



Friday, 26 April 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)

Whimp v Scaglia (NSWSC) - Court construed the will of a deceased who had died relatively young and distributed half of her estate among her nieces and nephews

Dimos v Burndred (NSWSC) - provision of money from sister to brother referred to mother's will was a loan and not a gift - brother's family provision claim also rejected

In the Estate of Noel Joseph Edmund Thompson (ACTSC) - a previous will with handwritten amendments was pronounced to be a valid will of the deceased

HABEAS CANEM

Country smile



Summaries With Link (Five Minute Read)

Whimp v Scaglia [2024] NSWSC 432

Supreme Court of New South Wales

Richmond J

Succession - a deceased died aged 48 in a car accident, leaving an estate of about \$1.5million - her will appointed her uncle and sister as joint executors, although the sister renounced probate - the will gave half of the deceased's estate to the Garvan Institute of Medical Research, and there was no issue that this was a valid gift - the will distributed the remaining half between her nieces and nephews, being the children of her four siblings - the executor sought a declaration as to whether the will, on its proper construction, provided for three trusts in favour of the children of each of three of the deceased's siblings, provided that monies were to be used for no other purpose than purchasing property or education, made provision for any niece or nephew born after the deceased's death, or made provision for any adopted, fostered, or step-child niece or nephew, and also as to the relative size of the parts provided for by the will - held: the object of construction of a will is to give effect to what can be ascertained, having regard to admissible extrinsic evidence, the testatrix intended by the words she used - it is necessary to consider the terms of the will as a whole and seek to ascertain the basic scheme which the deceased had conceived for dealing with his or her estate and then to construe the will, if possible, to give effect to that scheme - in order for any child of the deceased's siblings to qualify as a beneficiary, that child must survive the deceased and reach 25 years - it was clear from the authorities that the natural and primary meaning of "survive me" in the context of a will is "outlive" and it requires that the person was alive both before and after the death of the testator, but this can be displaced where the will is considered as a whole in the light of the surrounding circumstances - the extrinsic circumstances in this case were consistent with "survive" being used with its ordinary meaning of "outlive" rather than the less restrictive meaning of "live after" - the will did not provide for the creation of three separate trusts - the will did not require certain monies gifted to be used for no purpose other than the acquisition of property or education - the gifts were not limited to such nieces and nephews as were alive at the date of the will, but were limited to children that were alive at the time of the deceased's death - the will did not provide for each beneficiary to receive an equal amount.

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Dimos v Burndred [2024] NSWSC 434

Supreme Court of New South Wales

Peden J

Succession - a deceased left her estate (approximate value \$1million) in equal shares to her three children - however, the gift to the sole son was subject to a proviso that, if he had not repaid a loan to one of his sisters, that loan should be repaid out of the son's share of the estate - the sister who was owed the debt was executor - the executor sister claimed she had loaned about \$200,000 which had not been repaid - the son commenced proceedings, claiming

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the \$200,000 had been a gift, and also making a family provision claim - held: the Court preferred the executor daughter's evidence on all matters - the provision of money by that daughter to her brother had been a loan and not a gift - in construing a will, the Court aims to give effect to what can be ascertained as the intended use of the actual words used by the testator, having regards to any admissible extrinsic evidence - extrinsic evidence, including evidence of the testator's actual intention, is admissible to assist the Court under s32 of the *Succession Act 2006* (NSW) if the will's language makes the will or any part of it meaningless, ambiguous on its face, or ambiguous in light of surrounding circumstances - s32 was enlivened here, as the references to "loan" and "loan amount" were meaningless without extrinsic evidence identifying the particular loan - to the extent possible, a will should also be given a construction which allows words used by the testator to take effect - the Court was satisfied that "loan" and "loan amount" were intended as a references to the executor daughter's loan to the son of about \$200,000 and ought to be construed as such - the son's share should be reduced by the amount of the loan - as to family provision, there was no doubt the son was an eligible person for the purposes of s59(1)(a) of the *Succession Act* - the question of financial need and competition for their satisfaction out of the estate was particularly prominent, because of the limited scale of the resources available - the fact that the son was an able-bodied, adult son of the deceased was a relevant consideration - in the case of adult children, the adequacy of a provision is to be assessed by reference to whether the provision is sufficient to enable the adult child to meet his needs, but not on an overly generous basis - the son had not shown that his late mother failed to provide adequate provision for his "maintenance, education or advancement in life" - he had provided incomplete, inaccurate, and out of date information about his financial situation, and the evidence revealed that, contrary to his assertions made on oath, he is in a better financial position than his sister - family provision claim dismissed.

