Estates and Administration Legal

TEP / TFM CASE UPDATE – SUPREME COURT OF VICTORIA (TRIAL DIVISION)

February 2025

Re Kalenyouk [2024] VSC 390 (Gray J)

This was a successful application to admit an informal will to probate under s 9 of the *Wills Act* 1997 (Vic). The document was signed before one witness - a beneficiary whose legacy was increased under the informal will. There was compelling evidence from medical staff and social workers as to the deceased's capacity and intentions during the hospital stay when the will was made. The Court found that the interests of minor beneficiaries who would have inherited under the penultimate will was of 'marginal significance' in the particular circumstances of this case. The case dealt with a side issue regarding an agreement to alter the distribution of the estate. The executor undertook not to diverge from the terms of the will without Court approval because the deed recording the consent of *suis juris* beneficiaries was signed without independent legal advice.

Re Haliem [2024] VSC 400 (Moore J)

Taher and Amal Haliem were a couple who moved to Australia from Egypt in the 1980s. They passed away in 2009 and 2013, respectively, leaving five children. Taher's will left his estate to his immediate family. Amal's will disposed of her residuary estate '*strictly in accordance with the Islamic law of distribution as outlined in the Quran in compliance with Sunni tradition*'. The executor defendant had acted on legal advice to transfer all estate property into *inter vivos* family trust contrary to the terms of the wills. Judicial advice was sought regarding the construction of Amal's will and for that purpose the parties jointly tendered an expert report on the effect of the residuary clause in Amal's will under Islamic succession law. The parties successfully sought declarations from the Court by consent that the transfers of estate assets were void and an independent administrator was appointed to the estates to deal with the assets in accordance with the wills. The Court declined to make any order (under s 66 of the *Trustee Act* 1958 (Vic) or otherwise) that the executor bear the future costs of the independent administrator. On the question of costs of the proceeding, the Court will give consideration to a third party costs order against the law firm who gave erroneous advice regarding the transfer of estate assets.

Cicvaric v Blazevic [2024] VSC 450 (Goulden AsJ)

The deceased left a simple estate to his three brothers, including the Plaintiff. The Plaintiff sought the removal of the executrix (successfully) and an account under order 52 of the *Supreme Court (General Civil Procedure) Rules* 2015 (unsuccessfully). The application was opposed. The Court summarised the evolution of the case law regarding removal of executors and trustees. The welfare of the beneficiaries is the paramount consideration in the deployment of that removal power. Following *Monty Financial Services v Delmo* an executor's or trustee's neglect of their duty was sufficient to demonstrate their unfitness. The Court found that numerous aspects of the executrix's conduct cumulatively demonstrated her unfitness and delayed the administration of the estate. Between late 2022 and early 2024 she failed to give effect to the beneficiaries' unanimous requests to receive the principal asset of the estate in specie. She (through her solicitors) engaged in a campaign of increasingly adversarial correspondence tainted by an unreasonable suspicion about the beneficiaries. Put simply, AsJ Goulden found that the executrix had *'forgotten that the estate belongs to the beneficiaries and not to her*' (at [119]). The executrix's conduct was found to be unreasonable, and to have arisen from self-interest. The executor was removed and the Plaintiff appointed in her place.

The Court noted the trustee's usual indemnity for properly incurred expenses but found the executrix's conduct generally and the preferential payment of her own legal costs in contrast with delay in paying the Plaintiff for the funeral (even requesting a picture of the coffin) raised questions about her entitlement to costs. The executrix was found to have acted improperly in paying her legal fees associated with opposing the removal application prior to any determination. She was required to restore those costs to the estate. In *Cicvaric v Blazevic* (No 2) [2024] VSC 633 the Court made an indemnity costs order against the executor, requiring her to reimburse the legal fees deducted by her from the estate for the defence of the proceeding and the Plaintiff's costs of the proceeding on an indemnity basis.

