



Friday, 6 September 2019

## Weekly Wills Estates and Superannuation Law

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

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## Executive Summary (1 minute read)

**Drivas v Jakopovic** (NSWCA) - wills and estates - succession - evidence - deceased had testamentary capacity when she made September 2007 Will - appeal dismissed

**The Estate of Michael Andrew Kennedy** (NSWSC) - wills and estates - executor sought judicial advice concerning estate's administration - incorrect description of residuary beneficiaries - Court satisfied to give judicial advice

**Re Gleeson** (VSC) - wills and estates - intestacy - Court satisfied plaintiff was deceased's domestic partner at date of death - plaintiff granted letters of administration

**In the Matter of the Will and Estate of Joyce Helen Greer, deceased** (VSC) - wills and estates - probate - testamentary capacity - executors of deceased's will sought probate of will - probate granted

**Coralie Ann Corlett as Executor of the Will of Ferenc Kocsis v Field** (WASC) - costs - wills and estates - sale of land under s126 *Property Law Act 1969* (WA) - appointment of trustee for property's sale - defendants to pay plaintiffs' costs on indemnity basis

**Wyee v Debbie-Lee Cairns as executor of the will of Graham John Smith** (WASC) - wills and estates - plaintiff sought appointment of 'independent third party' to sell property - appointment of third party granted

**Davies v James** (TASSC) - wills and estates - family provision - adult daughter of deceased sought further provision from deceased's will - application dismissed

## Summaries With Link (Five Minute Read)

### **Drivas v Jakopovic [2019] NSWCA 218**

Court of Appeal of New South Wales

Bell ACJ; Macfarlan & McCallum JJA

Wills and estates - succession - testamentary capacity - evidence - probate granted to respondent in respect of 'September 2007 Will' - appellant contended September 2007 Will invalid due to deceased's lack of testamentary capacity - appellant sought letters of administration with 'earlier will' ("1998 Will") - primary judge found, 'largely on basis' of evidence of solicitor who arranged signing of 2007 Will, that deceased had testamentary capacity when she signed September 2007 Will - appellant appealed - whether primary judge erred in 'giving weight' to solicitor's evidence - whether erroneous failure to give 'proper weight to the medical evidence' - whether primary judge should have found that conduct of respondent 'gave rise to suspicions' concerning whether 'deceased knew and approved of' September 2007 Will - whether primary judge should have 'expressly considered' whether 'deceased knew and approved' of will's contents - whether erroneous failure properly to evaluate evidence and make 'adverse findings' concerning respondent's credit - *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 - held: appeal dismissed.

[View Decision](#)

[From Benchmark Friday, 6 September 2019]

### **The Estate of Michael Andrew Kennedy [2019] NSWSC 1144**

Supreme Court of New South Wales

Kunc J

Wills and estates - judicial advice - executor of deceased's estate sought judicial advice concerning estate's administration - incorrect description of residuary beneficiaries - 'not an unfamiliar problem' - whether appropriate to give advice - whether applicant should be required 'to bring an inter partes construction suit' - held: Court satisfied to provide judicial advice - advice given.

[View Decision](#)

[From Benchmark Wednesday, 4 September 2019]

### **Re Gleeson [2019] VSC 589**

Supreme Court of Victoria

McMillan J

Wills and estates - intestacy - deceased died intestate - deceased survived 'two minor children' (children) and plaintiff, who was children's mother - plaintiff claimed she was deceased's domestic partner and entitlement to 'letters of administration on intestacy' - if plaintiff found not

to be deceased's domestic partner plaintiff sought appointment as estate's administrator on children's behalf - caveatrix was children's paternal aunt - caveatrix opposed plaintiff's application - whether plaintiff was deceased's domestic partner at date of death - whether caveatrix had standing to oppose application - *Dow v Hoskins* [2003] VSC 206 - held: Court satisfied plaintiff was deceased's domestic partner at date of death - plaintiff granted letters of administration.

[Re Gleeson](#)

[From Benchmark Tuesday, 3 September 2019]

## **In the Matter of the Will and Estate of Joyce Helen Greer, deceased [2019] VSC 592**

Supreme Court of Victoria

Ginnane J

Wills and estates - plaintiffs were executors of deceased's will (2015 will) - plaintiffs sought probate of will - defendant contended deceased lacked testamentary capacity - defendant also contended that if deceased did have testamentary capacity, she did not exercise testamentary capacity when will made - whether deceased had 'mental capacity to recognise' claims of defendant on her bounty and 'to balance those claims' - *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 held: Court satisfied deceased had testamentary capacity when making 2015 - probate of will granted.