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In the Estate of Noel Joseph Edmund Thompson [2024] ACTSC 110

Supreme Court of the Australian Capital Territory
McWilliam J

Probate - a deceased executed a valid will in 2007 - he made and signed handwritten amendments to this will in 2020 - the handwritten amendment were not witnessed by two or more people present with the testator when he signed them - two of a deceased's children brought proceedings under s11A of the *Wills Act 1968* (ACT) contending that the will with the handwritten amendments constituted a valid will of the deceased - held: the task for the Court may be broken down into satisfaction of three separate components: (1) establishing there is a physical thing that falls within the definition of 'document'; (2) the contents of the subject document; and (3) the person's intention with respect to the legal effect of the subject document - it was uncontroversial that there was a document here - the express words of the document, in particular the handwritten amendments, were sufficient to satisfy the Court that the document did purport to embody the deceased's testamentary intentions - the signing of each

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amendment with the date next to each signature were strong indicators that the particular document that was amended was one that the deceased intended to have legal effect from the date written - the deletions were not just for the purpose of then providing the marked-up document to a solicitor to create a further document for the deceased to then sign - further support for the inference that the deceased intended the document to constitute his will came from remaining handwritten words which were not expressly accompanied by a signature and date, which were either explanations for why the deceased intended to delete or insert certain parts, or explanations of the deceased's thought process (for example, in relation to the number and ages of his grandchildren) rather than amendments with any operative force - there was nothing to suggest that there was any matter affecting the deceased's testamentary capacity as at the date of the handwritten amendments - the Court was satisfied that, at the time the will with handwritten amendments was brought into existence, the deceased did intend it to constitute his will - orders made as sought.

[In the Estate of Noel Joseph Edmund Thompson](#)

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)

European Court of Human Rights

Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ

Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.

[Kirkorov](#)



Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,
Far-cast, I flare
Through gulfs the sun's uncharted orbits bind,
And spaces bare
That intermediate darks immerse
By road of sun nor world confined.
Upon my star-undominated gyre
I mark the systems vanish one by one;
Among the swarming worlds I lunge,
And sudden plunge
Close to the zones of solar fire;
Or 'mid the mighty wrack of stars undone,
Flash, and with momentary rays
Compel the dark to yield
Their aimless forms, whose once far-potent blaze
In ashes chill is now inurned.



A space revealed,
I see their planets turned,
Where holders of the heritage of breath
Exultant rose, and sank to barren death
Beneath the stars' unheeding eyes.
Adown contiguous skies
I pass the thickening brume
Of systems yet unshaped, that hang immense[67]
Along mysterious shores of gloom;
Or see—unimplicated in their doom—
The final and disastrous gyre
Of blinded suns that meet,
And from their mingled heat,
And battle-clouds intense,
O'erspread the deep with fire.

Through stellar labyrinths I thrid
Mine orbit placed amid
The multiple and irised stars, or hid,
Unsolved and intricate,
In many a planet-swinging sun's estate.



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Ofttimes I steal in solitary flight
Along the rim of the exterior night
That grips the universe;
And then return,
Past outer footholds of sidereal light,
To where the systems gather and disperse;
And dip again into the web of things,
To watch it shift and burn,
Hearted with stars. On peaceless wings
I pierce, where deep-outstripping all surmise,
The nether heavens drop unsunned,
By stars and planets shunned.
And then I rise
Through vaulting gloom, to watch the dark
Snatch at the flame of failing suns;
Or mark
The heavy-dusked and silent skies,[68]
Strewn thick with wrecked and broken stars,
Where many a fated orbit runs.
An arrow sped from some eternal bow,
Through change of firmaments and systems sent,



And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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