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## **2025 SPECIALIST ACCREDITATION LIST OF CASE LAW**

### **WILLS AND ESTATES**

## 2025 List of Case Law

**NOTE:** The cases and sections of legislation within this List of Case Law and within the Guidelines are provided by way of guideline assistance only.

The reference to cases listed below **is not an exhaustive list** of all cases which candidates may be tested on.

In the event that any new legislative reforms become effective before the date of assessment and / or new cases delivered, practitioners will be required to be aware of the changes to the law resulting from that legislation and / or those cases.

Candidates will be examined on the law as it stands at the date of assessment.

### Administration

#### Administration of an Estate

**Dolan v Dolan [2007] WASC 249** (case on costs in probate proceedings, including informal will proceedings)

**Commissioner of Stamp Duties (NSW) v Bone (1976) 135 CLR 223** (a debt released or forgiven on death by the deceased's will does not vest in the executor, although equity regards the debt as an asset in the hands of the executor in favour of creditors at least – the release of a debt by the will operates as a legacy in favour of the debtor of the amount of the debt)

**In the Estate of Williams (1984) 36 SASR 423** (before a trustee can be found to be an executor according to the tenor of the will an intention, either express or implied, that the trustee is to pay the debts and undertake the duties of administration must be found)

**Mavrideros v Mack (1998) 45 NSWLR 80** (an application to revoke a grant of probate is an application for the court to exercise its inherent jurisdiction - the court may revoke the grant of probate to an executor who is shown to be guilty of inexcusable delay or who otherwise impedes the due administration of the estate – an obdurate refusal to do something necessary for the administration of the estate without sufficient reason for that refusal is a circumstance in which the court can use its power)

**Kane v Radley-Kane (1999) Ch 274** (LPR can't appropriate non-cash or non-cash equivalent assets to themselves to pay legacy unless all beneficiaries are sui juris and consent)

**Sutton v Wahlen [2000] NSWSC 1063** (the factors that a court considers where there is more than one executor and they cannot agree on the sale of real estate)

**Stanley v Stanley [2000] NSWSC 1133** (the same principle applies to revocation of a grant of administration as applies to a grant of probate – however, the court can to some degree be more ready to act upon its own view as to the appropriate person to be administrator than where a testator has appointed an executor)

**McLauchlan v Prince [2001] WASC 43** (the court may exceptionally order that an LPR account on the basis of wilful default, which binds the LPR to account not only for what they have actually received but also for what they would have received but for their neglect or wilful default)

**Re Estate of Thurston [2001] NSWSC 144** (a renouncing executor may be permitted to retract the renunciation and obtain leave of the court to continue so long as there is a reason for retracting the renunciation)

**Freeman v Fairlie (1812) 3 Mer 29** (an LPR is under a duty to keep proper books of account which contain a full and frank financial record of his or her administration of the estate)

**Dibbs v Goren (1849) 11 Beav 483; 48 ER 1017** (a beneficiary must repay funds wrongly paid to them; the funds can be recovered by deducting them from subsequent estate distributions)

**Stainton v Carron Co (1854) 52 ER 58** (while probate will not be refused on the ground that an executor is insolvent, an insolvent executor may be restrained from acting if the testator was not aware of the insolvency)

**Farrell v Brownbill (1864) 3 Sw & Tr 467** (the court will not grant administration to a person who has no interest in the estate)

**In the Goods of Cholwill (1866) LR 1 P & D 192** (absence from the jurisdiction may result in a named executor being passed over)

**Jervis v Wolferstan (1874) LR 18 Eq 18** (an unpaid creditor may follow assets of the estate paid to any legatee and may also recover the value of its debt from any payment made to a legatee, subject to any good equitable defence)

**Re Marsden; Bowden v Layland (1884) 26 Ch D 783** (the executor is bound by a most direct trust to deal properly with the assets and to apply them in due course of administration of the estate; they are personally liable in equity for all breaches of the ordinary trusts which are considered in equitable courts to arise from their office; acquiescence or consent by a beneficiary can be a good defence to a breach of trust or to a claim of devastavit)

