being 'left out'," [121]. Nor was detriment made out.

"Whether Mr Waterton had adequately provided for Susan must depend on all the facts that existed at the date of his death, whether he knew of them or not, and all the eventualities that might at that date reasonably have been foreseen by a testator who knew the facts: *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* [1979] HCA 2; (1979) 143 CLR 134, 147 148. As an adult child, Susan would not have needed to establish some special need before relief could be granted: see *Jones (a pseudonym) v Smith (a pseudonym)* [2016] VSCA 178 [38]," Allanson J said [125].

In [131], "The **evidence that the plaintiff chose to adduce was insufficient**. Quite simply, Susan has not proved what her financial resources were at the time. For the court to make a finding, it must be actually satisfied of the facts to the civil standard of proof. On the exiguous evidence the plaintiff has adduced, I am not satisfied that on the facts that existed at the time of her father's death, her proper maintenance and support required any provision from Mr Waterton's estate.

"It follows that Susan has not shown that she suffered any detriment by not pursuing a claim for family support," [132].

Claim dismissed.

P: Mr G M G McIntyre SC & Mr A S Meysner ins Butcher Paull & Calder. 1D (estate): NA. 2D (William): Mr M N Solomon SC & Mr T J Carmady ins Williams & Hughes. 3D (Madelaine): Mr M W Fatharly ins Kott Gunning.

Purpose keeps libel

Frances Jane O'Grady (Deceased) [2017] SASC 150. Stanley J. 19.10.17.

Stanley J refused the executor's application under Probate Rules 2015 (SA) r 67 [Application for omission of words of an offensive or libellous nature from grant] to omit certain words from the will subject of application for grant.

Clause 7 of the will stated: "I DECLARE that I have made no provision for my grandson ADAM BERNARD VINCENT ZITO as he stole a number of valuable items including jewellery from me and I have not spoken to him since that date and we no longer have a meaningful relationship", the executor wishing omission of the words after "as" and before "we".

The will bequeathed $230,000 in equal shares to five grandchildren , a cousin and sister-in-law, as well as gift of art to a grandson and the residue between two charities.

Stanley J drew attention to his reasons in *Betty Jean Hoffman (deceased)* [2016] SASC 110, 28.7.16, detailed rule 67, and noted other authorities, particularly *Paul William Brummitt (Deceased)* [2011] SASC 116, [32] (Gray J).

At [13], his Honour: "Libellous is the adjective of the verb to libel. To libel a person is to make a defamatory statement of a person in a durable form which is visible. Frequently this is in writing. A statement is defamatory if it tends 'to lower the plaintiff in the estimation of right thinking members of society generally' or 'if it is likely to cause ordinary decent folk in the community, taken in general, to think less of him'," citing *John Fairfax & Sons Ltd v Hook & Anor* [1983] FCA 83; (1983) 72 FLR 190 at 193.

"Publication by an executor, in the absence of malice, is privileged, being an accurate republication of a register kept pursuant to statute: *Searles v Scarlett* [1892] 2 QB 56; *Marianna Enjakovic [*2008] SASC 72, [21]. A will published with a grant of probate is a public document for the purposes of the statutory defence in s 26 of the Defamation Act 2005 (SA)," [14].

Stanely J rejected proposition the Registrar might contravene Criminal Law Consolidation Act 1935 (SA) s 257 prohibition of criminal defamation.

"To the extent that the Registrar could be considered to publish the will by the grant of probate, he does so with a lawful excuse within the meaning of s 257 of the CLCA," in [15].

Stanley J agreed the words were offensive and libellous.

"I am also satisfied that the words sought to be omitted from clause 7 of the will do not have any dispositive effect. However, to my mind, the words do have a clear testamentary purpose," [18].

Then, in [20], "Although the words do make a direct accusation of criminal dishonesty, they are also directly relevant to the explanation of the deceased's testamentary dispositions. The words provide a very powerful explanation for the exclusion of her grandson from her testamentary bounty. For these reason I do not consider the words to represent an attempt by the deceased to use her will as vehicle for libel but rather are used to explain the terms of her will," Stanley J said [20], and noting *In the Will of JP (Deceased)* (1922) 39 WN (NSW) 228 at 229 per Owen AJ.

In [21] "Notwithstanding the seriousness of the allegation I am not persuaded the Court should exclude the words which explain the basis upon which the deceased has exercised her testamentary disposition. To do so would considerably weaken the deceased's explanation for why she has disposed of her estate in the way in which she did. The omission of the words would conceal rather than reveal the deceased's testamentary purpose," Stanley J said.

Order. Appearances unannounced.

Estate inheritance outside class of items

Estate of Deidre Carolyn Peters [2017] NSWSC 1405. Emmett AJA. 18.10.17.