[In the Matter of the Will and Estate](#)

[From Benchmark Wednesday, 4 September 2019]

## **Coralie Ann Corlett as Executor of the Will of Ferenc Kocsis v Field [2018] WASC 243 (S)**

Supreme Court of Western Australia

Le Miere J

Costs - wills and estates - Court ordered sale of land under s126 *Property Law Act 1969* (WA), appointed trustee for property's sale and made 'related orders' - determination of costs - plaintiffs sought defendants pay their costs on indemnity basis - plaintiffs relied on 'multiple offers of compromise' and defendants' conduct - plaintiffs also contended defendants had made numerous 'unfounded and unsubstantiated' allegations - held: defendants to pay plaintiffs' costs on indemnity basis.

[Coralie](#)

[From Benchmark Tuesday, 3 September 2019]

## **Wyee v Debbie-Lee Cairns as executor of the will of Graham John Smith [2019] WASC 317**

Supreme Court of Western Australia

Master Sanderson

Wills and estates - family provision - plaintiff sought appointment of 'independent third party' to sell property - plaintiff contended there was a conflict between duty of first defendant as estate's executor and first defendant's 'personal interest' - whether appropriate to appoint independent third party - *Family Provision Act 1972* (WA) - *Trustees Act 1962* (WA) - held: appointment of

independent third party granted.

[Wyee](#)

[From Benchmark Thursday, 5 September 2019]

**Davies v James [2019] TASSC 32**

Supreme Court of Tasmania

Holt AsJ

Wills and estates - family provision - applicant adult daughter of deceased sought further provision from deceased's estate - s3(1) *Testator's Family Maintenance Act 1912* (Tas) - held: Court not satisfied applicant had been 'left without adequate provision for her proper maintenance and support' - even if 'threshold test' satisfied, Court would have declined to intervene in exercise of discretion - application dismissed.

[Davies](#)

[From Benchmark Thursday, 5 September 2019]



# Benchmark

**From: The Hunting of the Snark**

**By: Lewis Carroll**

**Fit the Sixth**

**The Barrister's Dream**

They sought it with thimbles, they sought it with care;  
They pursued it with forks and hope;  
They threatened its life with a railway-share;  
They charmed it with smiles and soap.

But the Barrister, weary of proving in vain  
That the Beaver's lace-making was wrong,  
Fell asleep, and in dreams saw the creature quite plain  
That his fancy had dwelt on so long.

He dreamed that he stood in a shadowy Court,  
Where the Snark, with a glass in its eye,  
Dressed in gown, bands, and wig, was defending a pig  
On the charge of deserting its sty.

The Witnesses proved, without error or flaw,  
That the sty was deserted when found:  
And the Judge kept explaining the state of the law  
In a soft under-current of sound.

The indictment had never been clearly expressed,  
And it seemed that the Snark had begun,  
And had spoken three hours, before any one guessed  
What the pig was supposed to have done.

The Jury had each formed a different view  
(Long before the indictment was read),  
And they all spoke at once, so that none of them knew  
One word that the others had said.

"You must know—" said the Judge: but the Snark exclaimed  
"Fudge!"

That statute is obsolete quite!  
Let me tell you, my friends, the whole question depends  
On an ancient manorial right.



# Benchmark

"In the matter of Treason the pig would appear  
To have aided, but scarcely abetted:  
While the charge of Insolvency fails, it is clear,  
If you grant the plea 'never indebted.'

"The fact of Desertion I will not dispute;  
But its guilt, as I trust, is removed  
(So far as relates to the costs of this suit)  
By the Alibi which has been proved.

"My poor client's fate now depends on your votes."  
Here the speaker sat down in his place,  
And directed the Judge to refer to his notes  
And briefly to sum up the case.

But the Judge said he never had summed up before;  
So the Snark undertook it instead,  
And summed it so well that it came to far more  
Than the Witnesses ever had said!

When the verdict was called for, the Jury declined,  
As the word was so puzzling to spell;  
But they ventured to hope that the Snark wouldn't mind  
Undertaking that duty as well.

So the Snark found the verdict, although, as it owned,  
It was spent with the toils of the day:  
When it said the word "GUILTY!" the Jury all groaned,  
And some of them fainted away.

Then the Snark pronounced sentence, the Judge being  
quite  
Too nervous to utter a word:  
When it rose to its feet, there was silence like night,  
And the fall of a pin might be heard.

"Transportation for life" was the sentence it gave,  
"And then to be fined forty pound."  
The Jury all cheered, though the Judge said he feared  
That the phrase was not legally sound.



# Benchmark

But their wild exultation was suddenly checked  
When the jailer informed them, with tears,  
Such a sentence would have not the slightest effect,  
As the pig had been dead for some years.

The Judge left the Court, looking deeply disgusted:  
But the Snark, though a little aghast,  
As the lawyer to whom the defence was intrusted,  
Went bellowing on to the last.

Thus the Barrister dreamed, while the bellowing seemed  
To grow every moment more clear:  
Till he woke to the knell of a furious bell,  
Which the Bellman rang close at his ear.

[https://en.wikipedia.org/wiki/Lewis\\_Carroll](https://en.wikipedia.org/wiki/Lewis_Carroll)

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