



Friday, 11 October 2024

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 (One Minute Read)

HBSY Pty Ltd v Lewis (HCA) - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) requires all appeals from State Supreme Courts involving matters arising under certain Commonwealth legislation be heard by the relevant federal court, irrespective of the State Supreme Court's source of jurisdiction

Van Der Made v Crow (NSWSC) - executor had power under the will, the general law, and statute to have access to estate property

Clinch v Brown (NSWSC) - transfer of property by husband to wife in 1976 not registered - wife's executor unable to discharge onus that there was an agreement between the spouses giving the wife the whole of the equitable estate in the property

In the Estate of Audrey Mary Harvey (ACTSC) - independent solicitor appointed as administrator where executor children of the deceased could not agree



HABEAS CANEM

Before the puppy ears finally dropped

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Summaries With Link (Five Minute Read)

HBSY Pty Ltd v Lewis [2024] HCA 35

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Jurisdiction - an executor and beneficiary named in a will caused loss to the estate in breach of fiduciary duty - an administrator was later appointed - the former executor became bankrupt, and his interest in the estate was sold to HSBY - HSBY commenced proceedings in the NSW Supreme Court seeking to revoke the letters of administration - the administrator cross-claimed, contending that HSBY was not entitled to any distribution until the loss was made good - HSBY said the former executor's liability to the estate had been extinguished under the *Bankruptcy Act 1966* (Cth) - the Supreme Court found in favour of the administrator - HSBY considered an appeal would concern a matter arising under the *Bankruptcy Act*, and so an appeal only lay to the Full Court of the Federal Court pursuant to s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) - HSBY sought an extension of time to appeal to the Full Court, which held it did not have jurisdiction to hear the appeal - HSBY sought writs of certiorari and mandamus from the High Court requiring the Full Court to hear the appeal - held (by majority, Gageler CJ dissenting): s24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court jurisdiction to hear appeals from State Supreme Court judgments where this is provided by any other Act - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act* provides that, if it appears that an appeal from a single judge of a State Supreme Court would involve a matter arising under certain Commonwealth legislation (including the *Bankruptcy Act*), that appeal can only be heard by the Federal Court, the Federal Circuit and Family Court of Australia (Division 1), or, by special leave, the High Court - the Federal Court had erred by reading down s7(5) so that it applies only to cases where the single judge of a State Supreme Court was exercising cross-vested federal jurisdiction under s4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* - s7(5) applies irrespective of the source of the Supreme Court's jurisdiction - writs of certiorari and mandamus issued requiring the Federal Court to hear and determine the appeal.

[HBSY Pty Ltd](#)

[From Benchmark Friday, 11 October 2024]

Van Der Made v Crow [2024] NSWSC 1240

Supreme Court of New South Wales

Meek J

Powers of executors - a deceased died, survived by his brother and sister, and the plaintiff, who claimed to be the deceased's de facto and who had occupied the deceased's unit for some time before his death - the unit was the main asset of the deceased's estate - the deceased brother was the executor and obtained probate - the will gave \$100,000 to the plaintiff and left the remainder of the estate to the deceased's siblings - the executor requested the plaintiff either vacate the unit or make it available for inspection by a selling agent - the plaintiff commenced proceedings seeking family provision - the executor applied for an order that the plaintiff grant access to the property for the purposes of taking an inventory of estate property, recording the

