



Friday, 1 November 2024

## Weekly Wills, Estates and Superannuation Law

A Weekly Bulletin listing Decisions  
of Superior Courts of Australia covering Wills Estates and  
Superannuation Law

### Search Engine

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### Executive Summary (One Minute Read)

**Alexiou v Alexiou** (NSWSC) - family provision ordered in favour of a son who had been estranged from his deceased father

**The Estate of Tatiana Anorov** (NSWSC) - parties to succession dispute settled on the basis of a division of the net estate - the costs of settling a further family provision claim made by a further relative after settlement must be taken into account in calculating the net estate

**Lehr v Matters** (VSC) - caveat against probate upheld as the caveator had established there was a case for investigation into whether, at the time he executed the propounded will, the deceased lacked testamentary capacity

## HABEAS CANEM

### Pig, Dog and Bougainvillea



## Summaries With Link (Five Minute Read)

### **Alexiou v Alexiou [2024] NSWSC 1340**

Supreme Court of New South Wales

Lindsay J

Family provision - a deceased died leave an estranged son and a daughter - the will appointed the daughter as executrix and left the share that would have gone to the son to the son's own two sons - the son commenced family provision proceedings against the executrix daughter and joined his two sons as defendants due to a concern that the executrix's personal interest in the outcome of the proceedings, in conflict with the interests of the two sons, precluded her from representing their interests in her capacity as executrix - the sons broadly supported the plaintiff's case, provided that any provision made in his favour came of the daughter's share, not theirs - held: the plaintiff and executrix had each conducted these proceedings against the other as a bitter adversary, and neither was an entirely credible witness - the strength of the deceased's conviction that the plaintiff should be disinherited in was illustrated by the evidence of the solicitor who drafted three of the deceased's wills - the plaintiff appeared to be the author of his own misfortune in the conduct of his financial affairs and litigation - the plaintiff had no assets of any substance and, on his evidence, few prospects of earning an income - the fact that the deceased substituted a gift to the plaintiff's sons for the gift formerly planned for the plaintiff demonstrated that the deceased appreciated that the plaintiff had an (attenuated) claim on his bounty and that he had a (reduced) moral obligation to consider the plaintiff's personal circumstances at the time he made his will - the plaintiff had made out a case for a grant of modest provision from the estate, qualified by recognition of the deceased's determination not to confer any testamentary benefit at all upon him directly - a wise and just testator would have determined that the plaintiff ought receive out of the estate a legacy of \$300,000, subject to an allowance in favour of the executrix of about \$130,000 in satisfaction of his costs liability under previous orders, leaving a net legacy of about \$170,000 - the Court also ordered the plaintiff's costs be paid out of the estate, and made orders capping those costs, and capping the costs of the defendants, and that the legacy and entitlement to costs of the plaintiff come out of the executrix's share of the estate, and capping the costs as between lawyer and client of each of the parties.

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### **The Estate of Tatiana Anorov [2024] NSWSC 1301**

Supreme Court of New South Wales

Slattery J

Succession - a deceased's will named two clergy of the Russian Orthodox Church as executors, and gave them the whole of the estate - the executors sought probate - two relatives challenged the validity of the will - four other relatives commenced family provision actions - all proceedings were listed together, but then settled - the settlement agreement provided for, *inter alia*, "liabilities and testamentary expenses" to be paid out of the estate before the "net distributable

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estate" was divided - a fifth relative then applied for family provision, and the executors settled this claim for \$100,000 and incurred about \$140,000 in costs in doing so - the parties disagreed whether this \$240,000 was a liability or testamentary expense for the purpose of calculating the net distributable estate, or a liability only of the executors - one of the will-challengers applied for the an order that it be a liability only of the executors - held: the Court had power to make the order sought as part of its power under s73 of the *Civil Procedure Act 2005* (NSW) to determine any question in dispute between the parties as to whether, and on what terms, proceedings have been compromised or settled - as the settlement agreement had determined four family provision claims, the Court also had power under s66(1) of the *Succession Act 2006* (NSW) to make a wide range of orders "for the purposes of giving effect to the family provision order" - the definition of "net distributable estate" in the settlement agreement included "liabilities" and "testamentary expenses", neither of which was defined in the past tense and each of which could, in its ordinary meaning, apply to liabilities and testamentary expenses emerging both before the date of the settlement agreement and up to the time of ultimate distribution of the estate - on its proper construction, the settlement agreement was intended to indemnify the executors from all amounts required to be paid out of the estate in discharge of their executorial duties, past, present, and future - the \$140,000 defence costs fell within the ordinary meaning of the word "liabilities" and were also clearly "testamentary expenses", which are expenses incidental to the proper performance of the duty of the executor - the executors had had a duty to address and investigate the fifth family provision claim - declaration made that the \$240,000 was a liability and a testamentary expense for the purposes of calculating the net distributable estate.