Amorosi v Robinson [2024] VSC 466 (Moore J)

The Court was asked to make declarations about the beneficial ownership of two properties that had been purchased for the benefit of Vanessa Amorosi at the height of her success. The main issue was the ownership of a Narre Warren propriety held in the names of Amorosi and her mother as tenants in common. Justice Moore found that the property was held on trust for Ms Amorosi subject to her payment of any remaining liabilities charged against it. Her mother was found to be owed $650,000 for funds advanced at Ms Amorosi's direction for the purpose of another property in California. Other claims on both sides were dismissed or unnecessary to decide. Much of the case turned on its own facts, consistently with its dominant character as a familial dispute. However the reasons cover some informative and novel legal points. In finding that the Narre Warren property was held on a common intention constructive trust his Honour discussed the elements required to establish such a trust with reference to Justice McMillan's decision in *Imam Ali Islamic Centre v Imam Ali Islamic Centre* [2018] VSC 413: a common intention CT requires an actual or inferred but not a presumed intention, detrimental reliance and equitable fraud in the denial of the interest. The reasons discuss the distinctions and overlap between a common intention constructive trust and other equitable remedies, such as a resulting trust (*Shepherd v Doolan* [2005] VSC 42)), which arises from a presumption of law and not the parties' intention, and proprietary estoppel. His Honour remarked that in view of the overlap between proprietary estoppel and the common intention constructive trust, the latter might not 'survive in Australia' (citing the Court of Appeal's comments in *Zekry v Zekry* [2020] VSCA 336). However, the Court noted that Mrs Robinson did not take issue with the doctrinal basis of the plaintiff's claims in this case. Finally the Court did not accept that there was an 'free standing' power at common law or in equity to award interest to compensate a wronged party (as distinct from an entitlement to interest on a judgment sum).

Roper v Roper (No 3) [2024] VSC 490 (Gray J)

The Court's previous decision concerning this Part IV claim (*Roper v Roper* [2024] VSC 249 (Gray J)) provided that the Court would receive submissions on the amount of provision required to meet the standard proposed by the Court (ie.an amount sufficient for the Plaintiff to avoid homelessness and a small lump sum to supplement his welfare payments). After considering the parties' positions, the Court determined to make further provision form the $1.5m estate in the amount of $335,000 for a one bedroom unit and $300,000 as a buffer for expenses and contingencies "including vicissitudes".

Re Johnson; Blackham v Blackham [2024] VSC 497 (Keogh J)

The Defendant was removed as the co-executor and trustee of the estate of his mother, Shirley Johnson, who passed away in March 2022. By August 2024, when judgement was handed down, the estate was unadministered due to the Defendant having obstructed the administration in pursuit of his own interests. He was residing rent free with his ex-partner in the estate's principal asset - a property in Narre Warren. The Defendant was found to have adopted an antagonistic attitude to the beneficiaries and to have deprived them of their interest in the estate by his continuing refusal to allow the transmission or sale of the property or to make any proposal for the purchase of the property by him.

Cassar v Cassar (Preliminary questions) [2024] VSC 502 (Gorton J)

The deceased died in 2011. A forged will was admitted to probate in 2012 and the estate property transferred into the name of the defendant who was the sole beneficiary under the forged will. The preliminary question was whether the estate assets transferred under the forged will should be transferred back to the estate. The Court rejected the defendant's attempts to avoid that outcome. The plaintiff, the deceased's wife, had been aware of the forgery. However, other estate beneficiaries had not been aware of or participated in the forgery. The defendant was found not to have indefeasible title to estate properties because of his fraudulent acquisition of them (s 42 of the *Transfer of Land Act* 1958). The Court was not persuaded that the plaintiff (in her representative capacity) should be denied relief because of her participation in the fraud or the delay in the application to restore assets to the estate.

Re Brumer; Sternfein v Bloom & Anor (No 2) (Moore J)

This was an appeal from a judicial registrar's decision to dismiss an application for summary judgement of a Part IV claim. The crux of the decision was the eligibility of the plaintiff under s 90(g) of the Act, which enables a claim for further provision to be made by "a person who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated as a natural child of the deceased ...". The appeal was conducted *de novo* but there was limited additional evidence before the Court; much of the reasoning involved construing the legislation in the context of evidence regarding the deceased's relationship with the plaintiff (his former step child). The Court allowed the appeal and dismissed the plaintiff's claim. The Court was satisfied that the Plaintiff had the requisite belief that the deceased was a 'parent' within the definition prescribed in the Act and for the relevant 'substantial' period. However, Moore J considered that the requirement for the deceased to have treated the plaintiff as a 'natural child' meant that the deceased should have "regarded" the plaintiff as a "biological child". The Court found that there was no evidence that the deceased or anyone ever regarded the plaintiff as his biological child and that, as a result, the claim must fail.

