



Friday, 28 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)

**Stanojevic v Damjanovic & Anor** (VSC) - a trust document was genuine, but reliance on it would be unconscionable - property held on resulting trust

**Re Sampson** (VSC) - under s14 of the *Wills Act 1997* (Vic), the intention of a testator that a spouse's appointment as executor not be revoked by divorce can be held at any time before death, and can be proved solely by extrinsic evidence

**Re Uscinski** (QSC) - executor ordered bring a previously made grant of probate in common form into the registry and to start a proceeding for a grant in solemn form, where there was a triable issue that the deceased had lacked capacity and had not known and approved of the contents of the will

**Richardson v Richardson (No 2)** (ACTSC) - modest family provision claim awarded in favour of estranged son of the deceased

## HABEAS CANEM

### First beach holiday



## Summaries With Link (Five Minute Read)

### **Stanojevic v Damjanovic & Anor [2024] VSC 350**

Supreme Court of Victoria

Tsalamandris J

Trusts - a deceased had been the sole proprietor of real property - plaintiffs claimed the property was held on express trust for the deceased's grandchildren, in accordance with a trust document executed soon after the property was purchased in 2007, or, alternatively, that the property was held on resulting trust in accordance with contributions made towards the purchase price by the deceased, his late wife, his late son (the father of the plaintiff grandchildren and another grandchild) and the late son's wife - held: the Court made findings on the evidence as to the amounts contributed by each relevant person to the purchase price - the other grandchild had not satisfied the Court that the trust document was not authentic - however, taking into account all of the evidence, and applying the relevant principles, the Court was satisfied that determination of the real justice in this proceeding required it to hold that it would be unconscionable to enforce the trust document - the deceased had been under a relevant special disadvantage when he signed the document - the property was partly held under a resulting trust for the late son's wife, and for the late son's estate, in the proportions determined by the Court - plaintiffs claim for lost rental income dismissed as there was no bad faith or ulterior motive on the part of the executor, and it had been open to him to permit the other granddaughter to continue to occupy the premises without paying rent, until the issue as to who had what interest in the property was determined.

[Stanojevic](#)

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### **Re Sampson [2024] VSC 351**

Supreme Court of Victoria

Moore J

Succession - the divorced wife of a deceased sought probate of his will - the divorce had occurred after the will naming her executor had been made - under s14 of the *Wills Act 1997* (Vic), the divorce of a testator revokes any appointment of the divorced spouse as executor or trustee, with such revocation taking effect as if the spouse had predeceased the testator - however, this does not apply 'if it appears' that the testator did not want the appointment to be revoked upon the ending of the marriage - the divorced wife said that this intention was established, not from the terms of the will, but from extrinsic evidence said to illuminate the deceased's intention in the period leading up to his death - held: the Court was satisfied on the basis of the extrinsic evidence that the deceased did not want his appointment of the plaintiff as executor of his estate to be revoked upon the ending of their marriage - the question was whether s14 permits a testator's contrary intention to be established solely on the basis of extrinsic evidence - s14 has no express confinement or limitation about how it is to be determined 'if it appears' that a testator did not want an appointment to be revoked upon the ending of the marriage - no temporal requirement is apparent as to when the existence of a

contrary intention is to be ascertained - in the grammatical composition of s14(2), the words 'upon the ending of the marriage' do not qualify or condition the words 'if it appears' - the *Wills Act* is remedial legislation, as it was one that 'gives some benefit to a person and thereby remedies some injustice' - generally, statutory provisions of remedial legislative character should be construed so as to give the fullest relief which the fair meaning of its language will allow - properly construed, s14 permits a contrary intention on the part of a testator to be established solely on the basis of extrinsic evidence including evidence relating to the circumstances in which a will is made and oral and written statements made by the deceased shortly before their death.

