



Recent Developments in Wills and Probate

1 MARCH 2019
CAROLYN SPARKE QC

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Testators Family Maintenance claims

Re McKenzie (2017) VSC 792 - Claim by widow and daughter

- long term marriage; caring daughter
- farm left to sons — (in effect, value \$1.3mil)
- court rejected argument that because widow had lived in run down house for long time, no need for funds to repair it
- court gave little weight to the views that the land should be kept in the family.
- daughter had assets of \$450k, debt of \$270k, income \$130k - 'far from wealthy and had significant debt'. Despite having investment property with geared debt and modest super, was 'unable' to provide for herself.
- awards
- widow- family home, topped up cash to \$250,000
- daughter - \$150,000

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Re Saric Saric v Yukasovic (2017) SC 759 - claim by widow

- Long marriage
- spouses had split assets, each owned half family home, half investment property
- husband badly behaved, intervention order, removed wife (testator) from home when she very ill
- husband not frank with assets
- estate offered extended of interest, husband wanted absolute interests
- **Award**
- extended life interest in lesser (investment) property

Davison v Kempton (appeal) (2018) VSC 451 - Dependent adult child

- Adult child, lived at home, care for parents
- adult child had not funds, didn't work - estate said he wouldn't have worked anyway
- estate divided between three children on intestacy \$ 484,000 - estate said that was enough
- court below awarded extra \$125,000
- Appeal court awarded extra \$250,000

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Katakorinos v Katakorinos [2019] VSC 3 - adult son

- estate was half of property in which daughter in law lived (son, her husband, having recently died)
- son and daughter in law had moved to property caed for father, done renovation, expected to live there
- claimant son had some previous benefit,
- claimant son was not working, had no money, had lost money and had young family. no apparent reason for him to be financially hopeless but he was
- daughter in-law had received super after son's death
- claimant wanted whole estate (ie: half property)

Award

- most of estate - half property less allowance for renovation done by , and contributions made by, son and daughter in law.
- property not preserved for daughter-in-law to live in, her finances of limited relevance.

Estate Grandy: La Valere v Chambers-Grandy [2018] NSWSC 104 - Large Estate

- Court reminder that a large estate does not necessarily enlarge a plaintiff's claim. "no necessary or mathematical correlation between the amplitude of resources available to a deceased person and the size of a family provision order."
- application for suppression of will to prevent 'embarrassment' was rejected

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COSTS

Re Williams: Smith v Thwaites (No 3) [2018] VSC 431 TFM Step-child claim - proper offer made

- stepchild awarded \$100,000
- previous offer(s) \$101,000 plus costs (fixed at \$25k)
- proper offer but for costs
- costs figure came from solicitor pre-mediation affidavit. In fact understated - at trial \$66k, likely to have been understated at mediation
- tension - proper offer VS plaintiff success stripped by larger costs burden

ORDER

- estate pay plaintiff costs at \$25k up to offer
- pl pay estate costs after offer
- pl own costs from offer limited to \$19k

re McKenzie (no 2) [2018] VSC 238 - burden of costs

- executors had defended proceeding based on award being limited from the farm, their share of estate
- awards made from farm
- executors wanted costs for the general estate (as per the usual rule)

ORDER - costs paid from the farm, this is effectively *inter partes* litigation

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Re Saric: Saric v Yukasovic (no 2) [2018] VSC 254 - Costs - Offer of compromise

- widower received award of extended life interest
- estate had offered \$10k lump sum

order

- despite different form, offer effective, pl bear own costs after offer

Mason: Scott v Petas [2017] VSC 687 - consent of uninformed beneficiaries won't bind estate

The consent of beneficiaries to the payment of the plaintiff's costs from the estate was held not to bind the beneficiaries or the Court where they were uninformed about their rights and about the quantum of costs.

Re O'Brien: Application by Kershaw [2018] VSC 780 - warnings re costs

Solicitors were deprived of some costs where applications weren't correctly drafted, where the costs were higher than reflected the simple nature of the documents. Further, the firm were a specialist wills and probate firm with high charge out rates, they ought not to have used counsel.

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VALIDITY CHALLENGES

Re Swin [2018] VSC 67
 The caveator daughter sought to allege 'undue influence' by one of the sons on grounds that -
 - son took control of her finances and she generally did what he wanted
 - sons received increasing amounts under will made after husband died
 - directions for disposal of body did not reflect deceased's catholic wishes but that of the son
 - deceased expressed lack of understanding of legal proceeding instigated by deceased against daughter seeking repayment of funds (by solicitor instructed by deceased and by son)
 Not enough - need to show causal link between facts assert d the allegation of influence
 An opportunity to exert influence did not establish *prima facie* case of influence.