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condition of the unit, and removing any estate property where there was no dispute as to ownership or possession - held: the question was what entitlement the executor had to obtain the orders he sought - a clause of the will gave power to the deceased's trustees to exercise any powers given to them by law, with all the powers of a natural person, including the power to invest and change investments as if beneficially entitled to them - on its proper construction, this clause gave such powers to the executor as executor, despite the use of the word "trustees" - a natural person may generally have access to or inspect their own property, unless they have bargained away such rights - the principal tasks of an executor at general law include ascertaining the assets of the estate and getting in those assets - this is complemented, by necessary implication, with a power to gain access to estate property to facilitate the identification and securing of the estate's assets - generally, executors have the same property in the estate that the deceased had when living, including the same power to bring actions - further, the Court had power to make orders for various matters, including the inspection of any property and the making of any observation of any property - the plaintiff was not given any right to occupy the unit under the terms of the will, let alone any right of exclusive occupation - an executor has a statutory power to sell assets of the estate for the purposes of administration, whether or not any such power is conferred under the will, pursuant to s46 of the *Probate and Administration Act 1898* (NSW) and s153(1)(a) of the *Conveyancing Act 1919* (NSW) - commendably and appropriately, the executor had not resorted to self-help remedies to exercise rights of access to the unit and estate property - orders made as sought plus an order that the executor may enter the unit on 48 hours' notice.

[View Decision](#)

[From Benchmark Friday, 11 October 2024]

Clinch v Brown [2024] NSWSC 1239

Supreme Court of New South Wales

Kunc J

Transfer of land - in 1976, a married couple executed a transfer (duly stamped and in registrable form) of property from the husband to the wife, which recorded consideration of \$14,500 - the transfer was never registered, but continued to be held by the couple's solicitor - in 2018, the wife died, and her will left the property to her daughter subject to life estate to the husband - the daughter commenced proceedings seeking an order that the executors lodge the transfer for registration and then transfer the property to her as beneficiary - the husband died while the proceedings was on foot, and, if the orders sought by the daughter were not made, the property would form part of his estate - held: as the executors had declined to bring the proceedings, the daughter could do so as a beneficiary of the wife's estate - from 1976 to his death, the husband had been the registered proprietor of the property and so was prima facie entitled to the full legal and beneficial interest in the property - the wife might have had an equitable interest, but such equitable interests can only be established if there is evidence of an antecedent agreement which founds the equitable interest - no agreement was in evidence - neither spouse was available to give evidence and neither party called the solicitor - the daughter bore the onus of proof to establish the terms of any agreement that would give rise to an equitable interest - no

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Jones v Dunkel inference should be drawn against either side as a result of the failure to call the solicitor - the Court found that, up to 1981, there was a consensual arrangement in place between the married couple that the transaction between them should not be completed - the daughter had been unable to satisfy the Court that the arrangement not to complete the transaction changed before the wife's death - the Court could not be satisfied that the wife had the whole of the equitable estate in the property at the date of her death - daughter's claim dismissed.

[View Decision](#)

[From Benchmark Friday, 11 October 2024]

In the Estate of Audrey Mary Harvey [2024] ACTSC 299

Supreme Court of the Australian Capital Territory

McWilliam J

Succession - a deceased died, leaving a will that named her three children as executors - one of the executors, the plaintiff, sought a grant of probate of the will - another executor, supported by the third executor, opposed the grant of probate to the plaintiff - the plaintiff sought the appointment of an independent solicitor as administrator under s25 of the *Administration and Probate Act 1929* (ACT) - the defendant said that administration by an independent solicitor should be pursuant to a number of preliminary steps and certain limits on the administration - held: the named executors are ordinarily entitled to carry out the executorial role and that the exercise of the jurisdiction to discharge an executor, whether statutory or inherent, keeps in view the due and proper administration of the estate and the interests of the beneficiaries - 15 months had passed since the death of the deceased, and on the evidence, the siblings remained in disagreement as to various matters - in broad principle, the siblings were each not opposed to an independent solicitor being named as administrator - it was apparent that the defendant's concern was not about testamentary capacity or the validity of the will, but was about the proper administration of the estate by the plaintiff - it was very much in the interests of the estate and the beneficiaries that probate progress and that a competent independent person, legally qualified and with experience in this area of the law, be appointed administrator - independent solicitor appointed as administrator.

[In the Estate of Audrey Mary Harvey](#)

[From Benchmark Friday, 11 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130

Supreme Court of New Zealand

Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ

Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.

[Paki Nikora](#)



Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anaïs Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

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.

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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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