Emmett AJA declared a will phrase "Inhereted Family Items" did not embrace the estate's interest in the estate of the step mother of the testatrix. Ms Peters died May 2015, her will appointing the NSW Trustee and Guardian her executor, the estate comprising realty, superannuation and bank cash.

Her will in its clause 3.1 gave her nephews, the plaintiffs, "Inhereted Family Items" said of value $1,000 but without further specification. Clause 3.2 provided for the executor to distribute items if the beneficiaries could not agree. The residue was for equal distribution between three individuals and five charities.

The will grant inventory did not include the estate interest in the step mother's estate, which had left all to Ms Peters and her brother Richard, and which had been partially administered, realising net about $1.2m, $500,000 of which had been distributed to the brother, the balance in the trust account of the plaintiffs' solicitor.

Emmett AJA: "Adam and Timothy contend that, having regard to the use of capital letters, the phrase 'Inhereted Family Items' should be construed as a composite phrase. Thus, they say, an object, thing or chose in action, whatever it may be, will satisfy that description if it is 'inhereted' by Deidre, it pertains to 'family' and is an 'item': if an object, thing or chose in action owned by Deidre at the time of her death satisfied those requirements, it passed to Adam and Timothy by the operation of cl 3.1 of Deidre's Will. They contend that Deidre's interest in Helen's estate satisfies those three prerequisites'," [10].

"That is to say, Adam and Timothy assert that Deidre's interest in Helen's estate was 'inherited' from Helen and Helen was Deidre's 'family'. In that regard, it is significant that there was no specific devise or gift to Richard and Deidre in Helen's Will. Rather, cl 3 of Helen's Will speaks in terms of a gift of 'the residue of my estate' to Richard and Deidre. There is no mention of any specific property. More particularly, there is no mention of the Elanora Heights Property. There is no property of Helen's that can fairly be characterised as having been inherited by Deidre," [11].

"The position might have been different if there had been a specific devise or gift in Helen's Will of either the Elanora Heights Property or an undivided share in the Elanora Heights Property as tenant in common. In that case, it might fairly be said that the Elanora Heights Property or a share in the Elanora Heights Property had been inherited by Deidre from Helen. However, in the events that had happened, as at the date of Deidre's death, she had no interest or right other than an entitlement to have Helen's estate administered according to law by her legal personal representatives. As I have indicated, at the date of Deidre's death, probate of Helen's Will had not been granted. The inchoate right that vested in the Executor upon the grant of probate of Deidre's Will, assuming that the right could constitute an 'item', could not fairly be characterised as having been 'inherited'," [12].

The plaintiffs advanced Conveyancing Act 1919 (NSW) s 26 [Construction of conveyance etc of any property beneficially to two or more persons together] which "... relevantly provides that, in the construction of a will, a disposition of the beneficial interest in any property, whether with or without the legal estate, to or for two or more persons together beneficially, is to be deemed to be made to or for them as tenants in common, and not as joint tenants", his Honour said in [14], the section not here applicable because it would leave no work for clause 3.2.

"Thus, the gift in cl 3.1 of Deidre's Will must be construed in the light of cl 3.2 and the two clauses must be read together. Clause 3.2 contemplates that there may be a plurality of 'items' to which Adam and Timothy are to be entitled. It would be a curious result if the Executor was required to choose who, as between Adam and Timothy, would receive the 'item' consisting of Deidre's interest in Helen's estate. When cl 3.1 is read with cl 3.2, it seems improbable that the phrase 'Inhereted Family Items' was intended to include an item such as a parcel of real property or an interest in a deceased estate, such that the Executor would be required to confer a disproportionate benefit upon either Adam or Timothy, according to the decision made by the Executor under cl 3.2," Emmett AJA said [15].

"The phrase in question **should be construed as referring only to personalty** of Deidre's that might fairly be characterised as family heirlooms. Strictly, the

term 'heirloom' refers to special goods and chattels that, contrary to the ordinary nature of chattels, by custom passed to the heir along with the inheritance, instead of to the executor or administrator of a deceased's estate. However, the term can refer to personal property and items such as jewellery, art treasures, furniture and collectables that have been passed down through a family for generations and might be expected to remain in the family. Of course, Deidre's Will did not use the term 'heirloom'. Nevertheless, I would construe the phrase 'Inhereted Family Items' as having a meaning similar to the ordinary meaning of the word 'heirloom'. The phrase 'Inhereted Family Items' should be construed as referring to property in the nature of heirlooms that may have been owned by Deidre and which she inherited from her family. I do not consider that the phrase is apt to refer to an interest in a deceased estate, such as Helen's estate, simply because Helen and Deidre were members of the same family. The word **'Items' must be understood** as referring to specific chattels or things and not choses in action, such as an interest in Helen's estate," his Honour said [16].

Over objection, the executor called in aid Succession Act 2006 (NSW) s 32 [Use of extrinsic evidence to construe wills] to put before the Court previous wills.

