RECENT WILLS AND ESTATES CASE LAW
A PRESENTATION FOR EASTERN SUBURBS LAW SOCIETY 1 NOVEMBER 2017

1 INTRODUCTION

The increasing age of will makers and increased size of estates has contributed to a great many judgments both at first instance and at the appellate level dealing with myriad aspects of wills and estate law. This paper deals briefly with a number of what I consider the most relevant judgments of practical significance. Some cover technical issues. More importantly for practitioners are the assessment of capacity for wills and powers of attorney and the consequences of failing to ensure that attorneys are aware of their continuing fiduciary obligations to incapacitated donees of powers of attorney.

I note too a tendency for greater use of the facility to obtain judicial advice.

2. APPELLATE DECISIONS

There have been few recent cases of interest before the NSW Court of Appeal.

2.1 *Page v Page* [2017] NSWCA 141 like *Yee* referred to below was a family provision claim where at first instance the claim failed because of a finding that not only was he not an eligible person but that there were no "factors warranting". The erstwhile plaintiff fared no better on appeal. Interestingly the plaintiff was the brother of the deceased.

2.2 The appeal from the judgment of Lindsay J *Estate Stojic, Deceased* [2017] NSWSC 168 has been argued with judgment reserved. At first instance the last two wills of the deceased were passed over on the ground principally of lack of knowledge and approval.

2.3 I understand that *Lodin v Lodn; Estate of Dr Mohammad Masoud Lodin* [2017] NSWSC 10 (Family provision order in favour of former spouse) may also be the subject of an appeal.

3. PROTECTED ASSETS:S205 LIFE INSURANCE ACT 1995 (Commonwealth)

Practitioners are familiar with recommendations by financial planners that obtaining life insurance cover is a good method of asset protection. The extent of that protection was tested in the judicial advice of Ward CJ in Eq in *Application by Clauson* [2017] NSWSC 1265.

The deceased was a partner in the accountancy firm Price Waterhouse Coopers. He left a de-facto spouse and children from two former relationships. But for the proceeds of

superannuation and insurance policies there was effectively no distributable estate. He also had considerable liabilities.

Her Honour advised with little discussion that the superannuation was protected from creditors and did not form part of the deceased's estate.

The insurance policies were different. The Australian Taxation Office was the principal creditor. A distinction was drawn by Her Honour between debts incurred by the deceased during his lifetime which were protected but did not extend the protection to what were termed the post-death liabilities in respect of such of the tax liabilities of the deceased as were incurred in respect of income earned after his death. Her Honour accepted that the Crown was bound by the *Life Insurance Act*.

There are suggestions that there may be an appeal in this matter.

4. FAMILY PROVISION

4.1 John Leary was an unsuccessful Family Provision plaintiff who also received an adverse costs order (*Leary v NSW Trustee and Guardian* [2017] NSWSC 1113 and *Leary v NSW Trustee and Guardian (No. 2)* [2017] NSWSC 1225. The plaintiff swore an affidavit two (2) days before the commencement of the hearing that he had lied to his solicitors, his counsel and the Court as to his true financial circumstances. He was an adult son who had been left equal provision with his three siblings. His true financial circumstances as distinct from his assertions in his original affidavit in support indicated that coupled with his entitlement in his mother's estate he possibly had no need and that properly instructed his solicitors would not have commenced the proceedings. He claimed in his disclosure affidavit to be a gambler and to have lost substantial monies in the days immediately preceding the hearing. Certainly he rolled the dice once too often in that as found by Her Honour he rejected offers at mediation which would have been better for him than the final result.

The message to practitioners must always be that utmost frankness is required from plaintiffs at all times. Practical problems can arise where there are wilful untruths from a client coupled with lack of documentary evidence. Caution should also be exercised when taking a matter over from a prior firm.

4.2 *Yee v Yee* [2016] NSWSC 360 is worth considering for the consideration of the concept of "factors warranting" in a claim by the deceased's nephew who was a member of the household for 10 years from the age of 9 to 19 during the 1960's and early 1970's. No provision was made for him in any of the deceased's wills. Although the actual estate was relatively small there was substantial notional estate.