Re an application by State Trustees Ltd [2024] VSC 536 (Barrett AsJ)

The Plaintiff sought directions under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* in relation to the administration of the state of Leslie Norman John Sholl. The application arose in fascinating factual circumstances. The deceased died intestate without any spouse, children, or living relatives on his mother's side. The Court was asked to determine his parentage for the purposes of succession of his $500k (approx.) estate. The genealogical evidence showed this his mother had been married to a Leslie Norman Bull. A contemporaneous news article revealed Mr Bull had deserted his naval post and entered into a bigamous relationship with the deceased's mother in 1950, having previously married in his native England. Because the marriage was bigamous it was regarded as void. The Court discussed the relevant sections of the *Status of Children Act* 1974 which was held to apply in the circumstances as the deceased had died after its enactment. Under section 5 a child is presumed to be the child of its mother and her husband if it is born during a marriage or within 10 months of the dissolution of that marriage, subject to evidence to the contrary. 'Marriage' includes a void marriage. The Court held, on the balance of probabilities that the deceased was born during the marriage between his mother and Mr Bull and that the presumption of paternity arose under s 5 and was not disturbed by any evidence to the contrary. Section 7 establishes separate requirements for the recognition of the relationship of father and child for the purposes of succession: by proof of the marriage of the parents at the date of the birth or subsequently, or the admission by, or proof against the father, of parentage during his or (if he is a beneficiary) the relevant deceased's lifetime. The Court held that that section was also satisfied to establish that Mr Bull was the deceased's parent for the purposes of the succession of the deceased's assets on intestacy.

Re Steficar [2024] VSC 560 (McCann JR)

This application for commission was opposed by some beneficiaries but was ultimately successful. The Court was not persuaded by the beneficiaries' allegations that the executor failed to act impartially and of certain deficiencies in the estate administration. The estate was relatively straightforward, but the executor was awarded 2% commission less the legal fees incurred by him as executor. The Court found that he had performed his duties efficiently, updated beneficiaries regularly, indicated his intention to claim commission early and had handled the additional burden of dealing with suspicious and, at times, hostile interested parties during the administration. The Court determined that it was reasonable for the executor to include attendances on solicitors in his own narrative of 'pains and troubles' and that this did not give rise to any unreasonable duplication: at para [43] 'it is appropriate for an executor to consult with legal representatives in the administration of an estate; to provide them with instructions for tasks to be undertaken and to seek advice'. The legal costs were deducted from the commission but the executor was entitled to rely on his attendances to instruct lawyers to justify his claim for commission.

Re Estate of TCW (a pseudonym) [2024] VSC 569 (Moore J)

The 'forfeiture rule' is the principle that forbids a person from obtaining a benefit or enforcing rights that arise from their own crime. It is settled law that a party who is guilty of a person's murder will forfeit any interest in their estate. If a person is found to lack criminal responsibility for a death by reason of mental incompetence, the rule does not apply. A debate about the application of the rule in cases of manslaughter was settled in Victoria by the majority of the Court of Appeal in *Edwards v State Trustees Ltd* (2016) 54 VR 1 which determined that the rule is applied on a case by case basis assessed by reference to the deceased's criminal culpability.

In this case, the beneficiary had been incapable of standing trial but was found guilty of manslaughter, a decision documented in the reasons from a special hearing under the *Crimes (Mental Impairment and Unfitness to be Tried)* Act 1997. The Court was required to consider the admissibility of those reasons as evidence relevant to the assessment of culpability on the forfeiture question. Based on recent Court of Appeal authority (*Osborne v Butle*r [2024] VSC 6) the Court found that the relevant sections of the Evidence Act 1958 limited the admissible evidence of criminal convictions to prove only those facts in issue in the criminal case (ie the elements of the crime) and not the broader circumstances of the offending. However, the Court determined that the reasons were admissible in the absence of objection (his Honour expressed doubt about this but considered himself bound by intermediate authority of the NSW Court of Appeal on that issue of construction of federal law pursuant to *Farah constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89). The Court found that the reasons were admissible and that the circumstances of the crime were such that the forfeiture rule applied to deprive the convicted person of their benefit under the Will.

