AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 15 December 2023

Weekly Wills, Estates and Superannuation Law

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

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Re Occhipinti (VSC) - beneficiary of a deceased's penultimate will had shown a prima facie case of undue influence regarding the purported final will sufficient to require the matter to go to trial

Re Glendon (QSC) - probate granted to widower of deceased who was named as her sole beneficiary and executor, notwithstanding concerns regarding the husband's capacity, given the simple nature of the tasks required to administer the estate

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Re Occhipinti [2023] VSC 730
Supreme Court of Victoria
Moore J
Succession - a deceased left a purported 2014 will in which she appointed one of her four sisters as executor and gave her estate to the four sisters in equal shares - the deceased's niece had been the sole executor and beneficiary under the deceased's previous 2006 will - the niece filed a caveat in relation to the deceased's estate, and claimed that (a) the deceased lacked testamentary capacity when she made the 2014 will; (b) the 2014 will was made without the deceased's knowledge and approval; (c) the 2014 will was made in suspicious circumstances; and (d) the deceased made the 2014 will under the undue influence of three of her sisters, including the sister who was the executor under that will - the sister named as executor applied for a grant of probate of the 2014 will - the Court had to decide whether there was a prima facie case to justify the matter going to trial - the sister accepted that the niece had established a prima facie case on the grounds of testamentary capacity, suspicious circumstances and knowledge and approval, and the issue for the Court was whether the niece had established a prima facie case on the undue influence ground - held: the assessment of whether there was a prima facie must be undertaken by reference to the particulars of the grounds of objection which, for the purposes of that task, are to be treated as true - the niece had to show that there was a case for investigation, or something to go on, that went beyond mere speculation - to make a good will a testator must be a free agent, but not all influences are unlawful - persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution are all legitimate - pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made - importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened - it is not sufficient to establish that a person had the power to unduly overbear the will of the testator: it is necessary also to prove that in the particular case that power was exercised, and that the exercise of that power produced the form of the will - the overall narrative disclosed by the particulars described a non-verbal woman of some 80 years of age who had suffered a serious stroke and who was subject to an administration order, and who executed a will which dramatically altered the testamentary dispositions of her penultimate will, without any involvement by her administrator - this allegedly occurred in circumstances where the administrator was approached by members of the deceased's family conveying the deceased's wishes to amend her will - it was open to infer from these facts, assuming them to be true, that the instructions for the 2014 will were provided by one or more of the sisters, and that they, or one of them, coerced the deceased to enter into the will for their own benefit, although innocent inferences were also available - which inference should be drawn would be a

matter for trial when evidence of all of the relevant facts and circumstances will be adduced - the niece had therefore established a prima facie case regarding undue influence.
Re Occhipinti
[From Benchmark Friday, 15 December 2023]

Re Glendon [2023] QSC 283
Supreme Court of Queensland
Henry J
Succession - a deceased left a will giving the whole of her estate to her husband and appointing him as the sole executor - he applied for a grant of probate - the applicant disclose that a doctor had given an opinion that he did not have the capacity to be executor or deal with complex financial decisions - held: the doctor had given evidence that the husband could participate in conversation around such arrangements though he believes he would need the support of his enduring power of attorney to manage those affairs - the estate mainly consisted of a half share in two properties in respect of which the husband owned the other half - there was also a bond to be recovered from the aged care centre in which the deceased had been living before her death - a reputable local solicitor had been engaged and was ready to attend to the two transfers and the retrieval of the bond once probate is granted - the three transactions which would be necessary in a substantive way to administer the estate could not conceivably be described as complex - they were straightforward and entirely consistent with the deceased's wishes - the relative complexity of the task required could properly be weighed relative to the degree of impairment - the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained - this decision was a borderline one, and, if the case involved any evidence that there was greater complexity about the nature of the estate and what ought occur pursuant to the will, then the concerns as to capacity might have required either a different decision or at least one which might have confined or limited the relevant grant - however, there was no evidence to suggest any such complexity at all so that, in the circumstances, notwithstanding the concerns properly disclosed to the Court regarding capacity, the Court was confident in all the circumstances that it was appropriate consistently with the deceased's wishes to grant probate to the husband as executor.
Re Glendon
[From Benchmark Friday, 15 December 2023]

Executive Summary and (One Minute Read)

Minnesota v Torgerson (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

Summaries With Link (Five Minute Read)

Minnesota v Torgerson 995 N.W.2d 164 (2023)
Supreme Court of Minnesota
Gildea CJ, Anderson, & McKeig JJ
A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.
Minnesota

Poem for Friday

In Memoriam, (Ring out, wild bells)

By: Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,

The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam,* written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells,* has been set to music including by Charles Gounod and Percy FletcherAlfred, Lord Tennyson died on 6 October 1892.

Ring Out, Wild Bells, Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

Ring Out, Wild Bells, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
https://www.youtube.com/watch?v=yPIqqvOM8Og

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
https://www.youtube.com/watch?v=KNMFvNZIsCM

Click Here to access our Benchmark Search Engine