



CARMEL LEE

GREENWAY CHAMBERS

SIGNIFICANT RECENT SUCCESSION LAW CASES



Introduction

- Significant NSWCA Cases: Lack of Knowledge and Approval
- Separation of Spouses Prior to Deceased's Death
- Costs

Lack of Knowledge and Approval

Lewis v Lewis [2021] NSWCA 168

- Deceased made last will in 2014 and a further two codicils in 2015.
- Primary judge found that only parts of the will and first codicil were known and approved.
- Executor argued on appeal that knowledge and approval was established because the will had been read out aloud to the Deceased.
- The CoA rejected that submission – the test of knowledge and approval is not that easily passed.

Lack of Knowledge and Approval

Drivas v Jakopovic [2019] NSWCA 218

- Claim Deceased lacked testamentary capacity when signed will.
- Will drafted by solicitor, Deceased signed in solicitor's office with attesting witnesses.
- Evidence of solicitor's common practice provided.
- Considered on appeal:
 - Whether primary judge erred in weight given to Mr Taylor's evidence and failed to give weight to medical evidence.
 - Whether deceased knew or approved terms of the will.

Lack of Knowledge and Approval

Drivas v Jakopovic (Cont)

- Medical evidence regarding forgetfulness and dementia of Deceased.
- Mr Taylor's evidence regarding taking instructions from elderly clients on wills and usual practice preferred.
- Evidence of a solicitor experienced in probate matters and dealing with elderly clients may be preferred to medical evidence (see [52]-[57]).

Lack of Knowledge and Approval

Estate Rofe [2021] NSWSC 257

- Deceased was a barrister who had been practising since 1956.
- Estate worth \$27 million.
- Wrote a number of wills in his last years.
- Suffered from dementia-related decline.
- Legal training and experience was a factor in coming to the conclusion that the deceased knew and approved the terms of his will.

Lack of Knowledge and Approval

Rodny v Weisbord [2020] NSWCA 22

- Stringency of the legislation empowering the Court to treat a will as operative.
- Deceased made will in 1997.
- In 2008 Deceased met with a solicitor to prepare another will – left in draft form.
- Proceedings begun seeking declaration that draft will was constituted last will of the Deceased.
- Primary Judge accepted 2008 draft will intended to constitute her will.
- Court of Appeal reversed the finding.

Rodny v Weisbord (Cont)

Lack of
Knowledge and
Approval

- *“...The finding that Mrs Rodny believed she had made a will leaves unanswered questions as to whether there was any particular document which was the subject of her belief and, if so, whether that document was a will which accorded with her instructions; as well as questions as to how and when she came to have that belief. The absence of findings addressing these matters leaves unanswered how Mrs Rodny came to intend that a particular unsigned document should, without more, constitute her will when her apparent intention was to give effect to her testamentary intentions by executing a will.”*

Lack of Knowledge and Approval

Battenberg v Phillips [2020] NSWCA 249

- Circumstances of the preparation of the will demonstrated Deceased had capacity.
- Deceased made will in 2006.
- Grant of Probate opposed by nephew – claimed will made in suspicious circumstances.
- Claim dismissed, nephew appealed.
- Court of Appeal upheld primary judgment.
- Appeal turned on circumstances in which deceased gave instructions for preparation of will.

Negligence in Settlement of Disputes?

Liprini v Hale [2020] NSWCA 130

- Appellant claimed damages for breach of contractual or tortious duty.
- Appellant claimed solicitor failed to commence Family Provision proceedings against his mother's estate, and/or that solicitor had been negligent in drafting the orders made at mediation.
- Court of Appeal dismissed the appeal, finding:
 - There was no breach of duty or causation.
 - In respect of drafting orders, RHS was also protected by advocates' immunity.

