



Friday, 20 December 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)

Neal v Brown (NSWSC) - Court had to resolve dispute caused by will being drafted without a clear delineation between executor and trustee, in circumstances where the distinction mattered

Re Costa (VSC) - Court approved settlement of family provision application upon being satisfied that the settlement was in the interests of minor and unborn beneficiaries



HABEAS CANEM

Merry Christmas from McGregor

Summaries With Link (Five Minute Read)

Neal v Brown [2024] NSWSC 841

Supreme Court of New South Wales

Parker J

Succession - deceased survived by children, his companion, and his companion's son (Sebastien) - will gave immediate gifts to children and gifts to Sebastien to be held on trust until end of formal education or he turned 25 - a house was to be held on trust for the children and Sebastien in equal shares until that time, with Sebastien having exclusive use until that time, with the "Estate" to bear costs such as rates, insurance, and capital works - superannuation entitlements also to be equally divided between the children and Sebastien, with distribution to children immediately and Sebastien's share to be held on trust - shortly before death, deceased sought payment out of two superannuation accounts, one of which was paid out completely before death, and one of which was in the process of being paid out at time of death - disputes arose as to (1) whether the 'Estate' that was liable for the house outgoings was estate as held by the executor, or the estate as held by trustee (that is, former executor who had transformed into trustee); and (2) whether the will provided for separate gifts of superannuation as between children and Sebastien, and whether superannuation gift adeemed - held: will was poorly drafted in that it retained definition that "Trustee" meant "executor and trustee", and did not carefully delineate between roles of executor and trustee, in circumstances where the distinction mattered - on proper construction, 'Estate' construed meant estate as held by trustee - will provided for separate gifts of superannuation - only gift of funds in superannuation account fully paid out by date of death was adeemed, as there was no superannuation entitlement 'at the time of [the Deceased's] death' within the meaning of the relevant clause of the will - this was not analogous to a gift of a receipt or expectancy from some other source, in which cases, as long as property continues to exist *in specie*, it can continue to pass by gift - deceased had caused the payment out to be made to one of his bank accounts, and had mixed the funds beyond possibility of tracing.

[View Decision](#)

[From Benchmark Friday, 20 December 2024]

Re Costa [2024] VSC 776

Supreme Court of Victoria

McDonald J

Succession - a deceased left an estate of about \$25million, a wife, and eight daughter - under his will, the entitlement of one of the daughters was limited to \$1,000 - that daughter commenced family provision proceedings under Part IV of the *Administration and Probate Act 1958* (Vic) - the parties settled at mediation - the settlement required the Court's approval because there were minors and unborn beneficiaries whose interests may be affected - held: on an application for approval of a compromise, the Court's role was not to consider the wisdom of a trustee's exercise of discretion but to approve the compromise if satisfied of its propriety, having regard to whether: (1) the trustee's decision to agree to the compromise was within

power; (3) there was any impropriety in the trustee's decision; (3) the trustee exercised its discretion in good faith; and (4) the trustee gave fair consideration to the relevant issues - the Court was satisfied that under the terms of the settlement the capital of the relevant trust would not be dissipated during the first 20 years following its establishment - the establishment of that trust conferred a benefit on the daughter's minor and unborn descendants which outweighed any detriment arising from their exclusion from the deceased estate and wider family trusts - the Court was satisfied the settlement is of benefit to the relevant descendants - settlement approved.

[Re Costa](#)

[From Benchmark Friday, 20 December 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

Khachatryan



Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
*You are light for the world;
Let it shine.
Love, and forgive*

And suddenly, hope is born.

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