**Allen v Edmonds (1886) 12 VLR 789** (specific, general and demonstrative legacies may each abate, but do so differentially – specific legacies are assigned priority positions in the order of application of assets respectively applying and, accordingly, will be among the last to abate)

**Re Barker [1892] 2 Ch 491** (a person entitled to a grant may appoint a power of attorney to take the grant on his or her behalf; the holder of a general power of attorney given before the appointor's death may obtain a grant)

**Re Chapman [1893] 2 Ch 763** (if the will gives a power to retain or convert then executors will not be liable for any loss suffered if the executors acted honestly and in what they considered the best interests of the estate in delaying the conversion of the estate)

**Re Chapman; Cocks v Chapman [1896] 2 Ch 763** (the court will not be quick to fix liability upon a trustee who has committed no more than an error of judgment provided he or she is honest and reasonably competent and acts with reasonable care, prudence and circumspection)

**Re Stiles [1898] P 12** (a renouncing executor may be permitted to retract the renunciation and obtain leave of the court to continue so long as there is a reason for retracting the renunciation, e.g. if it is the best method of administering the estate)

**Smith v Smith (1903) 3 SR (NSW) 571** (general legacies have priority greater than residuary legacies but lower than specific legacies)

**Re Tyson; Tyson v Webb (1906) 7 SR (NSW) 91** (subject to any contrary direction in the will, simple interest is payable on general legacies from the expiration of 12 months from the date of the testator's death until the date of payment)

**In the Will of Rose (1907) 7 SR (NSW) 201** (a testator may in the will appoint people to nominate executors, and such persons may nominate themselves, however the power of nomination must be clear)

**Re West; West v Roberts [1909] 2 Ch 180** (a specific legacy carries with it all income derived by the estate in respect of it since the testator's death)

**Donaghy v Carrol (1910) 11 SR(NSW) 9** (the LPR has a right to possession of the body of the deceased and a duty to arrange for burial or cremation of the deceased)

**Union Bank of Australia v Harrison, Jones and Devlin Ltd (1910) 11 CLR 492** (the duty of the executor is to meet the deceased's obligations and to carry out the 'mind, will and intent of their testator'; where there are multiple executors, they hold the deceased's property as joint tenants; where there are several administrators or executors, they each may act independently of each other)

**Greenway v McKay (1911) 12 CLR 310** (the court has power to appoint an administrator ad litem for the limited purpose of commencing or carrying on a legal proceeding, and such a grant would normally be made to the person who is likely to get a general grant eventually)

**Walford v Walford [1912] AC 658** (there are three recognised categories of legacy – general, specific and demonstrative)

**Nissen v Grunden (1912) 14 CLR 297** (the court should not be overly concerned about minor breaches of trust by the LPR, as a fiduciary, especially where they tend to benefit the trust)

**George Attenborough & Son v Solomon [1913] AC 76** (the concept of 'assent' by an executor and its effect – a valid will is necessary and sufficient to vest in a legatee an inchoate property in the subject matter of the legacy, but the trusts of the will cannot become operative, and title cannot pass, until such time as the executor determines that the property is no longer required for the payment of the debts and legacies of the testator and the liabilities of the estate – assent is the process by which the executor makes and communicates that decision to the legatee; at common law, this applies only to personalty and chattels real, and only to an executor; an executor who assents in respect of part of the estate of a deceased person loses the right to exercise the powers of an executor in relation to that part of the property)

**In the Estate of Gamble (1915) 32 WN (NSW) 121** (power of appropriation – an LPR may in certain circumstances apply in specie in favour of a beneficiary any asset being a part of the estate of a deceased person in satisfaction of that beneficiary's distributive share or interest in the estate or residue – this power of appropriation may be derived from common law, the will or statute)

**Drummond v Registrar of Probates (1918) 25 CLR 318** (sub nom *In the Estate of Wyndham* (1918) 24 ALR 365) (where a sole surviving executor dies, then his executor becomes executor ipso facto, not only of that will, but also the will of any testator of whom the other was the sole or surviving executor, and thus, a chain of executorships is created; an executor of an executor cannot renounce probate of his testator's testator)

