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Benchmark

Friday, 21 June 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)

**SC v Ability One Financial Management Pty Ltd** (NSWSC) - Court refused to order a change in the management of the protected estate of an elderly man

**Application of Yi** (NSWSC) - judicial advice given that the executor of an estate would be justified in maintaining an appeal from a decision that upheld a loan agreement against the estate

**The Estate of Smith** (NSWSC) - Registrar's decision to refuse to grant letters of administration where he was not satisfied the applicant had shown the deceased did not have a de facto spouse set aside

**The Estate of Daniele Claudio Legler** (NSWSC) - Court found that a deceased had been domiciled in Portugal at the date of his death, and the plaintiff had been his de facto partner - letters of administration granted to an independent administrator

**Pascoe (in his capacity as administrator of the Estate of the Late Kut Sze Tu and as constructive trustee)** (NSWSC) - the Court can give judicial advice as to whether a trustee charged with a breach of duty by misusing trust property should defend the charge, as that is a question respecting the management and administration of the trust property

**Bradley v Irvine; Irvine v Irvine** (NSWSC) - deceased' s step-children had alleged sexual abuse and ceased contact - they now applied for family provision - Court was neither satisfied

the allegations were made up nor satisfied one way or the other whether they were true, and therefore could not assign blame for the relationship breakdown - claim failed due to the long-term lack of contact

**JB v PRN** (WASC) - Court resolved a dispute regarding burial rights between the paternal and maternal family of an aboriginal man who had died intestate

## HABEAS CANEM

### Small dog, big surf

## Summaries With Link (Five Minute Read)

**SC v Ability One Financial Management Pty Ltd [2024] NSWSC 637**
Supreme Court of New South Wales
Lindsay J
Protected estates - the Court had made orders transferring management of the management of the protected estate of an elderly man from the NSW Trustee to Ability One Financial Management, and then appointing SR as a committee of the person (in colloquial terms, a "guardian") of the elderly man - a nephew of the elderly man, with whom the man lived in Queensland, sought a change in the manager of the estate - this was opposed by the man's surviving son - the son contended that the plaintiff was the effective cause of the elderly man moving to Queensland away from his family home in Greystanes, near the son, and that, suffering from dementia, the elderly man lived not only in the care of the nephew but under his controlling influence, that the nephew had obstructed his access to his father, and that the nephew was motivated by a desire to secure the man's wealth for himself, if not during his lifetime then upon his death, under a will ostensibly made in favour of the nephew at the time the elderly man moved to Queensland - held: the jurisdiction the Court was called upon to exercise was not a "consent jurisdiction", and an order for the appointment, removal, or replacement of a particular manager is not to be made merely because a party, or some other person, seeks it, consents to it or acquiesces in it - the governing purpose of the jurisdiction exercised by the Court is protection of the welfare and interests of the particular protected person concerned - in the choice of a manager, consultation of the welfare and interests of a protected person may favour appointment of a member of his or her family over the appointment of an institutional manager - a manager does not have a legal entitlement to be, or to remain, manager of a particular protected estate - a decision about whether a manager should be replaced may need to be approached differently from one made about the identity of an appointment as an initial manager because of a perceived need to identify an acceptable reason for change - the material breakdown in relationships here was between Ability One and the nephew, not the company and the elderly man - Ability One had not mismanaged the estate, and had, , on the whole, acted diligently and reasonably in management of the elderly man's affairs - the nephew had no real insight into his lack of independence in dealing with questions relating to management of the elderly man's affairs - the Court was affirmatively satisfied that it was in the best interests of the elderly man for Ability One to remain in office as manager.
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**Application of Yi [2024] NSWSC 724**
Supreme Court of New South Wales
Hmelnitsky J
Equity - applicant sought urgent judicial advice pursuant to s63 of the *Trustee Act 1925* (NSW) in his capacity as executor of the estate of his mother - the Court had determined a claim by the applicant's sister against the estate for recovery of a loan and the applicant was appealing

