Daughter ordered to repay mother $140,000

Dowsett v King [2019] NSWSC 1459. Robb J. 28.10.19.

Ordered the daughter defendant, with a general power of attorney, to repay $140,000 to her 89yo mother, the plaintiff who appeared by a tutor who was one of her two sons.

Robb J: "For the following reasons, I reject Donna's claim that she was authorised to transfer the $140,000 by the series of transactions that led to the whole amount being paid into an account solely in the name of Donna, on the basis that the payment was intended by Mrs Dowsett to be a gift to Donna," [91].

"The evidence is not sufficient to enable the Court to make any positive finding about whether or not Mrs Dowsett authorised the series of transactions. However, whether or not Mrs Dowsett knew of the transactions, I am satisfied that she did not say that she intended to transfer the $140,000 to Donna as a gift.

"It is significant that Mrs Dowsett did intend to make a gift to Donna, that is the transfer of the Pelican Property to Donna, and did so with advice and in a manner such that she would have had reason to understand that she should take special steps to ensure that future such gifts could not be attacked. The fact that comparable steps were not taken in respect of the payment of $140,000 to Donna weighs in the balance against a finding that Mrs Dowsett intended to make a gift of that money to Donna," [100].

"Mrs Dowsett's 10 July 2015 will was made only three months before the $140,000 was transferred into the sole name of Donna on 19 October 2015. As recorded above, that will provided for the residue of Mrs Dowsett's estate, which would at that time have included the proceeds of the AMP investment that had been paid into Mrs Dowsett's Bonus Saver Account, to be divided equally between Mrs Dowsett's four children. There is no satisfactory explanation as to why, by October, Mrs Dowsett may have changed her mind, so that the whole of the amount should be given to Donna alone.

"Such a change of mind is also unlikely given that, on 30 October 2014, Mrs Dowsett had transferred the Pelican Property, valued at $290,000, solely to Donna. On the whole of the evidence, there is insufficient reason for the Court to infer that Mrs Dowsett so greatly preferred Donna above her other three children, as to wish to give such a substantial portion of her estate to Donna to the exclusion of those other children.

"Finally, while the evidence is not comprehensive, it appears that the effect of Mrs Dowsett making a gift of $140,000 to Donna may have been to deprive Mrs Dowsett of having sufficient residual funds to provide for herself for the balance of her life," [103].

"This conclusion appears to have been borne out by the fact that Mrs Dowsett was said to be unable to pay the fees for the Gunnedah nursing home, as a result of the fact that both the Department and Centrelink treated the supposed gift as remaining an asset of Mrs Dowsett.

"In these circumstances, Mrs Dowsett is entitled to an order that Donna pay her $140,000 plus interest calculated in accordance with s 100 of the Civil Procedure Act 2005 (NSW) from 19 October 2015. Mrs Dowsett should, after confirming the calculations with Donna, inform the Court of the total amount, including interest, that should be the subject of the order in favour of Mrs Dowsett," [105].

Mosman Occasional Law Reader

Deceased mother's share

Straughen-Nicholson v Straughen [2019] NSWSC 1389. Ward CJ in Eq. 15.10.19.

Uncontested application granted under Succession Act 2006 (NSW) section 41 [Dispositions not to fail because issue have died before testator], the plaintiff's mother and daughter of the testator having died before her father. By agreement, the matter proceeded on an affidavit of the plaintiff and submissions.

The will had left the estate to the three children as tenants in common in equal shares. Ward CJ in Eq detailed s 41.

"The issue for determination is straightforward (albeit that there has been no contradictor on the present application).

"The gifts to the deceased's children are unconditional and are not expressed to be dependent upon them being alive at the time of the deceased's death. The gifts are not without limitation as to remoteness, being limited to the named issue (the three children) of the deceased (and not to the issue of the testator of all degrees of remoteness)," [11].

"Therefore, as Karen Straughen did not survive her father for 30 days, the requirements of s 41(1) are satisfied and the operation of s 41(2) has the effect that Emma Straughen-Nicholson takes her mother's one-third share of the estate (including the Lalor Park property and residue of the estate)."