**Harris v Harris (1919) 20 SR (NSW) 61** (although an LPR may be unable to sue a legatee to recover an overpayment, the LPR is entitled to retain money, out of future sums otherwise payable to that legatee in the course of administering the estate or its trusts, for the purpose of correcting the error)

**Ryan v Davies Bros Ltd (1921) 29 CLR 527** (an action commenced by the deceased prior to their death may be continued by the executor, notwithstanding that the action would not otherwise have survived the death of the testator; where the deceased left a will naming an executor who accepts the office and obtains a

grant of probate, the executor or executors derive title to the property of the deceased from the will and not from the grant of probate)

**Fell v Fell (1922) 31 CLR 268** (common law principles of construction of a will) an amount sufficient to meet the proportion of the estate's debts and expenses charged upon it)

**In the Will of O'Brien; Raftis v O'Brien [1924] VLR 262** (if an LPR proposes to sell estate property for the purposes of distribution, a residuary beneficiary may require transfer of that property in specie upon payment to the LPR of an amount sufficient to meet the proportion of the estate's debts and expense charged upon it)

**Dalrymple v Melville (1932) 32 SR (NSW) 596** (an LPR is not generally liable for a breach of duty committed by their co-LPR, but if they are at fault in allowing or not taking care to prevent a co-LPR from committing a breach of duty, then the LPR will be personally liable for the breach, which in fact becomes their own)

**Re Doolette (1933) 36 WALR 1** (the property of the testator vests in the executor or administrator upon a grant of probate or administration)

**Levy v Kum Chah (1936) 56 CLR 159** (if an executor fails to discharge all debts where there are adequate assets in the estate to discharge them, then the executor becomes personally liable for those debts, and also becomes personally liable for the costs of litigation relating to the recovery of the debts)

**Re Coller's Deed Trusts; Coller v Coller [1939] Ch 277** (in the absence of a direction in the will as to whether an annuity is charged upon income or capital or both, the general rule is that it charges the whole of the available estate)

**National Trustees Executors and Agency Co of Australasia Ltd v Dwyer (1940) 63 CLR 1** (the duty of the LPR is to administer the estate according to law; if the LPR cannot or will not do so, or does not do so properly, or is unsure of how to proceed and wants the guidance or direction of the court, administration proceedings are available to beneficiaries, creditors or the LPR; the court has an inherent equitable jurisdiction to oversee and even undertake the administration of the estate; as a tort, there is a six year limitation period for a claim on devastavit)

**Re Mitchell (deceased) (1941) 42 SR (NSW) 19** (if one of two or more executors is making a claim against the estate then he or she does not have to renounce probate but could proceed by serving notice of the application on a co-executor)

**Re Tankard; Tankard v Midland Bank Executor and Trustee Co Ltd [1942] Ch 69** (time for payment – once administration is complete, the interests of beneficiaries, including legatees, crystallise and they are generally entitled to be paid according to the tenor of the will; where a delay in a distribution is due to the default of the LPR, he or she may be ordered to pay damages or interest by way of compensation, which itself falls into residue; who may complain of devastavit)

**Re Sloan; Stevens v Sloan [1943] VLR 63** (as between themselves, general legacies are payable proportionately, with no one legacy being entitled to priority over another; where a specific pecuniary legacy is charged upon assets specifically dealt with by the will, that legacy will not be reduced unless, once all debts have been paid, the value of that property is insufficient to pay the legacy in full)

**Re Diplock; Diplock v Wintle [1948] Ch 465** (where a distribution is made with notice of an actual debt, the LPR is estopped from recalling the payment from the beneficiary)

**Tatham v Huxtable (1950) 81 CLR 639** (failure of will on grounds of uncertainty; at common law, a testator must exercise his or her power of testation personally, and may not delegate that right – the general rule against delegation of testamentary power)