against that judgment - applicant sought advice whether he was justified in maintaining the appeal - held: a necessary consequence of the provisions of s63 is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings - failure to follow that course does deprive the Court of power to give advice, but it is a circumstance that may have consequences for the application - it is ordinarily inappropriate for the Court to comment on the merits of a trustee's claim, but this is especially so where the appeal has been filed and the submissions are already on - the judicial advice proceedings must not be treated as a trial of the issues agitated in the appeal - on the opinion of counsel briefed in the appeal, the Court was satisfied that the ground of appeal was sufficiently sound, but otherwise expressed no view as to the merit of the appeal or its prospects of success - without endorsing the merit of the appeal, the Court noted that a cost benefit analysis suggested the applicant was justified in maintaining the appeal - although it is generally inappropriate for the Court to give judicial advice where the subject matter of the advice concerns a dispute between parties to a trust, and this was a dispute between beneficiaries, this was a case where it was appropriate to give judicial advice, as it was in the interests of the estate as a whole that the issue in the appeal be resolved to allow the estate to be administered - advice given that the applicant is justified in maintaining the appeal - the main consequence was that, if the Court of Appeal either makes no order as to costs or makes a costs order against the applicant, but does not address the question of whether those costs should be borne by the estate, and if the applicant has recourse to the estate to meet the costs of the appeal (his own costs or ordered costs), then the applicant will have the benefit of s63 of the *Trustee Act* from this point onwards.
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**The Estate of Smith [2024] NSWSC 725**
Supreme Court of New South Wales
Hammerschlag CJ in Eq
Succession - the parents and siblings of a deceased had predeceased him and he had no children of his own, and he was survived by 13 nieces and nephews - the deceased died intestate - if the deceased died leaving a de facto spouse, that is, a party with whom he was in a domestic partnership immediately before his death, that person would inherit the whole of the estate under s104 of the *Succession Act 2006* (NSW), and otherwise the nieces and nephews would take in equal shares under s129(1) and (3)(b) - one of the nieces applied for letters of administration, three and a half months after death - the Registrar refused to grant letters of administration on the basis that he was unpersuaded that it had been established that there was no de facto spouse - the niece sought review of this ruling - held: on the affidavit evidence of the plaintiff, the Court was satisfied that the deceased had not been in a de facto relationship at the time of his death - the Court declined a request by the niece that the matter be dealt with in chambers, as it considered that this application was more appropriately to be dealt with in open court - Registrar's decision set aside, and application for letters of administration referred to the Registrar to complete the grant.

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**The Estate of Daniele Claudio Legler [2024] NSWSC 726**
Supreme Court of New South Wales
Pike J
Succession - a deceased died intestate in Portugal, leaving substantial assets in at least NSW, Portugal, Lichtenstein, and Malta - the plaintiff contended she was the de facto partner in a domestic relationship with the deceased at the time of his death and sought the grant of letters of administration - the eldest daughter of the deceased sought that letters of administration be granted to her, or alternatively to an independent administrator - held: the NSW assets consisted only of moveables, and succession to moveable property on intestacy is determined by the law of the domicile of the intestate (in contrast to immovables where the *lex situs* is determinative) - under Portuguese law, the children would take on intestacy, although Portuguese courts would also apply the law of the place of domicile as the law of succession, and would determine the question of domicile for themselves, without being bound by the decision of a NSW court on this issue - at every moment of their life, a person has one and only one domicile, which may change - s9 of the *Domicile Act 1979* (NSW) provides that the intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country - s9 only clarifies but does not alter the common law - the inescapable inference from the evidence was that, at the time of his death, the deceased was domiciled in Portugal - having regard to all of the evidence, the deceased and the plaintiff had been in a relationship as a couple living together, and this relationship remained on foot as at the date of death - the Court had real concerns about the plaintiff's fitness to be administrator, and an independent administrator should be appointed.
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**Pascoe (in his capacity as administrator of the Estate of the Late Kut Sze Tu and as constructive trustee) [2024] NSWSC 738**
Supreme Court of New South Wales
Hammerschlag CJ in Eq
Trusts - the administrator of a decease estate sought judicial advice under s63 of the *Trustee Act 1925* (NSW) whether he was justified in defending proceedings brought by the deceased's daughter and her husband, and whether he was entitled to be reimbursed out of the estate - the daughter and son in law opposed the Court giving advice on the basis that the advice sought was not on any question respecting the management or administration of the trust property as required by s63 - they contended that, where the sole concern of a trustee is with a question of potential personal exposure of the trustee because of past acts and a completed course of conduct, the question whether it would be proper for a trustee to defend proceedings cannot be one "respecting the management or administration of the trust property" - held: whether any particular question is one "respecting the management or administration of the trust property"

within the meaning of s63(1) is to be determined by the application of conventional canons of statutory construction to the facts - the term "respecting" is a broad one, conveying the notion of "in respect of" a particular subject-matter - the words "in respect of" have been said to have the widest possible meaning of any expression intended to convey some connexion or relation between two matters - read properly, previous cases were not authority for the unconditional proposition that the necessary "respecting" relationship will never be satisfied where the question concerns potential personal exposure of the trustee because of past acts and a completed course of conduct - to the extent that previous cases were authority for such a proposition, they were plainly wrong - there was no warrant to read down the operation of s63(1) - whether a trustee charged with a breach of duty in that capacity by misusing trust property should defend the charge is a question respecting the management and administration of that property - on the evidence here, discretion exercised to give advice that the administrator was justified in defending the proceedings, and was entitled to be reimbursed for doing so out of the estate.
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[From Benchmark Friday, 21 June 2024]

