FOLEY'S LIST

COMMERCIAL CPD SEMINARS

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Ground Floor Auditorium, Monash University Law Chambers
555 Lonsdale Street, Melbourne VIC 3000

Session One

WILLS AND ESTATES – PRESENT ISSUES AND PRACTICAL TIPS

Recent Developments in Wills, Estates and Probate

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RECENT DEVELOPMENTS IN WILLS ESTATES AND PROBATE

This paper outlines recent developments.

Informal Wills

In *Estate of Elzow* [2018] VSC 498 Lyons J admitted to Probate an informal Will not seen or executed by the Testator, which was unusual. Following the review of authorities by Habersberger J in *Fast* [2013] VSC 18 56-118, His Honour came to the view that there was no absolute rule that a document must have been said or read to a person before a Court can be satisfied that the person intended the document to be his or her Will. It depends on the state of the evidence. Thus, the Solicitor who was a Probate Lawyer, who had prepared thousands of Wills and gave evidence in some detail, recalling conversations in March 2016 when he attended the home of the deceased. The Solicitor confirmed he went through and discussed each of the terms of the new Will with the deceased, but the client died before she could sign the Will.

His Honour was of the view the deceased clearly intended the terms of the new Will without any alteration or reservation was to the manner in which the property was to be disposed of. Here the evidence of the Solicitor who took instructions was persuasive and accepted.

In *Re Langley* [2018] VSC 623 Moore J found that although the deceased had executed a formal Will and then an informal Will which was incomplete the Application would be refused as although the deceased had capacity at the time of making the informal Will and the deceased had signed and dated the informal document and expressed it to be her Last Will and Testament, those features were not determinative (paragraph 56). The Will contains a large gap which remained to be filled being the annuity account. His Honour took into account that the Will had not been stored as if it was an important document (paragraph 66) having been found in the kitchen.

IMO the Estate of Bruce William Standish (deceased) [2018] VSC 629 Ierodiaconou As J refused to grant summary judgment against an application by the Respondent to file an Originating Motion which sought a Grant of Probate in respect of an audio recording as part of an informal Will.

A very interesting case. It referred to *Estate of Elzow* (paragraph 35). Although not definitively decided, but Her Honour refused an application for summary judgment.

As an aside, rarely does an informal document prepared as a Will before suicide not get admitted to Probate. In *Re White; Montgomery & Anor v Taylor* [2018] VSC 16, McMillan J, held an informal Will rationally and methodically considered prior to suicide could be admitted to Probate.

Rectification

A recent and unusual case is *Re Heley; Application by Arbuthnot & Donoghue* [2018] VSC 614 in which McDonald J ordered rectification of a Will where it failed to carry out the Testator's intentions and the Solicitor on oath set out the circumstances in which the Will had not been drafted in accordance with the Testator's instructions.

No authorities were quoted in the judgment, but it provides an interesting consideration of rectification.

Will construction

In *Re Lewis; Caddick & Staples v Lewan* [2018] VSC 615 McDonald J dealt with an issue as to whether or not the residuary estate was to be paid to the beneficiary of the trust upon termination of the trust or whether it should pass to the next of kin on intestacy. His Honour held that the Estate was to be paid to the beneficiary on attaining the age of twenty-one (21). There is a useful discussion on how the Will should be constructed and that the clause in the Will should be construed in the context of the Will considered as a whole (paragraph 7).

Small Estate

In the County Court the Court has struggled with a number of cases concerning very small Estates. For example, in Higgins *v Wilkinson* [2017] VCC 1534, Judge Kings dealt with an Estate of $40,000 in which the daughter of the deceased made a claim against the Estate where her mother had got the benefit of the Estate.

A very sad case and one in which Her Honour found there was no moral obligation and dismissed the case.

Costs

Since the changes to the legislation questions of costs has become more common.

In *Re Saric; Re Saric v Vukasovic (No 2)* [2018] VSC 254 McMillan J dealt with an offer of comprise made on 29 August 2017 for a hearing commencing 4 September 2017 and the acceptance for which expired on 13 September after a trial concluded on 4 September 2017.

Her Honour ordered that the Plaintiff have his costs up until 31 August which was shortly prior to trial, otherwise he was to bear his own costs of the proceeding without indemnification from the Estate of the deceased, and the Defendant's costs were to be paid to the Trustee from the Estate of the deceased.

The Plaintiff was not ordered to pay the costs of the trial. Her Honour ordered otherwise than in accordance with Rule 26.08.

In *Re McKenzie (No 2)* [2018] VSC 238 McMillan J awarded to the Plaintiffs a sum more favourable than their open offers made after mediation before trial and that the Plaintiffs then sought their costs from an estate on an indemnity basis.

The Plaintiff sought $200,000 for the First Plaintiff and $120,000 for the Second Plaintiff with costs fixed at $40,000.

The First Plaintiff received ultimately $180,000 and the Second Plaintiff $150,000 at trial to a greater extent than the offer and the Court made an offer of indemnity costs in favour of the Plaintiff as from 8 March 2017.

In *Re McKenzie (No 3)* [2018] VSC 311 Her Honour in refusing the executor's costs said:

"as Executors of the Estate, it is incumbent on them to assess the evidence in an impartial and objective manner properly and reasonably in conducting litigation and, if appropriate, compromise the proceeding[s].

This is consistent with the fiduciary duties of Executors conducting litigation affecting an Estate. As the only beneficiaries of the available asset pool, they do not have such a duty. Family Provision legislation imposes a duty on a Testator to make adequate and proper provision for eligible persons and, as Executors, the Defendants must not ignore this.

They should also be mindful that, as the only beneficiaries of the available asset pool, the proceeding is effectively inter parties litigation and this may affect where the burden of costs litigation falls."

Her Honour ordered that the costs of the Defendants be paid from the available asset pool of the Estate of the deceased up to 7 March – from the time shortly before the Plaintiff's offer expired then they were to bear their own costs personally without indemnity from the available asset pool of the Estate of the deceased.

Costs are now at the forefront of Part IV litigation and Plaintiffs and Defendants, especially Defendants, must be aware that obligations in conducting the litigation.

In *Nobarani v Mariconte [No 2]* [2018] HCA 49 the High Court who said "the general rule concerning executors, like that concerning trustees, is that costs properly and reasonably incurred by the executor in connection with the administration of the estate are payable from the Estate [2] the same approach applies to litigation [3].

And on costs you might want to be careful as Senior Counsel who appeared in *Harstedt Pty Ltd v Jose Maria Lopez & Ors (No 2)* [2018] VCC 1604, found out that despite having been found by His Honour Judge Cosgrave to have done "an exemplary job at trial in presenting the Plaintiff's case and making submissions" His Honour found that did not entitle the Plaintiff to have costs of Senior Counsel.

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Aickin Chambers

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