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## **Lehr v Matters [2024] VSC 640**

Supreme Court of Victoria

Daly AsJ

Succession - a deceased died in 2022 after suffering a number of physical and psychological impairments, largely as a consequence of a traffic accident in 2015 - a caveator filed a caveat in respect of the estate - the executors of a 2021 will commenced proceedings seeking removal of the caveat and a grant of probate of the 2021 will - the caveator filed grounds of objection which objected to the grant of probate of the 2021 will, claimed that he had standing to challenge the 2021 will, and asserted that the deceased had lacked testamentary capacity shortly before and at the time of the execution of the 2021 will - held: the task for the caveator in seeking to maintain the caveat was to show that there was a 'case for investigation', or 'something to go on', but mere speculation will not suffice - a testator who leaves a will that is rational on its face and which has been duly executed enjoys the presumption of validity in relation to the will - ill-health, even extreme ill-health, is not enough to establish a lack of testamentary capacity - the caveator in this case had established that there is a case for investigation into whether, at the time he executed the 2021 will, the deceased lacked testamentary capacity - the deceased had been using ketamine and medal marijuana, and the issue here was not whether these drugs



impaired the deceased's cognitive functioning, but concerned the impact of delay on the deceased receiving ketamine on his mood and psychological presentation - the Court noted that one does not need to be a medical practitioner to appreciate that the use of medications with psychotropic qualities may impact a person's judgment and decision making, especially if combined with the symptoms of psychiatric ill-health and other vulnerabilities - application to strike out caveat dismissed.

[Lehr](#)

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# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Case of Kobaliya v Russia (EUHRTS)** - European Court of Justice found that, in its overly broad definition of 'foreign agents', Russia committed multiple violations of the *European Convention on Human Rights*

### Summaries With Link (Five Minute Read)

**Case of Kobaliya v Russia, No 39446/16**

European Court of Human Rights

Pastor Vilanova P, Schukking, Serghides, Roosma, Ktistakis, Mjöll Arnardóttir, & Kovatcheva JJ  
Prior to its exclusion from the Council of Europe in 2022, Russia was bound by the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights. Here the activity in question occurred between 2012 and 2022 and related to fundamental rights to freedom of expression and assembly as guaranteed by the Convention. Under Russian law, non-governmental organisations (NGOs), media organisations, and individuals who received any foreign support were required to register as 'foreign agents' and conform to restrictions placed on persons so designated. The complainants alleged that the statutory definition was so overly broad as to impinge on rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the *European Convention*. The European Court found that the Russian legislation was unlawful because it was overly broad and employed the stigmatising term 'foreign agent' to a very wide universe of parties that could not all be lumped together as 'foreign agents'. Under Russian law, once designated as a foreign agent, substantial regulatory legislation attached curtailing the political rights of the parties so classified. By casting such a wide net, the term 'foreign agent' was used to circumvent basic *European Convention* rights.

[Case of Kobaliya](#)



## Poem for Friday

### Echo

By Christina Rossetti (1830-1894)

Come to me in the silence of the night;  
Come in the speaking silence of a dream;  
Come with soft rounded cheeks and eyes as bright  
As sunlight on a stream;  
Come back in tears,  
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,  
Whose wakening should have been in Paradise,  
Where souls brimfull of love abide and meet;  
Where thirsting longing eyes  
Watch the slow door  
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live  
My very life again tho' cold in death:  
Come back to me in dreams, that I may give  
Pulse for pulse, breath for breath:  
Speak low, lean low,  
As long ago, my love, how long ago.

**Christina Georgina Rossetti**, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

**Stanford Chamber Chorale**, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>



Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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