**Re Birch; Ex parte Public Trustee (1951) 51 SR (NSW) 345** (an executor de son tort – a person who, though not named or appointed an executor or administrator, administers or meddles with the estate of a deceased person without authority – is liable to be sued by the rightful personal representative, creditors or beneficiaries of the deceased estate for any property received or any loss or damage to the estate arising from his or her actions, and has all the liabilities but none of the privileges of an executor; the fact that the estate of the deceased before a grant is deemed to vest in the Public Trustee “in the same manner and to the same extent as aforesaid, the personal estate and effects vested in the Ordinary” does not mean that the Public Trustee has power, in respect of the estate of a deceased person before grant of administration, to bring an action to recover property transferred as a result of undue influence or unconscionable conduct)

**Ministry of Health v Simpson (Diplock’s Case) [1951] AC 251** (an unpaid or underpaid legatee may usually recover a shortfall from any other legatee to whom the relevant sum was paid, but the action cannot be brought unless the legatee has first exhausted his or her remedies against the LPR whose error caused the shortfall)

**Andrews v Hogan (1952) 86 CLR 223** (where the deceased leaves a will naming an executor who accepts the office and obtains a grant of probate, the executor or executors derive title to the property of the deceased from the will and not from the grant of probate, although the grant of probate is necessary to prove that entitlement; however, with a grant of administration, even a grant with a will annexed, the administrator’s title to the property of the deceased is derived from the grant itself and not from the death of the deceased)

**Smith v Layh (1953) 90 CLR 102** (where a gift of residue or of a share of residue is, for any reason, unable to take effect, the failing share does not fall back into the residue unless there is a gift over of that residue or share of residue, or the will directs that it should fall back into residue. Rather, except where the will evidences an intention that it should be taken by the executor beneficially, there is an intestacy in respect of it, and it passes in accordance with the rules of intestate succession)

**Harvell v Foster [1954] 2 QB 367** (upon an effective assent being communicated by the executor, the legatee gains the right to sue for and recover the property the subject of the assent)

**King v Perpetual Trustee Co (Ltd) (1955) 94 CLR 70** (where there is a gift to a single class, identified by the members of the class, being the children of any one of several named persons, the prima facie rule is that such class takes per capita, and not per stirpes, and it is a rule that should not be lightly departed from – if the testator intends per stirpes, then the will needs to show that clear intention)

**Hardiman v Beale (1956) 58 WALR 20** (an executor to whom probate is granted may sell or lease real estate under an open contract – if they sell under an open contract but fails to state in what capacity the sale is made, the purchaser can insist that the vendor make title by any available means and is not bound to enquire as to the state of the litigation – if the executor sells before a grant is obtained, the executor will be liable for any damages arising from their failure to deliver title)

**Official Receiver v Schultz (1990) 170 CLR 306** (neither a residuary beneficiary nor the beneficiary of a specific devise have a legal or beneficial interest in an asset of a deceased estate before the completion of administration – see also **Commissioner of Stamp Duties v Livingston (1964) 112 CLR 12**)

**Murdocca v Murdocca (No 2) [2002] NSWSC 505** (costs of an administration suit are testamentary expenses, incurred to enable the proper administration of the estate to take place, even if some of those costs are likely to be incurred by parties to the litigation other than the executor or administrator)

**Gorman v McGuire [2002] NSWSC 1089** (the appropriate procedure to adopt for revocation of a grant of probate where there has been a grant to multiple executors is to revoke the original grant of probate and to make a fresh grant to the remaining executor)

**Gonzalez v Claridades (2003) 58 NSWLR 188; [2003] NSWSC 508;** (when an obligation may arise to make interim distribution from an estate not fully administered)

**Halfhide v Beaven [2003] NSWSC 1207** (meaning of devastavit and liability of LPR)

**Mann v Grantham [2004] VSC 156** (an LPR may be relieved of the obligations of their office by leave of the Court, and this may arise for a number of reasons, such as old age, irreconcilable differences with other executors)

**In Re Estate of Crane [2005] SASC 379** (the court has the power to make an order passing over a named executor) **Wallis v Miller [2006] WASC 7** (rules of construction of a will)