Despite evidence that the plaintiff maintained a relationship with the deceased Justice Slattery commented adversely on his credibility.

Paragraphs 195 to 213 of the judgment contain the discussion and analysis of "factors warranting" and deserve close reading. The claim was dismissed with a finding that the Plaintiff had not established "factors warranting".

4.3 *Reilly v Reilly* [2017] NSWSC 1419 (20 October 2017) is a significant judgment of Lindsay J. It deals not only with family provision but also with rectification of the will, breach of fiduciary obligation by an attorney and the consequential relief, breach of the common law duty of care owed by the solicitor who drafted the will, breach of duty by the solicitor who acted for the attorney on the inter vivos gift of the principal's main assets to third parties without benefit to the principal and with the dissolution of a partnership and taking of accounts. It is an important judgment for rural practitioners touching on inter alia the legal consequences of unpaid farm work [21]. The litigation generally was characterised by Lindsay J at [32]"

> "The present proceedings arise out of failures in the management of inter-generational change in a farming family, with miscarriages in succession plans involving (to use neutral expressions):
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> (a) a disconnection in arrangements which the first defendant believes to have been made between the deceased and herself before he became incapacitated;
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> (b) a lack of communication between the plaintiff and the first defendant as joint and several donees of an enduring power of attorney granted to them by the deceased, compounded by an absence of communication between the plaintiff and a solicitor retained by the first defendant (in her capacity as an attorney for the deceased) to transfer "Boronga" to her daughters after her husband lost capacity; and
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> (c) a clerical error in the will of the deceased which purported to dispose of "Boronga" without nomination of a beneficiary (despite instructions given by the deceased to the solicitor who drafted the will

that the property be gifted to the plaintiff), giving rise to an application by the plaintiff for an order under section 27 of the Succession At 2006 NSW that the will be rectified."

The deceased's family consisted of his widow and five children of whom the only son was the Plaintiff. The deceased and his wife were farmers in country New South Wales and conducted the farming enterprise in partnership. Other partnership agreements were executed involving the couple's children contemplating the right to use the parents' grazing properties. Orders relating to the dissolution of the partnerships were made by consent and are not discussed in this paper. Sufficient to say that modern wills and estates practice requires practitioners to be commercially astute and to recognise the separate nature and rights attaching to assets and liabilities whether owned separately or jointly or through a corporation or trust.

The role of the solicitor in the impugned transactions apart from the clerical error in the will is dealt with at Paragraphs 167 to 182 and again is salutary reading. Ultimately family provision orders were made for various of the children.

4.4 Family provision orders in favour of former spouses are rare. Nevertheless in *Lodin v Lodn; Estate of Dr Mohammad Masoud Lodin* [2017] NSWSC 10 Brereton J gave $750,000 to a former spouse finding factors warranting. The application was made 25 years after separation and 23 years after final property settlement.

4.5 The recent judgment of Pembroke J in *Kralijevic c Kralijevic* [2017] NSWSC 225has excited the attention of print media with the provocative headline "*Judge attacks feckless heirs trying to win over automatic inheritances*" (The Australian 27 March 2017). An apparent move to dismiss claims by adult children is also evident in some of the recent judgments of Hallen J who hears most of these matters as for instance:

- *Jodell v Woods* [2017] NSWSC 143*:* Hallen J: Adult 74 year old daughter even with periods of estrangement with the only competing beneficiary being her adult sister given $425,000.00 of an approximately $2 million estate. She owned a home in country Victoria with a reverse mortgage and was dependent on the aged pension.
- *Meres v Meres* [2017] NSWSC 285 Hallen J: claim for additional provision by adult 66 year old son with the competing beneficiary being his twin adult brother. Claim dismissed. Estate of approximately $1.2 million with

Plaintiff's share approximately $600,000.Past criminal conduct of Plaintiff and estrangement of Defendant. Plaintiff with separate funds exceeding $300,000 dependant on age pension; plaintiff lived with deceased rent free many years.

- *Petkovic v Koutalianos* [2016] NSWSC 1817: claim by adult daughter dismissed. The other adult daughter the sole beneficiary lived rent free in the principal asset for most of her life.