[Re Sampson](#)

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### **Re Uscinski [2024] QSC 131**

Supreme Court of Queensland

Copley J

Succession - the daughter of a deceased applied under r640 of the *Uniform Civil Procedure Rules 1999* (Qld) for an order that the respondent, as the executor of the will of her deceased grandmother, bring into the registry the grant of probate in common form which she had obtained in 2022 and start a proceeding for a grant in solemn form, and that the applicant be granted leave to issue notices of non-party disclosure to two entities - the applicant was concerned that the deceased did not have testamentary capacity at the time the will was executed, and that she did not know and approve of the contents of the will at the time it was made - held: the applicant had a sufficient interest in the administration of the estate because she was a beneficiary under all of her mother's earlier wills and she would have had an entitlement had her mother died intestate - an order under r640 should be made if the material establishes a triable issue and there are no contrary discretionary considerations - having regard to the medical evidence the facts in relation to capacity and knowledge were inconclusive - there was a triable issue that the deceased had not had capacity or knowledge - relief should not be refused on the basis of delay as the delay had been explained - an order should be made under r640 - the material sought from the deceased's previous solicitors and the hospital under the notices would have relevance to the issues at a final hearing - leave granted to issue notices.

[Re Uscinski](#)

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### **Richardson v Richardson (No 2) [2024] ACTSC 191**

Supreme Court of the Australian Capital Territory

Curtin AJ

Family provision - a deceased died with two sons, one of whom was estranged - her will appointed the non-estranged son as executor, gave a gift of \$500 to the estranged son, gifts of \$7,000 to three friends, and the remainder of her estate 60% to the non-estranged son and 40% to the son of the non-estranged son - the net value of the estate was about \$740,000 - the will

# Benchmark

specifically referred to the fact that the deceased had not seen the estranged son for many years and that this was the reason for only making a small gift to him - the estranged son sought provision under s8 of the *Family Provision Act 1969* (ACT) - held: from the earliest family provision cases, courts have considered the criterion of "moral duty", "moral obligation", and "moral claim" as informing the determination of an application - the presence of a testator's moral duty is to be characterised in light of community standards which change and develop over time - s22 of the *Family Provision Act* requires the Court to consider the testator's reasons for making the dispositions made by will, or for not making provision or further provision for someone such as the plaintiff - the court is not entitled to re-write the will of a testator in accordance with its own ideas of fairness or justice - in cases where the estate is of a small to moderate value, questions of financial need and competition for their satisfaction are prominent because of the limited resources available - the Court must be able to properly understand the impact that a shifting of property resources away from a beneficiary in favour of an applicant will have on each of those respective parties - the term "estrangement" does not describe conduct, but the condition which results from the attitudes or conduct of one or both parties - attention may be paid to the apparent cause of the estrangement - the plaintiff did not appear, on the evidence, to have treated his now-deceased mother callously, but rather their estrangement came about because they had some type of falling out and the deceased had disapproved of the plaintiff's drinking and general approach to life - on the evidence, the Court came to the view that the will did not make adequate provision for the plaintiff's proper maintenance, education, or advancement in life - the estrangement does not disentitle the plaintiff from a successful claim - given the size of the estate, the plaintiff should receive a further \$74,000, being about 10% of the net value of the estate - this should be paid out of the deceased's grandson's share - plaintiff's costs capped at \$40,000 to be paid out of the estate.

[Richardson](#)

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# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**United States v Rahimi** (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

### Summaries With Link (Five Minute Read)

#### **United States v Rahimi 602 US \_\_ (2024)**

United States Supreme Court

In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.

[United States v Rahimi](#)



## Poem for Friday

### Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop  
The name, because one afternoon  
Of heat the express-train drew up there  
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.  
No one left and no one came  
On the bare platform. What I saw  
Was Adlestrop only the name

And willows, willow-herb, and grass,  
And meadowsweet, and haycocks dry,  
No whit less still and lonely fair  
Than the high cloudlets in the sky.

And for that minute a blackbird sang  
Close by, and round him, mistier,  
Farther and farther, all the birds  
Of Oxfordshire and Gloucestershire.

**Edward Thomas**, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adlestrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*"

all’.

**Adestrop** by Edward Thomas, composed by Susanna Self- the third of six “Songs of Immortality”

<https://www.youtube.com/watch?v=2NYUdo12yfg>

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.

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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