Grege v Grege & Ors (Ruling) [2024] VSC 475 (Gobbo AsJ)

Can discovery can be sought in a Pt IV claim for further provision? The defendant executors sought discovery of documents relating to a lease arrangement that was understood to provide an income stream to the plaintiff. Order 29 of the *Supreme Court (General Civil Procedure) Rules* limits discovery to writ proceedings unless discovery is ordered under r 29.07 (discovery of documents that a party relies on or which will assist or be adverse to another party's case) or under r 29.08 (particular discovery). The Court stated that discovery will not ordinarily be ordered in a Part IV unless the documents sought relate to an issue in the proceeding and special circumstances exist (citing *Harris v Bennett* (2004) 8 VR 425). It will not generally be sufficient that the documents might bear upon the various factors to which the Court must or could have regard to in considering a Part IV case. More is required to show the relevance to the issues in dispute and special circumstances. In this case, because the plaintiff had put her financial need in issue the documents were required to ensure her 'full and frank' disclosure of all financial resources.

Re Estate of Luttrell [2024] VSC 598 (Harris J)

This was a successful application for rectification of a will under s 31 of the *Wills Act* 1997. The deceased and her husband made mirror wills which were intended to give effect to an estate plan in which their respective shares of the property they owned as tenants in common were to be held for the benefit of the survivor for life, then passed to their intended beneficiaries. The Will included a cross reference to the incorrect sub-paragraph of the residuary clause which would have the effect (called 'absurd' by the plaintiffs) of the property passing absolutely to the survivor instead of the intended beneficiaries once the survivor's life interest was determined. The Court was satisfied that the Will did not give effect to the testator's intentions and found that it was the testator's actual intention to benefit her nieces and nephews once her husband passed. The Will also provided for a half share of the residue to pass to the husband unless he was 'unable or unwilling' to take the gift, including by reason of his having predeceased his wife. The Will did not specify any survivorship period. The husband had survived the testator by less than 30 days. The Court found that s 39 of the *Administration and Probate Act* 1958 did not apply to cause the will to be read as if the husband has predeceased his wife, because he failed to survive her by 30 days. The will was made in 1996 but the relevant section only applies to wills made after 20 July 1998 when the Act commenced.

Vernon v Sixty Third Octex Pty Ltd [2024] VSC 599 (AsJ Irving)

This will be an interesting case if it proceeds to a substantive hearing. The plaintiffs were specified and general beneficiaries of two trusts. The defendants, the corporate trustees, executed deeds of variation excluding the plaintiffs as beneficiaries and substituting the deceased's second wife and her family members. These plaintiffs' statement of claim alleges the defendants failed to give real and genuine consideration to their needs and to exercise the amendment power for the purpose for which it was conferred. The stated purpose of the trusts was the provide for the deceased's first wife and issue from that marriage. These reasons deal with various interlocutory applications for amendment to the statement of claim (allowed in part), joinder of the second wife as appointor (unsuccessful) and discovery.

Pendergast v Ewhelski & Anor (variation of orders) [2024] VSC 602 (Keogh J)

When will the Court alter or rescind final orders made in a proceeding? In this s 15 proceeding the Court made final orders by consent granting leave to an independent solicitor to apply for a grant. No order was made passing over the executors, one of whom then refused to renounce. The Court has an inherent discretionary jurisdiction in exceptional circumstances to alter final orders in a proceeding (as to that principle his Honour cited the Court of Appeal's decision in *Gamboni v Bendigo and Adelaide Bank (No 2)* [2013] VSCA 282 which in turn cited *VSF Group Pty v BM008 Pty* [2010] VSCA 577). The Court held that the passing over of the executors was an 'unstated but inherent feature' of the orders made by consent. Passing over orders were made but the Court refused to make an order to dispense with the surety requirement. The independent solicitor had indicated that he would refuse to act without that dispensation but the Court required that the request be directed to the Registrar in the first instance.

Lehr v Matters [2024] VSC 640 (Daly AsJ)

This was an unsuccessful application for summary dismissal of a caveat. The grounds alleged that the deceased lacked capacity. Since a serious accident in 2015, the deceased had suffered a number of serious conditions including anxiety, depression, complex regional pain syndrome, coronary artery disease, autism spectrum disorder, obsessive compulsive disorder and post-traumatic stress disorder. The deceased's treatment regime included ketamine and medical marijuana at the time that he made a new will in 2021. The will made substantial changes to the dispositions in the penultimate will, disinheriting the deceased's mother and step brother. The executors had resisted any affidavits being filed to allow medical reports into evidence and had no evidence from the solicitor who drafted the will. They contended that there was an insufficient connection to show that the deceased's conditions affected his capacity in 2021, but not in 2020 when the penultimate will was made. The caveator's extensive particulars nevertheless included a compelling outline of the deceased's complex condition and included extracts from text messages around the time the will was made which appeared to show the deceased's increased psychological distress and possible delusions. The Court observed that a medical condition by itself does not establish a lack of capacity (citing *Bailey v Bailey* (1924) 34 CLR 588). However, the Court was satisfied that the 'low bar' for a prima facie case was overcome, finding that there was such a case for investigation, assuming the facts in the particulars to be true and having regard to the overall narrative of the deceased's health and circumstances.