**Pappas v Priakos [2007] NSWSC 410** (in an application under the NSW equivalent of s.45 of the Administration Act 1903 (WA), the court can make an order resolving a dispute between co-executors, such where they disagree as to the sale price of the deceased's property and evidence establishes that an offer is a proper offer and refusal is misconceived)

**Baird v Logan [2008] NSWSC 1029** (when removing an executor the court can order indemnity costs against the obdurate executor)

**Murray v Schreuder [2009] WASC 51** (no claim of legal professional privilege can be made by trustee against beneficiaries who seek to inspect trust documents)

**Pacella v Sherborne [2009] WASC 58** (scope of operation of section 45 of the Administration Act 1903 (WA), standing to apply to settle any questions arising in respect of any will or administration of an estate extends beyond the LPR and includes a beneficiary who wishes to seek directions from the court as to the proper interpretation of the deceased's will)

**Re Estate of Boian [2014] NSWSC 800** (when appropriating estate property to a beneficiary, the trustee should rely on a valuation close to the date of appropriation, not a probate valuation)

**Re Ellis [2015] WASC 77** (passing of executor's accounts; consequences of accounts being taken)

**Re Estate of Wilkinson (dec'd) [2018] SASC 200** (the court has the power to pass over of the propounding executors – circumstances may include where the executor is a bad character, or has neglected his duties, or has intermeddled in the estate and then refused to take a grant; or is absent abroad; or has disappeared; or is suffering from ill-health, or is of unsound mind, or is not competent to take a grant; or where the estate is insolvent)

**Minicozzi v Starr [2019] SASC 55** (an executor de son tort may be allowed to renounce executorship)

**Re Arklie (No 2) [2019] VSC 350** (passing over of executors due to acrimonious relationship)

**Martin as Executor for Estate of Korbl v Hurse [2021] WASC 488** (on a disposition under a home-made will of "any property owned by me ... including all contents thereof" the disposition was held to be wide enough to cover the contents of a safe (which contained a substantial amount of cash and valuable jewelry) situated in the house passing to the nominated beneficiary under this clause. The case highlights the importance of clarifying what is to be covered under a disposition in a will)

**In the estate of Robert Ian Edwin Partridge (Dec'd) [2022] WASC 367** (claim of wilful defaults; referral under r 4(4) of the Non-contentious Probate Rules 1967 (WA))

## Administration General

**Sorrell v Incorporated Law Institute of New South Wales (1960) SR (NSW) 95** (a solicitor who acts for an LPR in the administration of an estate is liable for loss caused by his or her own wilful default, not only to the client of the solicitor, but also to the other persons injured by the default)

**Osborne v Smith (1960) 105 CLR 153** (principles of mistake and rectification of a will)

**Brown v Holt [1961] VR 435** (remedies for creditors where estate has been distributed)

**McBride v Hudson (1962) 107 CLR 604** (general legacies do not adeem)

**Re McGeorge (dec'd); Ratcliff v McGeorge [1963] Ch 544** (legacies which are directed to be paid at a date later than a year after the testator's death carry interest only from that date)

**Re Gillespie (dec'd) [1965] VR 402** (if a testator designates with sufficient precision a class of persons or objects to be benefited, he or she may delegate to his or her trustees the selection of the individual person or object within the defined class)

**Re Robertson (dec'd) [1966] VR 196** (if a testator purports to deal successively with the same residue, but in favour of different beneficiaries, the gift secondly described is regarded as substitutionary and takes effect only if the first fails)

**Ex parte Callan; Re Smith [1968] 1 NSWLR 443** (the doctrine of relation back under s 8 of the Administration Act 1903 (WA) is similar to that under s 44 of the now repealed Wills Probate and Administration Act 1898 (NSW) in that it does not have an unlimited or expansive operation but is confined and limited to the operation of that doctrine at common law)

**Re Hayes Will Trusts (1971) 2 All ER 341** (LPR must consider beneficiaries as a whole and not favour one over another)

**Fisher v Fisher (1986) 161 CLR 438** (family law claim for an alteration of marital property will survive and may be continued after the death of one of the parties to the marriage)