"Under all of her earlier wills, Deidre evinced an intention that Adam and Timothy would have a first claim on property that constituted 'Inherited Family Items'. However, in each case, her estate, other than the relevant 'items', went, in the first instance, to named individuals or charities. There is no basis for concluding that Deidre ever evinced an intention that property would pass to Adam and Timothy merely because it was inherited from her family," Emmett AJA said [23].

"Adam and Timothy are not entitled to the relief claimed in the summons. Rather, there should be a declaration that the phrase 'Inhereted Family Items', when used in Deidre's Will, does not include Deidre's interest in Helen's estate. The Executor does not oppose the making of an order that Adam and Timothy's costs of the proceedings for the construction of Deidre's Will be paid out of Deidre's estate on the ordinary basis," his Honour said [24].

P: D M Flaherty ins Mitchell Reece & Associates. D: S Chapple ins NSW Trustee & G.

Subpoena to solicitor

Griffiths v German [2017] NSWSC 1392. Parker J. 13.10.17.

A day before he died unmarried and childless in Batemans Bay Hospital in mid 2016, Mr Warwick Harding executed a will appointing the defendant his executor and sole residuary beneficiary after a gift of chattels to the Locksmiths Guild.

The plaintiff was a long standing friend, suing for family provision, and had issued subpoenas to the solicitors Delves and Wain who prepared the will, and the hospital.

On the defendant's objection to the subpoenas, Parker J allowed that to the solicitors, but set aside that to the hospital.

His Honour detailed Uniform Civil Procedure Rules 2005 (NSW) r 33.4 [Setting aside or other relief].

"No objection has been taken by the recipient of either subpoena, but it is clear that UCPR r 33.4(1) confers power on the Court to set the subpoenas aside on the application of the defendant, as a party, if a proper case is shown for doing so," Parker J said [8]. His Honour detailed the subpoena to the solicitors.

"In a family provision application, the Court usually gives considerable weight to the testamentary judgment reflected in the deceased's will, **unless there is reason** to think that the judgment has somehow miscarried: *Slack v Rogan; Palffy v Rogan* [2013] NSWSC 522; (2013) 85 NSWLR 253 at 284-285 [127]. For this reason, the defensibility of the deceased's testamentary intentions as reflected in the will is often of central importance in such an application. Counsel for the defendant submitted that the subpoenas were of a 'fishing' nature. I do not agree. Counsel for the plaintiff pointed to a grammatical mistake in the will: the gift of the residue was made in favour of 'such of [sic] ROSLAYN GERMAN', indicating that at some point other beneficiaries may have been included. In any event, in my opinion, the very fact that the will displaced earlier intentions of the deceased (according to the plaintiff's evidence) and was made the day before the deceased's death is enough to invite reasonable inquiry as to how it came to be made," his Honour said [10].

In [11], "Even if there may ultimately be some argument about the admissibility of some of the documents covered by the subpoena, I do

not think that deprives the subpoena of its legitimate forensic purpose."

The defendant contended privilege, the plaintiff raising Evidence Act 1995 (Cth) s 121 [Loss of client legal privilege: generally].

"The **process of obtaining documentary evidence for trial is a three-stage one**. The first stage is the production by the subpoena recipient of the documents which are the subject of the subpoena to the Court. The production of the documents to the Court puts the documents under the Court's control but does not necessarily give any party the right to inspect the documents; the question of inspection is the second stage. The third stage is the tender at the trial of any of the documents so produced and inspected. It is important to maintain this distinction: the considerations which apply at **each stage are different**: *National Employers' Mutual General Association Ltd v Waind & Hill* [1978] 1 NSWLR 372 at 381," Parker J said [14].

Traditionally, his Honour said, privilege would be determined at the second stage, but that approach altered by UCPR 1.9 [Objections to production of documents and answering of questions founded on privilege].

"Where UCPR r 1.9 applies, a party who receives a subpoena and claims privilege over documents covered by the subpoena is **entitled to refuse to produce the documents** at all, and the Court is not entitled to require production unless and until it has ruled on any claim for privilege. However, in the present case, the privilege is not being asserted by the solicitors as recipients of the subpoena, but by the defendant as the party allegedly entitled to maintain the privilege. Accordingly, UCPR r 1.9 does not apply*: Singtel Optus Pty Ltd v Weston* [2011] NSWSC 1083; (2011) 81 NSWLR 526 at 532 [28]," his Honour said [16].

In [18] "In my opinion, except in a very clear case or as required by UCPR r 1.9, the **proper approach** is to leave questions of privilege to be addressed in the ordinary way at the second stage, where the documents actually covered by the subpoena are known and evidence and submissions can be put to the Court in that context."

Instant circumstances were not so clear to warrant summary approach, for three reasons.