For my part I am not certain that this apparent move to exercise a discretion away from adult children is properly in the spirit of the original legislators. To quote the 2nd reading speech when the original TFM Act was introduced discussed and reproduced in a paper "*The TFM Act: Early days leading to a 99 year centenary"* delivered to the Law Society in 2015 by Justice Lindsay:

> "I do not think any person has a right to take upon himself the awful responsibility of parentage and all it means unless he is prepared to do a square deal. No child asks to be born, none of us have sought life. We have come here by act of our parents and the parent is responsible for us and for our maintenance if he can afford it."

4.6 The judgment of Lindsay J in *Estate MPS deceased* [2017] NSWSC 482 is interesting for a number of reasons.

Firstly it examines the elements of a "close personal relationship" with a finding that although the plaintiff and the deceased occupied separate residences the absence of a single residence was not an impediment to satisfying the element of "living together" based on extensive case law discussed in the judgment @ paragraph 25 ff.

The judgment also considers "conduct disentitling" and its interrelationship with s.60(m).

What however is of greater interest to practitioners is the consideration whether while the successful plaintiff a disability support pensioner conducted the proceedings without a tutor but there was doubt as to his capacity for self-management a protective order was required.

The level of costs was criticised. Part of the explanation for their quantum may have been the result of the plaintiff's precarious mental health.

The deceased died intestate. Her estate was approximately $2m. The only next of kin was her surviving brother.

Provision was made for the Plaintiff of $550,000 to be held on protective trust. The form of the protective trust was to be the subject of further orders.An appeal has been foreshadowed by the defendant.

4.7 The judgment of Hallen J in *Carusi-Lees v Carusi* [2017] NSWSC 590 is a more recent claim by an adult child of the deceased's first marriage. There had been provision for her in the deceased's many prior wills but not in the last will where there was a statement that the deceased had made sufficient inter vivos financial provision for her although that amount was overstated.
There was virtually no actual estate. The defendant had not made any application for probate at the date of the hearing. The notional estate was significant. The relevant parts of the judgment dealing with the necessity or otherwise of a grant of probate/administration are contained in paragraphs 9 to 15.

As I have noted in discussing the *MPS* judgment above there was also criticism of the level of the Plaintiff's costs.

Although the Plaintiff's evidence revealed a chronic state of living beyond her means she was given $400,000 plus costs.

5. THE COURT APPOINTED ADMINISTRATOR

Frequently in hotly contested and lengthy litigation and particularly in large estates there is need for the appointment of a special administrator to keep the estate going pending resolution of the litigation. A practice has arisen where the Court often appoints an Accredited Wills and Estates Specialist for this role.

The power to appoint a special administrator was considered by Ward CJ in Eq in *Sergent v Glass* [2017] NSWSC 1446 (13 October 2017). Jeremy Glass, a solicitor, was appointed special administrator with power to defend and compromise family provision proceedings in circumstances where the precise whereabouts of the widow who was the sole person entitled on intestacy was unknown.

Many of these appointments are made without contest.

6. PROCEEDING BY A TUTOR

The *Uniform Civil Procedure Rules* 2005 NSW provide for the appointment of a tutor for incapable parties. Difficulty for practitioners arises when assessing the need for such an appointment particularly where the party is subject to episodes of mental instability. This was the case in *Daniel Walton v Terence George Hartmann as executor of the Estate of Wanda Resler* [2017] NSWSC 1432 (Sackar J, 20 October 2017). It was held in the face of an application by the Defendant to dismiss the proceedings that the Plaintiff did not lack capacity at the time proceedings were commenced but that his condition was such that at the time of the hearing of the proceedings it was appropriate that the future litigation proceed through a tutor.

Problems of capacity to instruct also arise in Guardianship Tribunal proceedings where there is an allegation that the person the subject of the application lacks capacity to instruct solicitors to represent him or her. Frequently the Tribunal will order of its own volition a separate representative to act for the affected person.