**Ramage v Waclaw (1988) 12 NSWLR 84** (requirement for leave in derivative actions)

**Reid v Hubbard [2003] VSC 387** (executors are under a duty to act reasonably and to perform the trust honestly and in good faith for the benefit of the beneficiaries; no exemption clause can absolve an executor from liability for knowingly participating in a fraudulent breach of trust)

**Tsaknis as Executor and Trustee of the Estate of Lilburne (dec'd) v Lilburne [2010] WASC 152** (section 92 of the Trustees Act 1962 (WA) remains available for trustees to seek directions from the Court in situations where they are uncertain of the appropriate course of action)

**Thompson v Gamble; Gamble v Thompson [2010] NSWSC 878** (principles relating to the liability of trustees to creditors and beneficiaries)

**Plan B Trustees Ltd v Parker [2012] WASC 392** (legislative history, purpose and operation of section 92 of the Trustees Act 1962 (WA) relating to applying for judicial advice)

**Public Trustee v Gerritsen [2012] WASC 201** (informal will case)

**Hansen v Hansen [2013] WASC 268** (review of authorities on whether a lost will can be admitted to probate; presumption of revocation of a lost will)



**Furesh (as administrator of Intestate Estate of Slipceвич) v Schor (2013) 45 WAR 546** (the court does not have inherent jurisdiction to make an order against a person to submit to a mouth swab to provide a sample for DNA analysis to determine issue of paternity)

**Lock v Phillips [2014] WASC 92** (status and effect of an application for a grant in solemn form – the resulting judgment transfers legal property in the estate of the deceased to personal representatives and, so long as it is not revoked, creates enforceable rights in beneficiaries)

**Beck v Henley [2014] NSWCA 201** (where property, such as shares in a company, is severable, and can be conveniently and fairly divided, then a beneficiary can call upon the property to be divided and distributed in specie, unless there are special circumstances; loss of control by distributing shares among beneficiaries does not amount to special circumstances)

**Randa Lee Investments Pty Ltd & Anor v Ballan & Ors [2015] VSC 178** (requirement of leave in derivative actions by beneficiaries)

**Larussa v Carr [2016] WASC 332** (five matters must be established before an applicant for a grant may prove a lost will – first, it must be established there actually was a will; secondly, it must be shown that the will revoked all previous wills; thirdly, the plaintiff must overcome the presumption that when a will is not produced it has been destroyed with the intention of revocation; fourthly, there must be evidence of its terms; and fifthly, there must be evidence of its due execution)

**Woodley v Woodley [No 2] [2017] WASC 94** (passing over of executors)

**Re Aitken [2018] VSC 817** (the court has jurisdiction to pass over the appointment of a named executor and appoint a different representative if that is necessary for the due and proper administration of the estate)

**Shephard v Galea and Byrne as Executors and Trustees of the Estate of the late Joseph Galea [2019] WASC 164** (derivative action by beneficiaries, judicial comments on cost implications and requirement for leave)

**London [2019] WASC 448** (the court in Western Australia is reluctant to appoint someone as an administrator of an estate with the will annexed if they do not have an interest in the estate)

**Carr as administratrix of the estate of Larussa v Larussa Pastoral Holdings Pty Ltd as former trustee of Larussa Pastoral Trust [2019] WASC 471** (undue influence, unconscionable conduct and public policy arguments not accepted so as to set aside forgiveness of trust debts by deceased prior to his death)

**De Lorenzo v De Lorenzo [2020] NSWCA 351** (to the extent that partition of property, such as shares in a company, is required in order to divide it between beneficiaries, the Court may order the co-owners to vote in favour of a share split)

**Olsen v James [2020] NSWSC 1015** (consequences for executor and possibly his solicitor when there are insufficient funds to pay all beneficiaries after interim distributions were made based on incorrect “probate value” of estate assets)

**Boord as Executrix of the Estate of Roman Iwankiw v Iwankiw [2021] WASC 13** (judicial advice)

**Koh v Samuel Conrad Buckeridge as executor of estate of Leonard Walter Buckeridge (No 2) [2021] WASC 148** (where there is no dispute as to the facts but the disputes relate to the proper interpretation of the will, then the appropriate commencing process is by originating summons and not by writ of summons where no breach of trust is specifically pleaded)