"In the first place, not all of the documents which are the subject of the subpoena are necessarily privileged. **Previous wills of the deceased are not necessarily privileged** (*Urquhart v Lanham* [2003] NSWSC 109 at [5], [7]) nor are the **solicitors' own time records**: *R v Manchester Crown Court; Ex parte Rogers* [1999] 4 All ER 35," Parker J said [20].

"Secondly, s 121 may indeed be applicable. In *d'Apice v Gutkovich; Estate of Abraham (No 1)* [2010] NSWSC 1336, White J held that s 121 does not affect the entitlement of an executor or putative executor to claim privilege in his or her own right where the privileged documents or communications are relevant to the intentions or competence of the deceased: at [17]. At present, there is no evidence before me about **the circumstances in which the solicitor visited the hospital** and took instructions. I do not know whether or not that involved the defendant, or indeed anybody else. It is enough to say at this stage that it is by no means certain that all of the communications between the deceased and his solicitor would necessarily be privileged," [21].

"Thirdly, I accept that it is possible that the waiver may arise if privilege does exist. I do not necessarily accept that mere reliance by the defendant on the will would necessarily amount to a waiver, but it all depends upon the forensic circumstances at the point of trial. It is possible that the defendant will ultimately seek to place weight on a specific aspect of the will or the circumstances in which it was executed, and that that will give rise to a waiver of such privilege as might otherwise exist," [22].

His Honour declined to set aside the subpoena to the solicitor.

Of the hospital subpoena, his Honour noted its embrace: "...all documents regarding the above mentioned patient including but not limited to medical records, medical notes, logbooks, statements, telephone records and/ or transcript of calls regarding the above mentioned patient".

"As I have mentioned, in a general sense the forensic purpose behind the subpoena to the hospital is the same as the forensic purpose behind the subpoena to the solicitors. However, there is, in my opinion, **a significant difference**. The central issue is the deceased's testamentary intentions at the time the will was executed. The very task of the solicitor was to prepare the deceased's will and it would be expected that the solicitor would have made and retained documents bearing directly on this issue. The same cannot be said

of the hospital. Of course, the hospital could have recorded statements made by the deceased which might bear on the question, but if so, that would be entirely incidental to the hospital's function which was to provide medical care to the deceased," Parker J said [25].

"In my opinion, it is not sufficiently 'on the cards' that the hospital would have records of the deceased's testamentary intentions to justify the issue of the subpoena. My conclusions are supported by the form of the subpoena. It does not seek to **limit the communications concerning the deceased's testamentary intentions**. If the subpoena were permitted, it would require production of all of the deceased's medical records whether or not such records have any bearing on the deceased's testamentary intentions. Counsel for the plaintiff hypothesised certain circumstances in which the deceased might have said or done something in the hospital which could be relevant to the question of his testamentary intentions, or to his capacity more generally. But there is no evidence that any such events actually occurred and to my mind this underlines that the subpoena to the hospital is a fishing expedition," his Honour said [26].

Orders, costs of the motion, each their own.

P/R: P A Tierney ins Withstand Lawyers. D/A: D Stretton ins Colquhoun Murphy Lawyers.

De facto holds probate on appeal

Brownell v Robinson [2017] TASFC 11. Estcourt J, Pearce J & Marshall AJ agreeing. 13.10.17.

The Full Court of the Supreme Court of Tasmania, led by Estcourt J, dismissed appeal against Brett J - [2017] TASSC 5, 31.1.17 - rejecting application of Ms Brownell, sister of the deceased, for revocation of grant of probate to Ms Robinson, the estate described as substantial..

Brett J had said: "Mr McGarry died intestate on 6 August 2013. On 13 November 2014, letters of administration were granted to the defendant as administrator of the estate. The grant of administration was in the non-contentious jurisdiction of the Court pursuant to the Probate Rules 1936. The grant was supported by sworn evidence from the defendant that she had been the spouse of Mr McGarry for a period of 23 years immediately preceding his death. They were not and had never been married, but her claim to be his spouse was based on her evidence that they had been in **a significant relationship** within the meaning of s 4 of the Relationships Act 2003, on a continuous basis during the said period. By virtue of s 6 of the Intestacy Act 2010, the definition of the spouse of an intestate includes a person who, immediately before the intestate's death, was a party to a significant relationship within the meaning of the Relationships Act, with the intestate that had been in existence for a continuous period of two years. As Mr McGarry's spouse, and given that Mr McGarry leaves no issue, the defendant is entitled to the whole of his estate: see the Intestacy Act, s 12".

Here, [3], Estcourt J: "The relief sought by the appellant in the proceedings below was an order revoking the grant of administration of the estate of Mr McGarry (the deceased), to the respondent. The power to revoke or set aside such a grant is derived from s 6(5) of the Supreme Court Civil Procedure Act 1932. A grant of administration in common form, in the voluntary or non-contentious jurisdiction of the Court, is revocable at the instance of a person whose interests are adversely affected by it. An established basis for the revocation of a grant is that it was made to a person who was not entitled to it. See Lindsay J's encyclopaedic decision in this area of the law in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [102]-[210]."

