

Probate Pot-Pourri - what a difference a year makes!

Presenters: Richard Neal & Caroline Sims

**Far North Coast Law Society Seminar
Ballina – Friday 19 February 2021**

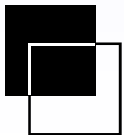


TEECE HODGSON & WARD SOLICITORS

Royal Brisbane and Women's Hospital Foundation v Attorney-General for the State of Queensland & Anor [2020] QSC 222 (23 July 2020)

Charitable gift; income only; Boddice J

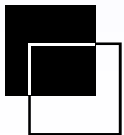
- Construction, charitable gift: “... to hold in perpetuity as [name] 'The Charitable Trust. ... The net income of the Charitable Trust is to be applied for the general purposes of the Foundation.”
- Claim for capital of the gift as well as income.
- *Congregational Union of New South Wales v Thistlethwayte* [1952] HCA 48; (1952) CLR 375 applied.
- Gift of income only in perpetuity.



Estate of Lyn Burtonwood [2020] NSWSC 715 (11 June 2020)

Application for Grant; body of deceased not found

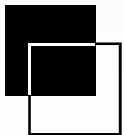
- Where death determined but no body is recovered, the Court may, on “the preponderance of probabilities”, grant Letters of Administration of the testamentary document(s) without the need to include the words “on presumption of death”. [s 40B PAA]
- Deceased had a blended family - adult children and a de facto.
- Eldest child applied for a grant of an informal Will.
- Letters of Administration with Will annexed granted to applicant.
- Difference between ‘presumption of death’ and ‘inference of death’: passive v active evidence; *The Estate of Alan Bruce Beeby* [2020] NSWSC 1512 (29 October 2020).
- Grant made: not limited as on presumption of death – additional leave to distribute not required.



Milson v Milson [2020] NSWSC 919 (20 July 2020)

Burial rights; aboriginal; Sackar J

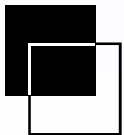
- Born in Gilgandra, as a teenager moved, then lived in Orange, Cobar, Singleton, Cessnock, Raymond Terrace and Beresfield.
- Mother wanted burial on country in Gilgandra.
- Wife wanted cremation and to retain the ashes.
- State of marriage in evidence, secret relationships; AVO.
- No assets to speak of (enough for a grant).
- No expert evidence but in other proceedings, evidence that burial includes of the ashes.
- Evaluative judgment, factors: cultural, spiritual and of the case.
- Letters of Administration granted to wife.



McCredie v Batson [2020] NSWSC 1913 (24 December 2020)

Cremation dispute;

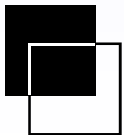
- Vacation application, two daughters executors, one took over.
- History of dispute about late husband's funeral arrangements.
- No dispute about cremation but re associated 'ceremonial'.
- *Smith v Tamworth City Council* [1997] NSWSC 197 applies.
- Take into account deceased's wishes - *Frith v Schubert* [2010] QSC 444, *State of South Australia v Smith* [2014] SASC 64.
- Court intervenes when executors do not agree, ordered to direct funeral director with the body to conduct cremation later that day, detailed directions as to what was to occur, who was and who was not to attend including hairdresser, no advertising, music but no singing, the parties (or agents) not to give eulogies.
- Costs estimated at \$50,000 borne out of the shares of the four in the litigation not the fifth – see (No 2) [2021] NSWSC 78.



The Estate of Ron Tee Lim (deceased); The Application of Kaye Lim [2020] NSWSC 322 (30 March 2020)

Retraction of renunciation of Probate by executor

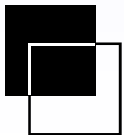
- Non-resident executor renounced Probate.
- Application for Letters of Administration with Will annexed by legal guardian of deceased; no beneficial interest in the estate.
- Requisition queried standing of applicant; referred to Judge.
- Surviving executor applied to retract renunciation - granted.
- Note: *Mulray v Ogilvie; in the Estate of Baker* NSWSC, unreported, Needham J, 28 April 1987; an executor who had arranged the deceased's funeral was held not to have intermeddled to such an extent that prevented renunciation.
- Usually the final decision can be made up to the point of lodgement of renunciation document.



Cassarino v Cassarino [2020] NSWSC 454 (28 April 2020)

Probate suit; settled in favour of an earlier Will; Hallen J

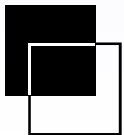
- Settled with a Grant of Probate of penultimate Will in solemn form proposed.
- Probate is a public act, not done as a matter of course.
- Court needs to be satisfied proper basis to not grant Probate of a Will later than the one put forward.
- Court recognises benefit in avoiding protracted and complex proceedings to determine validity of a Will.