**Bradley v Irvine; Irvine v Irvine [2024] NSWSC 727**
Supreme Court of New South Wales
Pike J
Family provision - a deceased had a de facto relationship for about 35 years up to his death - the deceased had two children from his previous marriage, and the de facto partner had three children from her previous marriage - all five children had lived with the deceased for various periods - each of the de facto's children contended they left the home and ceased contact with the deceased and the de facto because the deceased had sexually abused them - the deceased denied these allegations during his lifetime, and those allegations continued to be denied by the de facto and the deceased's children - the deceased had been tried and acquitted - the de facto and the de facto's children made separate applications for family provision under s59 of the *Succession Act 2006* (NSW) - held: the de facto's children had to show that they had been dependent on the deceased (which they could do), and that there were factors warranting an application for provision - the "factors warranting" requirement means that there are circumstances which, when added to the facts that make a plaintiff an eligible person, make that plaintiff a natural object of testamentary recognition - family provision applications should not be the vehicle to determine allegations of sexual abuse - a family provision claim does not encompass reparations or compensation for the deceased having failed in a legal or moral duty to be a good parent - where a parent's conduct has deprived an applicant of opportunities in life, and there is a causal connection between the conduct and the need for provision, the court may take that into account - if the Court determines allegations of sexual assault are false, that may totally disentitle a claimant - the Court was not positively persuaded that the allegations were made up, and proceeded on the basis it was not able to determine whether the allegations were true - while the cause of the breakdown in the relationship was clear (the making of the allegations), as the Court had found it was not satisfied the allegations

were made up, it was neither possible nor appropriate to determine who was right or wrong and thus seek to attribute blame for the breakdown - the fact was that the de facto's children had had no contact with the deceased for over 20 years, and, during this period, the de facto and the deceased's children stuck by the deceased through the criminal trial and worked hard in the family businesses, thus assisting in maintaining and growing the deceased's assets - the de facto's children were not natural objects of the deceased's testamentary recognition, and so there were no factors warranting an application for provision to them, and their claim therefore failed - the provision for the de facto was inadequate, as, while the will provided for her to continue to reside at the family home for as long as she wished, it did not provide beyond that, should she need to leave that property for whatever reason - parties to agree on orders giving effect to the Court's reasons in this regard.
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**JB v PRN [2024] WASC 219**
Supreme Court of Western Australia
Hill J
Burial rights - an aboriginal person died intestate - a dispute arose regarding the burial arose between the deceased's paternal and maternal families - the paternal were Wongi People, and the maternal family were Noongar People - held: the Court had jurisdiction pursuant to s4 of the *Administration Act 1903* (WA) and its inherent jurisdiction to determine who should have carriage of a funeral, where, and how, a body should be disposed of by way of burial or cremation - there is no property in a deceased person's body, but the executors of a person's will are entitled to custody and possession of the body so that they can make funeral arrangements - where a person dies intestate, the court will ordinarily order that the body be released to the person who appears, on the state of the evidence before the court, to be the person who is most likely to receive a grant of administration - this approach is not rigidly applied - other factors that may be taken into account include (1) cultural considerations; (2) the deceased's wishes and the wishes and sensitivities of living close relatives of the deceased; and(3) the need for the funeral and burial to be held in a timely way, and the costs and logistical difficulties with the competing proposals - here, it was unlikely that any application for letters of administration would ever be made, but, if such an application were made, the principal competing parties would rank equally - the deceased had maintained a relationship with his both his paternal family and maternal family, but there was no evidence as to what the deceased wanted - the paternal family's proposal should be accepted, because it would allow the attendance of all family members and not exclude one side of the family.
JB
[From Benchmark Friday, 21 June 2024]

## Executive Summary and (One Minute Read)

**Food and Drug Administration v Alliance for Hippocratic Medicine** (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

## Summaries With Link (Five Minute Read)

**Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ___**
Supreme Court of the United States
In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.
Food and Drug Administration

## Poem for Friday

**"Hope" is the thing with feathers (314)**

**By** Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chillest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson
Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel, Nazareth College
https://www.youtube.com/watch?v=gDlSo4hEzmE

Recitation 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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