"Declare that on the true construction of the last Will dated 22 August 2014 of the late Roy Straughen, who died on 13 April 2019, and pursuant to the operation of s 41(2) of the Succession Act 2006 (NSW), the plaintiff (Emma Straughen-Nicholson), as the only issue of Karen Anne Straughen who died between 17 and 18 January 2019, takes the share of Karen Anne Straughen under cll 5, 6 and 7 of the Will."

Executor not liable for share price decline

Eugenius Sunny Willison v Hollingsworth, Executor of the Will of Willison [2019] WASC 392. Master Sanderson. 30.10.19.

Master Sanderson: "Kim Robert Willison (the deceased) died while living in Bali on 17 April 2011. The deceased left assets in Australia, Indonesia and Singapore. Taken together these assets are referred to as the deceased's 'estate'. Difficulties arose with various wills signed by the deceased and the executors were uncertain whether the wills were valid in Indonesia or Australia. They were also unsure where probate should be sought – that is, whether in Indonesia or Australia – and they were also uncertain as to how to go about resealing the grant of probate in Singapore. ...

The plaintiff was one of three sons of the testator.

"In the end the plaintiff's main complaint appears to be the value of the estate declined significantly in the time between the death of the deceased and the disposal of the shares in the HSBC portfolio. While such a decline did occur there is nothing to suggest the defendant could have done anything more to protect the estate than he did. Perhaps with the benefit of hindsight some of the steps taken could have been taken more promptly. But really the fault there lay with the Indonesian solicitors – or perhaps with the deceased given the uncertain way he arranged his affairs. The evidence does not suggest any fault lay with the defendant. He did not waste the assets of the estate and he did **not commit a devastavit**. The pleaded case cannot succeed. On that basis the defendant is entitled to summary judgment," Master Sanderson said [16].

Executor ordered to transfer real estate

Kritsidimas v Dimitrakakis [2019] VSC 704. Lansdowne AsJ. 23.10.19.

Executrix plaintiff, her brother the defendant seeking appointment of himself or the State Trustee as executor of their father's $7.5m estate, comprising real estate in Victoria and Greece, and cash.

The plaintiff had commenced alleging her brother had acted unconscionably over certain property before their father's death, she asserting entitlement to withhold dispositions until the unconscionable dealings had been determined, he alleging the estate indebted to him for rents.

Lansdowne As J detailed Administration and Probate Act 1958 (Vic) section 34 [Discharge or removal of executor or administrator] and cited *Molnar v Butas (No 3)* [2017] VSC 711 [21]-[22].

To "**unfit to act**", cited *Dimos v Skaftouros* (2004) 9 VR 584; [2004] VSCA 141: no fixed criteria but beneficiaries' interest paramount; *Monty Financial Services Pty Ltd v Delmo* [1996] VicRp 7; [1996] 1 VR 65 (Ashley J): not every conflict should remove executor.

Lansdowne As J: "Where a ground for removal is established, the Court retains a discretion as to whether or not to order removal. In *Re Greif* [2005] VSC 266, for example, Byrne J found that grounds for removal of the executor were established, being delay in providing accounts, delay in finalising the administration of the estate and the payment to himself of unauthorised amounts. However, he declined to remove the executor in part because the administration of the estate was almost complete and the cost of a new administrator would be a burden on the estate. He was also concerned that the attitude of all the beneficiaries was not known. To meet the concern of the plaintiff beneficiaries that further irregularities may come to light, he accepted the suggestion by the defendant executor of an audit, to be paid for by him," [31].

At [62] "The plaintiff relies on *Cherry v Boultbee* [1839] EngR 1099 and the equitable principle of set-off to justify her retention in the Estate of the gifts of the two interests in real estate to the defendant pending determination of this proceeding. As applied to the administration of estates, they can each be seen as mechanisms to ensure that a beneficiary who owes money to an estate does not receive more than his or her fair share of the distribution of the estate."