Nicol v Nicole; The Estate of Peter Nicole [2020] NSWSC 419 (20 April 2020)

Determination of costs after proceedings settled; Hallen J

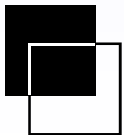
- Application to pass over executor: alleged conflict of interest and not a fit and proper person.
- Independent administrator (solicitor) appointed by agreement.
- Referred to Registrar to complete Grant of Letters of Administration with Will annexed.
- Costs not agreed, Court invited to consider conduct (criminal convictions).
- Referred to Registrar who determined the Registrar's delegation was exceeded, returned to Judge.
- Costs follow event; here, no contested event was determined.
- Accordingly, no order as to costs.



Micallef v Linney [2020] NSWSC 1457 (22 October 2020)

Probate costs principles

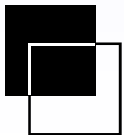
- Probate decision [2020] NSWSC 898, suspicious circumstances.
- Although the testator may have caused the litigation and the circumstances may have led reasonably to an investigation of the matter, parties have a duty to review their position where those investigations affect the merits.
- That is, you may not be justified going to a final hearing.
- Opposition to a grant on rational and reasonable grounds assists the Court.
- Costs where allegation of undue influence is unsuccessful.
- Criticism of parties' focus on peripheral and tangential issues.



Battenberg v Phillips [2020] NSWCA 249 (9 October 2020)

Contested Probate; appeal by unsuccessful beneficiary under penultimate Will

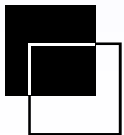
- Burden of proof.
- Proportionality.
- Evidence that Testatrix instructed a solicitor and had Will read aloud to her sufficient to establish that the deceased knew and approved of the contents of the Will.
- Note: Although not raised by Court of Appeal, there have been recent indications that the Court may be more willing to make third-party costs orders.



The Estate of Frances Kedesch Michell [2020] NSWSC 1300 (24 September 2020)

Passing accounts; indemnity costs; UCPR 42.5; moderation; Hallen J:

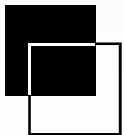
- Informal Will, agreed dismissal, no costs order for claimant.
- Intestacy application compromised, costs on ordinary basis for claimant, fixed amount (\$1,500) for opponent.
- Family provision made (Lindsay J), costs ordinary basis for claimant, no costs affidavits; indemnity costs for administrators for all three proceedings.
- Agreed commission \$10,000; net estate \$479,575.82, costs \$267,737.70 (55.82%), half share residue \$86,167.06.
- Registrar moderated \$37,133.69 against administrators (costs then 48.08%); appeal: no power in face of indemnity costs order.
- Held: UCPR 42.5 applies solicitor qua administrator, still moderated as to reimbursement from estate; [Addendum].



Wilcox v Chapple [2020] NSWSC 1859 (16 December 2020)

History of estate litigation; devastavit asserted; Rees J

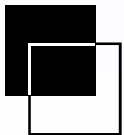
- Construction question, not judicial advice for that answer.
- Question of retention of funds to defend further litigation.
- Plaintiff opposed his claim being defended with the executor having this costs protection from the estate against him.
- Statement of facts, confidential advice of counsel, procedure – see *Re Estate late Chow Cho-Poon* [2013] NSWSC 844.
- Previous judicial advice (brother's claim) given to conclude mediation when this plaintiff would not consent to outcome.
- Judicial advice – entitled to reasonable costs to defend and costs of the application for advice to be paid from the estate.
- Compare *Rattigan v Hanly* [2020] NSWSC 1722.



Estate of the late James Sundell [2019] NSWSC 1108 (30 August 2019)

Probate, informal amendments; temporary or permanent; Sackar J

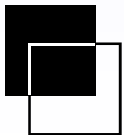
- Handwritten changes to executorship not properly executed, effected control change of family trust, it controlled most assets.
- Said to be temporary so as to enable family law settlement of property to be reached on assumption the husband in that case would not be in control of the family trust.
- In fact not further revised after family law case concluded.
- Amendments testamentary and declared to be part of the Will.