**Murphy v Lewis [2021] WASC 251** (a grant of probate in solemn form cannot be made simply by consent of the parties, but the fact that the parties agree on orders to resolve the matter is a relevant consideration) obtained with regard to loans which executor believed to be liabilities of estate)

**Section 22 of Human Tissue and Transplant Act 1982 (WA); Ex Parte A, Re [2022] WASC 52** (ex parte application for order permitting removal and storage of sperm and associated tissue from the body of applicant's de facto husband)

**Britt v Office of the State Coroner [2022] WASCA 75** (burial rights over person dying intestate, dispute between deceased's mother and de facto partner)

**Knuckey v Knuckey [2022] WASC 157** (executor's right to commission)

**Kramer as executor of will of Money v Evans as executor of will of Money [2022] WASC 381** (removal of executor and replacement with new administrator, basis of appointment)

**David Macdonald Johnston as executor of will of Patricia Kay Creasey also known as Patricia Kaye Creasey — decd v Green [2022] WASC 393** (proper interpretation of will)

**Littlely as Executor of Estate of late Littlely v Leslie Raymond Gard [No 5] [2022] WASC 394** (application for sale of land)

**Section 22 of Human Tissue and Transplant Act 1982 (WA); Ex Parte P, Re [2022] WASC 477** (ex parte application for order permitting removal and storage of sperm and associated tissue from the body of applicant's deceased husband)

**Jarrett v Murchison (deceased) [2023] SASC 77** (passing over an executor – principles)

**Simon Dirk Kenworthy-Groen as executor of the estate of William Grove v Grove [2023] WASC 87** (judicial advice application and whether section 92 of the Trustees Act 1962 (WA) informs section 45 of the Administration Act 1903 (WA))

**Hart v Cooper [2023] WASC 132** (burial rights over person dying intestate, dispute between deceased's sister and alleged de facto partner)

**Re Luna [2023] VSC 223** (passing over where family members could not perform executorial duties)

**Cardaci v Filippo Primo Cardaci as executor of the estate of Marco Antonio Cardaci [No 5] [2021] WASC 331** (removal of executor due to lack of understanding of duties and responsibilities of trustee, executor failed to distinguish between assets of deceased's estate and other entities and used assets of estate, executor did not breach duties as executor by asserting and accepting that loans from controlled company or that repaid by another company as liabilities of estate, executor found to have acted honestly and reasonably based on financial advice obtained with regard to loans which executor believed to be liabilities of estate)

**Commissioner of Stamp Duties v Livingston (1964) 112 CLR 12; [1965] AC 694** (residuary beneficiary has no interest in the assets of the estate but merely has a right to have the estate duly administered)

**Jolliffe v Fera [1973] 2 NSWLR 702** (upon the death of one of several executors of a will or administrators of the estate of a deceased person, the survivor or survivors may exercise all the powers originally vested in the full complement of grantees)

**Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57** (under general law, the executor derives title from the will, and probate merely authenticates his/her title and is not the source of it)

**Bartlett v Barclays Bank Trust Co Ltd (No 1) [1980] Ch 515** (it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent person of business would extend towards his or her own affairs, bearing in mind that the business of the trustee is looking after the property of others for the short and long term benefit of others for whom the trustee felt morally bound to provide; the standard to be applied is the standard of the reasonably prudent person of business, and it is immaterial that the trustees are not people of business)

**Re Mutch [2018] VSC 619** (standing to make an application for a grant of administration is established by a person's interest in an estate – the person who has the greatest beneficial interest in the estate is the person entitled to a grant of administration, however the Court may in the interests of the due and proper administration of an estate exercise its discretion to appoint a stranger in interest as an administrator of an estate)

**Bassett v Atherley [2011] WASC 117** (an executor's right to a commission may be reduced or negated where the will provides a legacy or remuneration in favour of the executor)