Separation of Spouses Prior to Death

Squire v Squire [2019] NSWCA 90

- Small estate (\$400,000).
- Claim by two adult children on estate of their father, Defendant was Deceased's wife.
- Deceased and wife had begun process of separation and division of assets.
- Deceased expressed intention to change will, had not done so at time of passing.
- Court of Appeal found Deceased's obligation to his wife had terminated: Court made provision for each adult child.
- Nature of separation between Deceased and his wife was: "*for all practical purposes final*".

Separation of Spouses Prior to Death

Brindley v Wade (No 2) [2020] NSWSC 882

- Plaintiff was second and former wife of Deceased.
- Family law proceedings reached final settlement 2018.
- Couple lived separately until Deceased's death.
- No relationship aside from acrimonious business relationship.
- *"...conduct after separation clearly demonstrated that their marriage had ended more in anger than sorrow"* (at [173]).
- Application dismissed with costs.

Separation of Spouses Prior to Death

Sarant v Sarant [2020] NSWSC 1686

- Separated husband claimed on wife's estate.
- Court considered length of marriage.
- Provision made for Applicant
 - “[w]hatever the resentments, or complaints, the deceased raised ... about the marriage, they were not significant enough for either to formally end the marriage or formally seek an alteration of the matrimonial property interests” (at [355]).

Costs

Dunne v Radburn (No 2) [2020] NSWSC 63

- Effectiveness of a *Calderbank* letter.
- In rejecting proposed settlement, did party act on reasonable grounds?
- Extent of uncertainty in case made accepting or rejecting offer and its impact on costs assessment difficult.
- Unreasonableness in refusing offer not found.
 - *“it is unclear even now where the balance will lie. It would have been even less clear at the time the offer was made. ... The regrettable history of this case demonstrates that the parties have proved unwilling to agree on numerous issues, including some of very little value. Hindsight shows that when the offer was made in August 2018 the disputes between the parties had a long way to run and their financial outcome was unclear.”*

Costs

Harris v Carter [2020] NSWSC 196

- Claim by minor child of Deceased.
- No contact between Deceased and Plaintiff.
- Offer of compromise, complied with UCPR.
- Family Provision claim dismissed.
- Defendant obtained judgment not less favourable than terms of offer.
- Question whether Plaintiff's tutor personally liable for costs.
- Defendant to pay Plaintiffs costs.

Costs

Vella v Vella; Vella v Vella (No 2) [2020] NSWSC 1032

- Plaintiffs sought provision out of mother's estate.
- Multiple UCPR offers and compromise and *Calderbank* letters exchanged. Ultimately, neither of the unsuccessful parties had accepted an offer made by the successful parties.
- Unsuccessful parties bore the brunt of the costs orders.

Costs

Purnell v Tindale (No 2) [2020] NSWSC 1047

- Whether circumstances of case warrant departure from usual rule that costs follow the event.
- Plaintiff nephew of Deceased, failed to prove dependency.
- Plaintiff not an eligible person and claims not borderline.
- Plaintiff of limited financial means, however after payment of Defendant's costs on an ordinary basis would retain in excess of \$610,000.
- Undistributed estate sufficient to pay some of the Defendant's costs.
- Unsuccessful Plaintiff to pay costs of the Defendant not covered by Deceased's undistributed estate.

Costs

Poche v Poche [2020] NSWSC 835

- Plaintiff successful, further provision made from estate.
- Significant costs.
- Judge critical of Plaintiff's attitude to spending on costs given significant debts.
- Plaintiff's costs capped, to be paid out of the estate at \$125,000.

Costs

Bassett v Cameron (No 2) [2021] NSWSC 419

- Claimant brought family provision proceedings and a claim based on proprietary estoppel.
- Was unsuccessful in estoppel claim and had the benefit of an FP order roughly amounting to \$600,000.
- Claimant spent over \$1.6 million on legal costs.
- However, claimant had issued a UCPR offer of compromise that was no less favourable to him than the judgment handed down.
- Costs orders largely in claimant's favour.