Rodny v Weisbord [2020] NSWCA 22 (27 February 2020)

Analysis of when testamentary intention is formed

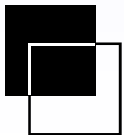
- Evidence required to prove a Will from a draft only.
- Appeal allowed; Grant revoked.
- Draft Will can be construed as constituting testamentary intentions in appropriate cases but requires further evidence to establish that the testator intends for it to be their final Will.
- Difficulty if evidence cannot show testator saw and approved the draft.
- Cf. cases elsewhere (e.g. Qld) re draft informal Wills.



Callaway v Callaway; The Estate of Aileen Margaret Callaway [2019] NSWSC 1275 (24 September 2019)

Unresolved disputes between executors; independent administrator

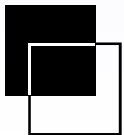
- Deceased died 2012; three sons, one died during litigation.
- Court has power to appoint an independent administrator in the case of mutual distrust and hostility between executors, avoids passing over of one executor for the other (Slattery J).
- Usual costs and expenses order for independent administrator.
- Issues identified by counsel; torn pages from diary insoluble.
- Acting evenhandedly between beneficiaries.
- Loss of main residence CGT exemption because of timeframe.
- Prospect of judicial advice or determination of beneficiary's entitlement – UCPR 54 on administration of estates



Estate Torny, Deceased [2020] NSWSC 1230 (10 September 2020)

Pre grant proceedings; independent administrator; construction of power of attorney benefit (conflict) clause; Lindsay J

- Probate granted; conflict, one executor also attorney; consent appointment of independent administrator.
- Usually by LPR; “nullity” if no grant; here, representative order (Hallen J), consent of parties, no other affected interest.
- Beneficiary proceedings for preliminary discovery on behalf of estate, investigate attorney, including benefit transactions.
- Benefit clause in enduring power of attorney protects third parties dealing with attorney taking a benefit.
- Benefit clause in enduring power of attorney does not absolve attorney of fiduciary duty qua principal.
- Enduring power of attorney is not a contract.



Grant litigation

An Elderly Plaintiff by his tutor the NSW Trustee & Guardian v A Daughter and A Granddaughter [2019] NSWSC 1747

Freezing order; protected estate; freezing order; protected person dies.

Grant v Grant; Grant v Grant (No. 2) [2020] NSWSC 1288

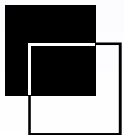
Estate recovery proceedings as a result of unconscionable conduct and breach of fiduciary duty by attorney.

Grant v Grant; Grant v Grant (No. 3) [2021] NSWSC 1

Indemnity costs against party responsible for significant misconduct.

Grant v Grant [2020] NSWCA 328

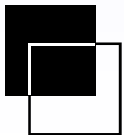
Stay of orders so appeal not 'stultified'; on terms to protect respondent.



G v G (No. 2) [2020] NSWSC 818 (1 July 2020)

Protective List; authorised investments; risk to super fund trustee

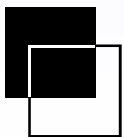
- Proposed investment in retail superannuation fund: authorised investment or not? [loss of control once placed]
- NSW T&G has power to invest/authorise private manager to invest protected estate funds in regulated superannuation funds, despite inability to supervise or control investment decisions.
- Interaction of protective estate management and post mortem litigation facilitated if a death benefit is paid to the LPR of a deceased person whose estate was under protective management.
- Authorised decisions do not extend to binding death benefit nominations - potential conflict of interest.
- Fund risk if benefit not paid to protected estate via LPR.



Re The Will of Alexa [2020] NSWSC 560 (14 May 2020)

Statutory Will

- Court may approve application for statutory Will for someone who has never had capacity if they are satisfied the proposed document is reasonably likely to reflect testamentary intentions.
- Orders often made in Chambers.
- Published decisions infrequent.



Millie Phillips – statutory Will

Substituted judgment of the Court prevails.

Small v Phillips [2019] NSWCA 222

Appeal by testator's grandson upheld and Will made on behalf of the testatrix. Court of Appeal ordered drafting of a statutory Will as opposed to leaving testatrix without Will.

Small v Phillips (No 2) [2019] NSWCA 268

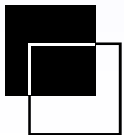
Reasons given for previous judgment, namely it was reasonably likely that the testatrix would have made a Will along the same lines (despite evidence that she had rejected it).

Small v Phillips (No 3) [2020] NSWCA 24

Costs of proceedings ordered to be paid from estate (large estate, c \$100m). Public interest served by putting a Will in place (contra about intestacy had been argued).

Phillips v Small & Ors [2020] HCATrans 96 (3 July 2020)

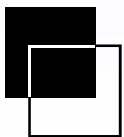
Issues regarding the adequacy of evidence to support legacies given under the statutory Will as well as the issue of the Will not reflecting the testator's express wishes. Not sufficient prospects of success. Application for special leave refused with costs.