In [80] "In these circumstances the defendant has shown that that the plaintiff's refusal to distribute the gifts of real estate to the deceased, which is conceded to be accompanied by anger at his actions, is not saved by being defensible in law. I consider the defendant has shown the plaintiff's refusal to distribute these gifts is a basis for her removal as executor."

"For these reasons, I will not on this application remove the plaintiff as executor. The nub of the defendant's grievance is the plaintiff's refusal to transfer the real estate to him. I consider the appropriate relief on this summons to be the alternative relief sought, that the plaintiff be ordered to transfer the gifts of real estate to the defendant. I will ask counsel to draw appropriate orders to that effect. Those orders may include an order for an account in respect of outstanding rent and outgoings if both counsel agree. If there is dispute as to whether that is necessary, I will hear the parties further given that the order was not sought in the summons and was not the subject of oral argument," Lansdowne As J said [86].

Parramatta diocese defends abuse release

Magann v Trustees of the Roman Catholic Church of the Diocese of Parramatta [2019] NSWSC 1453. N Adams J. 28.10.19.

On the Church's application, N Adams J declared a 2007 deed of release extinguished the church's liability in respect of abuse 30 years ago. The plaintiff had sued in 2003, the Court of Appeal - [2005] NSWCA 358 - holding not just to extend time.

"On 16 October 2007, Mr Magann entered into a Deed of Release with the Church where the parties agreed that, in exchange for a payment of $95,000, he would release and discharge the Church from "all actions, suits, claims and demands of every description past present and future relating to or arising from the Claim or the Complaint or any other matters set out in the Deed"," [7].

Her Honour noted **authorities to releases**, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251; [2001] UKHL 8 at [8] per Lord Bingham: construe by objective reference; *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112; [1954] HCA 23 at 128-130: construe release narrowly; *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26: read down exclusion; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302; [2015] VSCA 351, at [63] per Whelan JA: possible for arrangement which does settle 'all conceivable further disputes'.

To **capacity of the plaintiff,** noted *Hanna v Raoul* [2018] NSWCA 201 [47]-[51] per Beazley P, including "It is also necessary, for a transaction entered into by a person without the required capacity to be voidable, that the other party to the transaction have knowledge of the incapacity: see *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17 at 441"; also *Borchert v Terry* [2009] WASC 322 per Martin J. Not here made.

To the **Contracts Review Act** 1980 (NSW), noted *Spina v Permanent Custodians Ltd* [2009] NSWCA 206 [74]; *Provident Capital Ltd v Papa* [2013] NSWCA 36 [7] Allsop P; *Lauvan Pty Ltd v Bega* [2018] NSWSC 154 [283]-[286] per Gleeson JA; *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, McHugh JA: absence of legal advice not determinative.

Here N Adams J was "unable to identify any undue influence or any unfair pressure or tactics", in [226], therefore statutory relief not available.

To **unconscionable conduct**, in [227], her Honour: "In Thorne v Kennedy (2017) 263 CLR 85; [2017] HCA 49 the High Court confirmed the relevant principles of unconscionable conduct in equity to be as follows at [38] (footnotes omitted):

[HC plurality] "A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage".

N Adams J: "Applying these principles to the facts as I have found them, Mr Magann has not established that he suffered from any special disadvantage let alone that the Church took advantage of it. No predatory state of mind on the part of the Church has been established," [228].

GREYLINGS ATTORNEYS

Phone: 9264 0676

www.greylings.com.au

YOUR WILL BE DONE

A prudent step to safeguard your family assets and future is to have your will professionally prepared by Greylings Attorneys, of Mosman.

A straightforward will costs $385 incl GST.

Simply telephone 9264 0676 for an appointment, or call in to Greylings office at the corner of Military Rd and Raglan St, Mosman (above The Burger Shed).

If you need Power Of Attorney or Guardianship, Greylings Attorneys' fee is $165 incl GST.

Our Services Include

- *Estate administration*
- *Conveyancing*
- *Commercial*
- *Litigation*

Phone: 9264 0676
www.greylings.com.au