Re Estate of Shepherd [2024] VSC 657 (Goulden AsJ)

An application under Order 54 of the *Supreme Court (General Civil Procedure) Rules* 2015 by a residuary beneficiary seeking an additional payment against his entitlement from a settlement sum paid to the executor. The will divided the residuary estate between three of the deceased's 6 children. The defendant executor was the husband of one of the residuary beneficiaries. The will also provided that any 'real property' was bequeathed to the executor's wife and her son to be used as a holiday home by other family members. Another of the deceased's children had misappropriated funds in the course of acting as his power of attorney. The attorney had used some of the funds to purchase a property. The executor claimed that the property was held on constructive trust for the estate. The claim on behalf of the estate was made by the executor without notice to the residuary beneficiaries and was settled for a payment from the proceeds of sale. The defendant executor distributed the settlement funds to his wife and son, purportedly pursuant to the gift of 'any real property' in the will. He submitted that the settlement funds represented the value of the deceased's interest in real property owned by way of a constructive trust at the date of her death and that this was a proprietary interest sufficient to fall within the terms of the specific gift. The Court held that the estate had only a chose in action at the date of the deceased's death to claim the funds misappropriated by the attorney. That chose in action was then converted to an interest under the settlement deed. There was no interest in real property as required (on a proper construction of the will) to justify payment to the specific legatees. The executor was ordered to pay the residuary beneficiaries the balance of their entitlement and to pay the plaintiff's costs on an indemnity basis.

Re Bordon [2024] VSC 663 (Moore J)

Is a statutory will valid if it is authorised by the Court prior during the propositus's lifetime but signed and sealed by the Court after death? Moore J determined that the remedial purpose of the statutory will provisions, properly construed, supported a finding that such a will was valid. The Court made orders authorising a will for a person who lacked testamentary capacity in 2013. Section 25(1) of the *Wills Act* 1997 provides that such a will is 'not valid unless it is in writing, signed by the Registrar and sealed with the seal of the Court'. When the propositus died in 2024 it was discovered that the will had not been signed and sealed. The Court found that the administrative actions that were required for validity under s 25 (ie signing and sealing) were not subject to any 'temporal' constraint. In contrast, the legislature had specified that the Court was not permitted to make orders authorising a statutory will where the propositus was deceased. The Will was found to be valid even though it was signed and sealed after the death of the propositus.

Re Tootell [2024] VSC 692 (Moore J)

The executor of an estate sought the Court's direction as to the construction of the deceased's will. The question was whether the executor / beneficiary was entitled to a gift of real estate where it was a condition of the gift that all rates, taxes and outgoings were paid in a reasonable time but due to his change in circumstances, there were substantial arrears. The executor had lived at the property with another disabled beneficiary (his Uncle Gary) who possessed a life interest in the property. He had looked after for Gary for many years and was unable to keep up payment of the outgoings after leaving his job to provide full time care. The Court was hesitant to approach the question of construction through the lens of these unfortunate circumstances, instead focusing strictly on the testamentary intentions as expressed in the will and with regard to the circumstances known to the testator at the time the will was made (with reference to principles in *Fell v Fell* (1922) 31 CLR 268). The Court declined to accept the Plaintiff's proposition that the Court could interpret the condition more liberally so as to enable the executor to take the property subject to an equitable charge securing an obligation to pay the arrears. The Court found that case law cited by the plaintiff in support of that proposition turned on its own facts and was distinguishable because there was no gift over (in this case the property was gifted to the deceased's children if the condition was not met). The Court determined that the property would pass under the gift over. In support of that construction of the condition on the gift, the Court stated that the testator's purpose in making the gift was to secure accommodation for Gary which would be jeopardised if rates and outgoings remained unpaid. The Court allowed the executor's claim for indemnity from the estate for alterations to the home undertaken as executor but no reimbursement of the outgoings for which he was responsible as a beneficiary.

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