The plaintiff, here appellant, vigorously contested the defendant's entitlement over five days' hearing with silk and junior mid last year.

Sixteen grounds of appeal, some complex, many factual, were advanced here, detailed by Estcourt J at [11], none successful.

Estcourt J traversed in detail over 40 pages the evidence below and the holdings of Brett J in context of the appeal grounds.

At [95], "If, correctly understood in the context of slightly different statutory provisions, anything said in *Sadiq v NSW Trustee & Guardian* [2015] NSWSC 716 by the learned primary judge, Hallen J at [2]-[4] and at [187]-[190] or on appeal by Emmett AJA in *Sadiq v NSW Trustee and Guardian* [2016] NSWCA 59 at [3]-[4], in accepting that ss 104 and 105 of the Succession Act 2006 (NSW) required that the existence of a de facto relationship for a continuous period of two years must occur immediately before the date

of the intestate's death because, only then would one be able to establish that the applicant was a party to a domestic partnership with the intestate 'immediately before the intestate's death', translates to s 6 of the Intestacy Act, then, with great respect, I would consider such an interpretation to be clearly wrong," Estcourt J said.

"Hallen J was of the view that the two year period specified in s 105 of the Succession Act was a 'minimum duration requirement' whereas, in my view, the two-year period specified in s 6(a)(i) of the Intestacy Act is a qualitative requirement in the same way as is the birth of a child resulting at any time from a significant relationship in s 6(c)(ii) of that Act. So understood, Hallen J's concern as to how, absent a minimum duration requirement, one would be able to establish that a person was a party to a domestic partnership with the intestate 'immediately before the intestate's death' is mollified.

"It is **only necessary that the significant relationship be in existence immediately before the intestate's death**, and that that same significant relationship had been in existence at any time for a continuous period of at least two years," [96].

"My view as to this does not require me to embrace the proposition that a relationship formed or reformed between two people after the cessation of a prior significant relationship is necessarily always a resumption of that same significant relationship, as opposed to a new and different relationship which may or may not qualify as a significant relationship under the Relationships Act.

"If however it does so qualify as a resumption of the earlier significant relationship, and is in existence at the date of the death of a party to it intestate, then the surviving partner will be the spouse of the deceased for the purposes of s 6 of the Intestacy Act provided the relationship was in existence at the date of death, for however short a period. "

"If it does not so qualify, if it lacks some of the necessary indicia of the earlier relationship and cannot be characterised in law as a significant relationship, it will not serve to constitute the survivor as the deceased's spouse," his Honour said [97].

Appeal dismissed.

A: J Needham SC ins Tremayne, Fay, Rheinberger. R: D Zeeman ins Butler, McIntyre and Butler.

Suspicious costs

Re Hobbs (No 2) [2017] VSC 611. Garde J. 12.10.17.

Costs traverse after Garde J rejected two later informal documents advanced by and favouring caveator step daughter - [2017] VSC 424, 27.7.17. Claim for indemnity costs over offer of compromise was declined because family provision suit was yet unresolved.

At [17] Garde J: "In probate cases, there are well recognised exceptions to the general rule that costs follow the event. In *Nicholson v Knaggs (No 3)* [2009] VSC 328, [43], Vickery J conveniently summarised these categories in the following manner: (a) where the testator has been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate; (b) second, where the circumstances lead reasonably to an investigation concerning the testator's will, costs may be left to be borne by those who have incurred them, even if they fail to sustain the issue which they raise; and (c) third, where a putative beneficiary, by improper conduct, is responsible for suspicious circumstances necessitating litigation, the costs of the litigation may be ordered to be paid out of that part of the estate in which the party is interested, even if successful in the litigation," authorities in reference.

Then, "In my view, the facts of the case do not go so far as to attract the third exception. There is no evidence as to the circumstances under which Ms Hobbs came to handwrite and sign the first and second documents. While the Court has suspicions about what may have occurred for the reasons given in the judgment, this does not amount to a finding by the Court that Mr or Ms Davis is guilty of misconduct or inappropriate conduct. Rather, the Court's suspicion as to what may have transpired was not allayed by the evidence of Mr and Ms Davis. I accept the submissions made on their behalf that the Court's concerns do not translate into findings of fact made against them. This is not a case where the Court has positively found that a putative beneficiary was responsible for the suspicious circumstances so as to attract an adverse costs order," Garde J said [26]. Plaintiff executor's costs from estate, step daughter her own.

P: Dr P T Vout ins Tisher Liner FC Law. D: Mr R B Phillips ins Hicks Oakley Chessell Williams.