7. INFORMAL WILLS

The ability of will makers to make informal wills (s8 *Succession Act)* has in my opinion added to uncertainty and expense. Some recent judgments where the boundaries have been pushed out in my view include:

7.1 *Borthwick v Mitchell* [2017] NSWSC 1145(Ward CJ in EQ) where it was held that notes dictated by the deceased to the first plaintiff on a named date were the will of the deceased; and

7.2 *Re Nichol; Nichol v Nichol* [2017] QSC 220 where an unsent text message was held to be the will in accordance with Queensland succession legislation.

8. CAPACITY AND SOLICITORS DUTIES

The Monday Probate duty list is replete with probate suits alleging lack of capacity of the will maker. During the last 12 months there have been significant judgments many in larger estates and many commenting and sometimes adversely on the solicitor's role in taking instructions and drafting the disputed will.

The judgments also refer to the shortcomings of reliance on the MMSE assessment as indicative of loss of capacity.

8.1 *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007: Kunc J after reviewing the more recent case law in relation to testamentary capacity and knowledge and

understanding sets out a suggested set of principles for solicitors preparing wills. I set out the excerpt below from the postscript to his judgment following his references to the New South Wales Legislative Council's *Report on Elder Abuse in New South Wales* (24 June 2016)and the ALRC's *Elder Abuse – a National Legal Response* (ALRC Report 131, May 2017):

> **"Postscript - the need for continuing legal education on questions of capacity**
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> 105. Assistance in relation to making a will remains one of the most likely reasons for Australians to seek the assistance of a solicitor. The demographic trend to which I have referred suggests that a good understanding of the issues surrounding mental capacity is an essential skill for any solicitor who holds himself or herself out as competent to provide legal services to natural persons. It is to be hoped that the recommendations of the two recent reports, will be acted upon as quickly as possible.
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> 106. Questions of testamentary capacity are necessarily fact sensitive. No rule or procedure will cover every case to avoid the possibility of litigation. Nevertheless, the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death. Bearing that in mind, and without wishing in any way to derogate from, for example, the desirability of all solicitors being familiar with the guidelines, the recent experience of the Court suggests that proposing some basic rules of thumb (which, as such, are necessarily arbitrary) may be of assistance.
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> 107. It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:
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> (1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.
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> (2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.
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> (3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it

that way? The questions and answers should be carefully recorded in a file note.

(4) In case of anyone:

(a) over 70;

(b) being cared for by someone;

(c) who resides in a nursing home or similar facility; or

(d) about whom for any other reason the solicitor might have concern about capacity,

the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

108. I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely."

8.2 Capacity and brain injury

Practitioners' focus when assessing capacity for will making and giving powers of attorney has largely been on the aged client with perhaps associated dementia and Alzheimer's disease and cognitive impairment. The capacity of intending willmakers with acquired brain damage has had little attention by comparison.

Kunc J considered the issue in *Glenda Phillips v James Phillips; John Matthew Phillips by his tutor NSW Trustee & Guardian v James Phillips* [2017] NSWSC 280 and found that the testator lacked capacity. The deceased testator had suffered a significant brain injury when struck by a motor vehicle when a pedestrian. He was then aged 82 and did not suffer from dementia.

While the will was rational on its face there was a finding that there were sufficient circumstances which raised doubt as to the existence of testamentary capacity and a finding that the testator lacked capacity.

The principal evidence relied on by the Court was the extensive contemporaneous medical reports coupled with the inability of the solicitor who prepared the will to satisfy the Court that the testator had testamentary capacity in the absence of adequate file notes and his failure to follow up on suggestions of the testator's possible lack of capacity when the will was made. Practitioners should consider paragraph 141ff for consideration of the role of the solicitor drafting the Will.

The judgment also considered the interrelationship between testamentary capacity and the making of a financial management order. At Paragraph 128 His Honour states:

> "..It is convenient at the outset that it was common ground that the fact that the Court had made an order in relation to Bill under the *Protected Estates Act* 1983 (NSW) did not lead to the conclusion that Bill was conclusively to be presumed to have lacked testamentary capacity: *Perpetual Trustee Company Ltd v Fairlie – Cunninghame & Anor* (1993) 32 NSWLR 377 (Powell J). However while that may be so I accept Mr Cheshire's submission that in many cases (of which I consider this case is an example) the fact that a person has been found incapable of managing their financial affairs provides a good starting point for establishing a doubt about that person's testamentary capacity".