Bowers v Bowers [2020] NSWSC 109 (20 February 2020)

Family Provision; outcome for claimant and beneficiaries calculated

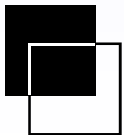
- Claimant a spendthrift with a trust under the Will.
- Net estate and costs used to fashion outcome of fixed amount (with limited housing restriction) for claimant and assessment of what each beneficiary would then receive after costs.
- Further steps by claimant both after judgment reserved and after judgment given with further estate costs incurred.
- Initial order for provision with consequential effects not altered and estate left to make what arrangements it could in relation to the extra costs from residue.
- Further litigation between the parties, self-represented (but in fact lawyers), continues – see [2021] NSWSC 72.



Megerditchian v Khatchadourian [2020] NSWCA 229 (25 September 2020)

Family Provision Appeal; *House v The King*; *Singer v Berghouse*

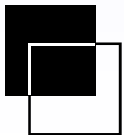
- Payne JA [32] “Whether a two-stage analysis is applicable to claims for family provision orders under Ch 3 of the *Succession Act* has been the subject of significant debate in this Court. The risk of error arises if a two-stage approach is adopted and it is assumed that the first stage requires an evaluation of whether the applicant has been left without adequate provision for his or her maintenance, education or advancement in life, thereby focusing primarily, or perhaps exclusively, on the applicant’s financial needs.”
- *Chan v Chan* [2016] NSWCA 222 Basten JA at [22]: “...[I]t is important not to elide the distinction between needs and adequate provision; the former is but one indicator of the latter. The adequacy of provision is not to be determined by a calculation of financial needs.”



Moore v Aubusson [2020] NSWSC 1466 (23 October 2020)

Testamentary promise; proprietary estoppel; detrimental reliance

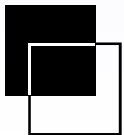
- Ward CJ in Eq.
- Initial claim on three bases – contract, proprietary estoppel or equitable estoppel, and secret trust.
- Plaintiffs claimed that the deceased promised them her estate in exchange for them not undertaking building works during her lifetime that would obstruct her view of Sydney Harbour.
- Court may uphold claim based in estoppel over and above the testator's Will based on clear representations made by the deceased during lifetime.
- Estoppel entitlement about \$9m out of about \$11m.



Gill v Garrett & Ors [2020] NSWSC 795 (16 July 2020)

Equitable estoppel; family provision; Slattery J

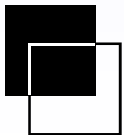
- Plaintiff lived with deceased since 2003.
- Claims: promise to leave him the house in exchange for care.
- Opposed by children: no promise or if was not contractual, not relied on and no detriment; declining capacities, undue influence, unconscionable conduct and apply Contracts Review Act 1980.
- Alternative claims: restitution for value of care (response was benefit of housing value outweighed that) and family provision.
- Alleged member of household, dependent, factors warranting as legatee of \$200,000 in the Will (children said enough).
- Cross claim for possession, alternatively restitution of expenditure on improvements by children.
- Plaintiff failed, including no factors warranting.



Rathswohl v Court [2020] NSWSC 1490 (23 October 2020)

Admissibility of evidence; Surveillance Devices Act 2007; Rees J

- Family provision claim by an adult son.
- Frequent family text messages between siblings [4] ... “often of a colourful and impolite nature, in respect of the care of the father and the roles that each of the children were playing [re] his care”.
- Sound recording made without the knowledge or consent of the deceased, regarding degree of care by a sibling.
- Offence under the Act but not if consent or it “is reasonably necessary for the protection of the lawful interests of (person)”.
- Second Reading, criminal, family law and civil cases reviewed.
- Exception established and sound recording admissible.



Aleta Gooley & Anor v Brett Gooley [2021] NSWSC 56 (12 February 2021)

Testamentary capacity; expert evidence

- Limit client evidence and not let them say whatever they want.
- Expert medical evidence preferred over treating doctors.
- Give experts updated evidence and transcript.
- Preferred experts not cross examined.
- Sackar J: [1150] ... “Judges in the common law system are umpires not investigators. It is no part of the function of a trial judge to make or explore a case not sought to be made by one of the parties. They are not of course obliged to accept evidence even where that has not been the subject of cross examination. But the failure to cross examine at all where matters are seriously in issue usually should have consequences, especially where the decision is to be seen as a deliberate forensic choice.”