De facto failure

Smith v Radonich [2017] WASC 290. Master Sanderson. 10.10.17.

Master Sanderson: "Boris Anthony Radonich (the deceased) died by his own hand on 25 August 2015. Probate of the will of the deceased was granted to the first defendant on 12 November 2015. The plaintiff and each of the second, third and fourth defendants were beneficiaries of the deceased's estate. The plaintiff claims to be the de facto widow of the deceased. She seeks further provision from the estate pursuant to s 6 of the Family Provision Act 1972 (WA)," [1].

The plaintiff failed on de facto, so lacked standing, and contingently, Master Sanderson said he was not satisfied to family provision jurisdiction, finding the will provision adequate, guided by principles exposed in *Devenish v Devenish* [2011] WASC 129 per Pritchard J - "... her Honour there sets out the principles as clearly as can be done".

The estate comprised realty lots and superannuation and was valued a little more than $2m. By the will, the 62yo plaintiff was to receive about $400,000, already owning a $600,000 house at Noranda, a north-eastern suburb of Perth, her mortgage and other liabilities about $120,000. His Honour detailed Interpretation Act 1984 (WA) s 13A [De facto relationship ...].

"In this case although I would accept there was a degree of mutual love and affection between the parties their relationship does not seem to me to have been 'marriage like'. They did not live together, they did not intermingle their finances (save with respect to the Naval Base shack), and they appear to have had a significant degree of independence. There is no evidence, for instance, of how often they spoke to one another. The evidence suggests the deceased arrived at the plaintiff's house on Friday afternoon or Saturday morning and left on Monday morning. The extent of their contact in the interim is not covered by the evidence. There was some midweek contact but it appears to have been irregular and then very much a matter of convenience - the deceased happened to be in Perth on business. In the end my overall impression is that while the parties were close, the relationship just did not meet the criteria of a marriage," Master Sanderson said [21].

His Honour assayed the competing positions.

At [41], "The plaintiff's case suffered from a further difficulty. There was **no evidence as to any need** she may have for funds in the future. She clearly has a shortfall of income over expenditure. But there was no evidence of what she might do with the property in Noranda as she ages, what return she would need to get on a fund invested to support her lifestyle, what the return might be if she were to subdivide the Noranda property and so on. That being the case, I have assumed she will sell the property left to her by the deceased, invest the proceeds and use a combination of the capital and the income to support her lifestyle. No other assumption was available," Master Sanderson said.

Earlier, his Honour: "Counsel for the defendants did not cross examine the plaintiff at all in relation to her claim she was a de facto of the deceased. **That was a bold forensic decision**. At the time I was surprised; in retrospect it was a wise decision. As counsel for the first and second defendants said in his closing submissions the evidence of the plaintiff spoke for itself," in [12].

"There is one matter which should be mentioned. There are **other proceedings** on foot between the plaintiff and the first defendant in his capacity as executor of the estate of the deceased. In those proceedings the plaintiff has pleaded she was the de facto widow of the deceased. In his defence the first defendant admits that fact. In my view that plea and the admission is irrelevant. It is not a material fact in that proceeding as to whether or not the plaintiff in this action was the de facto partner of the deceased. The admission made by the first defendant is neither here nor there in the other action let alone in these proceedings. Moreover, in these proceedings the question of whether or not the plaintiff was the de facto partner of the deceased goes to jurisdiction. If she was not the deceased's de facto partner then there is no jurisdiction to make an award. **An admission by the first defendant cannot serve to enliven a jurisdiction which does not exist**. It is for the court to determine in these proceedings whether or not the plaintiff is in the class of eligible persons to bring an application," his Honour said [13]. Orders, costs for submissions.

P: A P Hershowitz ins Greenstone Legal. 1&2D: M Curwood ins Frichot & Frichot. 2&3D: Ms M A Kershaw ins Kershaw Legal.

Unsent SMS held will

Re Nichol; Nichol v Nichol [2017] QSC 220. Brown J. 9.10.17.

Brown J admitted an unsent SMS mobile telephone message as an informal will pursuant to Succession Act 1981 (Qld) s 18 [Court may dispense with execution requirements for will, alteration or revocation].

Application for grant of letters on intestacy brought by the widow failed.

Application to admit the SMS was brought by the deceased's brother and nephew, respondents to the widow's application. They qualified digital evidence expert Dr Bradley Schatz, of Brisbane. No other will was found.

Her Honour detailed s 18, exposition in *Lindsay v McGrath* [2015] QCA 206, the Court of Appeal therein [57] drawing on Powell JA in *Hatsatouris v Hatsatouris* [2001] NSWCA 408, [56]: document, purportedly embodying testamentary wishes, well proved intended by the testator as will.