Consideration is given in the judgment to the role of expert medical evidence which was called by one party only.

The will itself was relatively short and simple. Lack of complexity and unnecessary length and lists of powers is something to be advocated in all cases where the willmaker may be of lesser intellectual capacity as the result of a brain injury and provided the willmaker satisfies the capacity tests enunciated in *Banks v Goodfellow.* Frequently the assets of such willmakers are modest such that the expense of a statutory will may not be justified. The making of the will in such

circumstances having regard to the cautions I have expressed may indeed be proper having regard to principles of free and independent testation.

8.3 Capacity and the death bed will

McNamara v Nagel [2017] NSWSC 91 is a judgment of Robb J. The disputed will was made by the then 87 year old testator during her final illness 15 days before her death. While there was no evidence that the testator suffered from delusions or dementia or any other cognitive deficit before her final illness she did have fever and delirium which waxed and waned during the period in which the will was executed. The Will effected a substantial change from the Testator's previous Will. Undue influence was argued against the principal beneficiary who was present when the Testator gave instructions for the Will and when it was explained to her before its execution. Evidence was given by the solicitor and the other attesting witness. Experts with differing views were retained by both plaintiff and defendant. The attack on the Will failed.

8.4 *Hobhouse v MacArthur-Onslow* [2016] NSWSC 1831

While the estate affected by the orders omitting parts of the will on the basis of lack of knowledge and approval was large the real interest of the judgment was unfortunately the failure by the solicitor to properly give effect to the instructions of the Deceased and to properly advise her so that she could come to a proper understanding of a complex will.

9. INDIGENOUS DISTRIBUTION ORDERS

There have been few judgments dealing with indigenous distribution orders in intestate estates although I believe there are a number in the pipeline. Many of the intestacies arise not only because of a reluctance to make a will but from a failure to recognise that even young people in employment have a significant life insurance cover attached to their employer superannuation and therefore a valuable asset.

The challenge in these matters is to provide cogent evidence of what are the "laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged" (Section 133 *Succession Act*) and to provide an alternative scheme of distribution. What is just and equitable must be balanced against what may be proved by the Plaintiff as to custom.

Re Estate Wilson, Deceased [2017] NSWSC 1a judgment of Lindsay J should be considered.

10. BURIAL PLOTS

Regrettably family disputes frequently arise when the time comes to deal with the funeral arrangements, often of a parent. *Kovac v Chanak* [2017] NSWSC 1023 is the most recent judgment, in such an unhappy saga. The judgment repeats the law in relation to burial licences. The matter was decided on the facts with an order for transfer of the burial licence.

11. STATUTORY WILL

The possibility of a statutory will should always be considered where the intending willmaker lacks capacity and an existing will or the intestacy provisions do not suit the circumstances.

The principles relating to statutory wills have been revisited by Robb J in *A Limited v J* [2017] NSWSC 736. The application was for a will by a severely disabled 13 year old who lacked capacity. The mother of the child claimed that the father had failed to fulfil his responsibilities as a parent and sought to exclude him from the will.
The child was brain damaged at birth and never developed capacity to consider the persons who might benefit by a will. The application was brought by the manager of his estate. Both parents participated in the hearing as defendants.

The proposed will made no provision for the father. There were urgent circumstances of impending surgical procedures for the child which caused great difficulty for Justice Robb. Ultimately he approved a will which made provision for the father but at a much lesser percentage than he would have received on intestacy.

12. OMISSION OF WORDS FROM WILL

On rare occasions application will be made to the Court to omit words from a will, often home-made. The matter was considered in the South Australian decision of Stanley J, *In the Estate of Frances Jane O'Grady (Deceased)* [2017] SASC 150 where the Plaintiff sought omission of words of an offensive or libellous nature. It was held that while the words were offensive and libellous they still had clear testamentary purpose and the Court was not persuaded to exclude them.