Mehail v Hana; Mehail v Hana In the Estate of Nadia Mehail (No 3) [2018] NSWSC 145
 - making a will based on mistaken belief induced by beneficiary does not per se amount to undue influence, suspicion, want of capacity
 - a material mistaken belief is insufficient to render invalid
 "(2) For a mistaken belief to rise to the level of a "delusion" which affects the validity of the will, there must at least be a high degree of irrationality in the belief and ordinarily evidence will be required that there has been an attempt to reason the deceased out of the belief, such that the deceased's adherence to it suggests that the deceased has a mental disorder or deficiency precluding the deceased from comprehending and appreciating "the claims to which he [or she] ought to give effect" (*Banks v Goodfellow* at 565)."

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Re Kohout, Rubenstein v D'Aquino [2018] VSC 68
 'suspicion' not made out where:
 - T was vulnerable, being distressed over recent death of brother (niece's father) and recent falling out with niece
 - solicitor notes referred to (disputed) domestic partner as 'friend'
 - usual solicitor took instructions, but law clerk at the firm witnessed will
 - notes recorded inaccurate advice about distribution of estate
 - T did not sign first page - did she read the first page and its dispositive provisions?

INFORMAL WILLS
Re White, Montgomerie & Amor v Taylor [2018] VSC 16 - will on Computer
 Document found on computer, made the night before committing suicide
 Validity
 - careful document, made with other careful documents and letters
 - contained testamentary language
 - usual presumptions about capacity and knowledge/approval dont apply - need to prove
 Capacity
 - suicide doesn't necessarily undermine capacity; prevails anxiety /suicide attempts dont undermine capacity
 - expert evidence about medication - likely to have not taken effect at time of will being made

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Re Battle [2018] VSC 219 (informal will, forfeiture, will construction and costs)
 - signed before one witness at a time when T was very busy
 - was more than a draft
 - T discussed the will as if valid, kept in folder marked 'wills'
 Found to be valid
 - T was killed by domestic partner O. O forfeited
 - will clause - gift over of O predeceased - but O didn't predecease, gift failed due to forfeiture
 - gift over didn't take effect.
 Costs
 - despite contradictors being appointed, beneficiary wanted to argue his position, he unsuccessful. Costs not paid from estate, he to bear his own costs.

Re Prien [2019] VSC 17 - Solicitors notes as informal codicil?
 - notes signed as "... confirmation of my testamentary intentions...". Sol said probate could be obtained on the notes.
 - testamentary capacity established - despite illness and medication, GP, solicitor said she OK.
 - some uncertainty in notes about her understanding of impact of pending litigation on assets and about meaning of notes - T likely to have had some queries
 - due to uncertainties, notes not valid as informal will

IMO the estate of Bruce William Sandish (deceased) [2018] VSC 629 - watch this space
 Application to probate an Audio recording with some problems with recording NOT struck out due - watch this space

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SUPERANNUATION

Re Naramon Pty Ltd [2018] QSC 185

- a person holding a power of attorney for an incapacitated superannuation member, can EXTEND/CONFIRM a BDBN on their behalf.
- they cannot MAKE a new nomination if it creates a conflict transaction

Marsella v Warcham (no 2) [2019] VSC 65

Despite giving no reason, exercise of trustee discretion in SMSF superannuation distribution was held to be improper. The objective circumstances

- conflict between family members
- complete exclusion of husband
- complete payment to self (daughter) excluding brother
- point second trustee (daughter husband) the same day as making distribution

were enough for the court to infer that the power had not been exercised properly.

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Approval of compromise of proceedings

Not always as straightforward as you might think

re Wood [2018] VSC 597 - caveat proceedings

Before probate grant, court refused application to approve compromise (infant involved).

- executor and beneficiaries of prior will had not been notified of the proceeding or the compromise;
- the caveator did not have standing unless and until the court determined there were sufficient grounds.
- s 19 Trustee Act cannot be used where validity of will is at stake.

Re Yallance, Harzer v Yallance [2018] VSC 523 - where beneficiary want agree

- testamentary capacity claim and a TFM claim
- residuary beneficiary refused to sign the terms
- ran case an undefended application for probate in solemn form

Simons [2019] VSC 62 - settling issues outside the proceedings

- Parties to TFM proceeding settled a claim on behalf of a disabled person. Also dealt with issues outside the estate - he give up certain superannuation and family trust entitlements.
- application for compromise refused -
- advice not provided as to why other benefits given up
- counsel simply adopted Litigation guardian view without proper analysis
- no financial planning advice as to impact on disabled person

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Questions?

Carolyn Sparke QC
Svenson's list

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