Onus on propounder to testamentary capacity: *Konui v Tasi & Anor* [2015] QSC 74, [43] per Boddice J; *Briginshaw* standard; capacity by reference to *Banks v Goodfellow* (1870) LR 5 QB 549, 565, Cockburn CJ as followed in *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107 at [21]-[22] (Applegarth J) undisturbed in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308 at [24].

Brown J noted facts of the discovery of the telephone near the deceased, and the message:

[SMS] "Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636 MRN190162Q 10/10/2016 My will".

Her Honour: "The abbreviation 'MRN190162Q' matches the deceased's initials and date of birth, 19 January 1962. There is a paperclip symbol on the left hand side of 'My will' and a smiley face on the other side," [14].

The estate comprised unencumbered house in a suburb of Ipswich, west of Brisbane, superannuation, chattels.

Intestacy would pass to the widow and son of the deceased, Anthony. Acrimony flavoured the proofs, which demonstrated the deceased and the widow had had been married for a year, their relationship of three years, punctuated by arguments and separations. The son had been distant. The deceased had been closest to his brother and nephew.

There was no contest the message constituted a document, noting the Act s 5 [Definitions], *Re Yu* [2013] QSC 322, [4]-[5] (Peter Lyons J).

Her Honour was satisfied to testamentary expression.

In [42], Brown J: "**Testamentary intentions** are the intentions about what is to be done with a person's property upon the person's death: *Lindsay v McGrath* [2015] QCA 206, [45]. In *Re Masters (deceased)* (1994) 33 NSWLR 446, 455 Mahoney JA observed:

[Mahoney JA] "... the document must state the deceased's 'testamentary intentions', that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death".

Brown J: "There are a number of matters which suggest the text message does state his testamentary intentions: (a) The text message says at the bottom it is 'my will'; (b) The message identifies the house and superannuation which are his principal assets about which he also says 'keep all that I have'; (c) He refers to 'Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten'; (d) He identifies that he has cash in the bank and provides the pin number; and, (e) He identified where he wanted his ashes placed," [43].

At [45], "The informal nature of the text does not exclude it from being sufficient to represent the deceased's testamentary intentions. In the case of Mellino v Wilkins [2013] QSC 336 the testator had written 'my will' on a DVD, had discussed his intentions to suicide in the DVD and then was at pains to define what property he owned. Although very informal, the court accepted that the document purported to dispose of that property after his death and made a declaration under s 18 of the Succession Act," Brown J said.

The second element was satisfied [46].

"The **third requirement** that the court must be satisfied of on the evidence is that the deceased either at the time of drafting the document, or subsequently, formed the intention that the particular document operate as his or her will. That requirement does not involve establishing that the deceased consciously set his or her mind to the legal formalities of making a testamentary document. However it is not enough that the

document set out the deceased's testamentary intentions. What must be established by the evidence is that **the deceased intended the document to operate to dispose of the deceased's property upon death**: *Lindsay v McGrath* at [59] per Boddice J. As set out above, it must also be shown by the respondents that the deceased had testamentary capacity," Brown J said [47].

Her Honour noted the competing submissions.

At [51], "The fact that the proposed testator has committed **suicide** does not raise a presumption against **testamentary capacity**: *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 707; see also *Re Yu* [2013] QSC 322 and *Mellino v Wilkins* [2013] QSC 336," Brown J said.

In [56], "The fact he was jealous of the applicant's relationship with her ex-husband does not indicate a lack of capacity but accords with normal human emotions. Similarly the lack of making a formal will after he had previously attempted suicide is consistent with the fact that he was receiving counselling and controlling his suicidal thoughts, rather than suggesting he lacked the testamentary capacity to make a will or that he did not intend the text message to operate as a will," her Honour said.

"Notwithstanding the absence of medical evidence in the circumstances, I find that on the balance of probabilities the respondents have established that the deceased had testamentary capacity at the time of creating the text message," [57].

"That leaves the question of **whether the evidence is sufficient** to satisfy the Court that it was the deceased's intention that the unsent text message should, without more on his behalf, **operate as his will**. The evidence must be scrutinised carefully and the Court must be satisfied that, on the balance of probabilities, the deceased wanted that particular draft to be his final will and did not want to make any changes to the document: *Lindsay v McGrath* at [60]; *Fast v Rockman* [2013] VSC 18 at [48]," [58].

"The following **circumstances** satisfy me to the requisite standard that the deceased did intend the text message, without more, to operate as his final will on his death at the time he completed it on or about 10 October 2016: (a) The fact that the text message was created on or about the time that the deceased was contemplating death such that he even indicated where he wanted his ashes to be placed; (b) That the deceased's mobile phone was with him in the shed where he died; (c) That the deceased addressed how he wished to dispose of his assets and expressly provided that he did not wish to leave the applicant anything; (d) The level of detail in the message including the direction as to where there was cash to be found, that there was money in the bank and the card pin number, as well as the deceased's initials with his date of birth and ending the document with the words 'my will'; and, (e) He had not expressed any contrary wishes or intentions in relation to his estate and its disposition from that contained in the text message," Brown J said [59].

In [60], "The terms of the text message reflect that the deceased wished the document to be his final will and was not merely an emotional expression of wishes.

"I do not consider the fact that **the message was saved as a draft message** and that he did not send it, is evidence that he did not wish the text message to be operative as his will. Rather, I find that having the mobile phone with him at the place he took his life so it was found with him and not sending the message, is consistent with the fact that he did not want to alert his brother to the fact that he was about to commit suicide, but did intend the text message to be discovered when he was found," her Honour said [61].

Orders, admitted to probate in solemn form, letters of administration to the brother and nephew, costs of each party from the estate on the indemnity basis, but the widow to pay her own for a hearing day adjourned.

A (widow): R D Williams ins MLDG Lawyers. R: J K Meredith ins Lewis & McNamara Solicitors.

Cautious to 'issue' construction

Coleman v Orr [2017] QSC 215. Mullins J. 4.10.17.

A $170,000 estate, Mrs Lillian May Beattie having died aged 96 years in August 2015, her 1998 will bequeathing 12 shares, here whether "issue" embraced children and grandchildren of the nominated beneficiaries, and whether the solicitor drawing the will should be liable for the costs of the construction application.

The applicant's process nominated 25 respondents, potential beneficiaries and the solicitor, which had brought voluminous

process cover sheets, Mullins J commending Uniform Civil Procedure Rules 1999 (Qld) r 6 abbreviation. Mullins J noted *Matthews v Williams* [1941] HCA 32; (1941) 65 CLR 639 at 650; *Sibley v Perry* [1802] EngR 323; (1802) 32 ER 211, Lord Eldon; *Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18, Bryson J; *Simpson v Simpson* [2011] QSC 196 at [10], Peter Lyons J: whole instrument considered to elucidate intention.

Her Honour noted reliance on David Haines QC in Construction of Wills in Australia (LexisNexis Butterworths, Australia, 2007) at [2.6]:

[Haines QC] "Judges should not adopt the words of one judge in one authority which refers to another will as if it were a canon of construction for all wills. **A judge should form an opinion apart from the decided cases** and then consider whether these decisions require any modification of that opinion. A court should not begin a construction by considering 'how far the will in question resembles other wills upon which decisions have been given'."

In [18] Mullins J: "The construction of the will as a whole does not leave any ambiguity about the intention of the deceased in using 'issue' in clause 4 as equivalent to the children only (and not any remoter descendants) of the named beneficiaries."

To the **solicitor's exposure**, her Honour noted correspondence, references to *Sibley* and *Simpson,* the solicitor asserting no ambiguity and resisting process, offering to meet its own costs if released before 10 July 2017.

In [26], "Not all questions of construction of a will have to be referred to the court, if **considered advice from an appropriately experienced lawyer** is obtained and the outcome of any application for construction of the will is a foregone conclusion. This is particularly so in respect of a small estate," Mullins J noted.

"In the circumstances of this case, if the applicant wished to take the cautious approach to the question of construction and pursue the application to court, the twenty-fifth respondent should not have to bear those costs," her Honour said in [30].

Declaration, estate to pay 25th respondent's costs from 10.7.17 on standard basis, applicant's indemnity costs, with liberty.

A: R D Williams ins Mitchells Solicitors. 25R: R T Whiteford ins Carter Newell Lawyers.

CPD/CLE

* Audio file should be available on or about Monday 20.11.17. CPD audio link: www.gapublishing.com.au/cpd.cle/october/29awems60min.mp3

Backyard

"A derivative suit is an instance of equity making available its flexible procedures to avoid injustice in cases where procedures at law are non-existent or inadequate," - **Parker J, *Butcher*, 19.10.17.**

"Mr and Mrs Waterton married in 1948, divorced in September 1971, but remarried in February 1973 and remained married until the death of Mr Waterton," **- Allanson J, *Lafferty*, 19.10.17.**

"That was a bold forensic decision," **- Master Sanderson, *Smith*, 10.10.17.**

Australia Wills Estates Monthly Summaries

© 2017 GA Publishing Mosman Sydney for legal practitioners. 4/914 Military Rd Mosman NSW 2088 Australia. DX 9306 Mosman.

Editor Anthony Monaghan.
Telephone 0421 488 656.
This edition published 17.11.17.
If we have overlooked any judgments for summarising, please email link to editors@gapublishing.com.au.

Subscriptions: Editions delivered by secure email, or download, .PDF linked to judgment texts. Annual - 12 editions - $385 incl GST. Two years - 24 editions - $605 incl GST. Payment secure online at www.gapublishing.com.au, or cheque to GA Publishing 4/914 Military Rd Mosman NSW 2088, or DX 9306 Mosman.