**Stamford v Stamford [2012] HCA 52** (family law claim for an alteration of marital property will survive and may be continued after the death of one of the parties to the marriage)

**David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353** (at common law a beneficiary can only escape repayment of funds wrongly paid to them if there has been a change in their position to their detriment in good faith reliance on the belief that they were entitled to the funds and can point to expenditure of financial commitment ascribed to the overpayment)

**Re Burbidge (No 2) (SC(NSW), Young J, 25 June 1993, unreported, BC9301765)** (the LPR is not obliged to commence or defend legal actions unless put in funds or indemnified by the beneficiaries)

**Re York (deceased); Stone and Another v Chataway and Another (1997) 4 All ER 907** (the liability of trustees and beneficiaries upon a distribution in the face of contingent liabilities)

**De Haas v Murcia and Associates (SC(WA), Templeman J, PRO 1215/1998, 14 September 1998, unreported, BC9805868** (very cogent reasons are required before the registrar authorises the release of a copy of a statement of the deceased's assets and liabilities filed pursuant to Rule 9B of the Non-Contentious Probate Rules 1967)

**Re Estate of Cranny (dec'd); Reyburn (Applicant) BC200203412; [2002] WASC 171** (the proper applicant for probate of a divorced intestate's estate were his two infant children through their guardian. The guardian would have to provide guarantees for the gross value of the estate or appoint a trustee under s.17A of the Administration Act 1903 (WA))

**Yeomans v Yeomans [2006] 1 Qd R 390** (alleged shortcomings of testamentary trusts, including need for certainty in describing class of beneficiaries and consequences of failure to stipulate a perpetuity period)

## Executors/Trustees

### Appointment of Executors

**In the Will of Rose (1907) 7 SR (NSW) 201** A testator may in the will appoint people to nominate executors, and such persons may nominate themselves, however the power of nomination must be clear.

**In the Will of Finn (1908) 8 SR (NSW) 32** Apart from a licensed trustee company, no company can be appointed executor. However, if a corporation or foreign trustee company is named as an executor it may

appoint its nominee called a 'syndic', to whom a grant of letters of administration with the will annexed may be made.

**Re Symm's Will Trusts; Public Trustee v Shaw [1936] 3 All ER 236** A testator's intention to empower an individual personally to perform certain tasks independently of the office of executor to which that will appoints that person, must in order to be effective, be expressed in the clearest possible terms.

### Entitlement to Grant

**Stainton v Carron Co (1854) 52 ER 58** While probate will not be refused on the ground that an executor is insolvent, an insolvent executor may be restrained from acting if the testator was not aware of the insolvency.

### Passing over of Executors

**In the Goods of Cholwill (1866) LR 1 P & D 192** Absence from the jurisdiction may result in named executor being passed over.

**Woodley v Woodley [No2] [2017] WASC** Passing over of executors. See also [2018] WASCA 149

**Re Luna [2023] VSC 223** Passing over where family members could not perform executorial duties.

### Removal of Executor

**Cardacci v Flippo Primo Cardaci as executor of the estate of Marco Antonio Cardaci [No5] [2021] WASC 331** Removal of executor due to lack of understanding of duties and responsibilities of trustee. The executor failed to distinguish between assets of deceased's estate and other entities and used assets of estate. Executor did not breach duties as executor by accepting loans from controlled company or that repaid by another company as liabilities of estate. Executor found to have acted honestly and reasonably based on financial advice obtained with regard to the loans which the executor believed to be liabilities of estate.

**Kramer as executor of will of Money v Evans as Executor of will of Money [2022] WASC 381** Removal of executor and replacement with new administrator. Basis of appointment.

**Baird v Logan [2008] NSWSC 1029** When removing an executor, the court can order indemnity costs against the obdurate executor.

**Mann v Grantham [2004] VSC 156** A legal personal representative may be relieved of the obligations of their office by leave of the Court, and this may arise for a number of reasons, such as old age, irreconcilable differences with other executors.

### Renunciation by Executor

**Re Stiles [1898] P 12** A renouncing executor may be permitted to retract the renunciation and obtain leave of the court to continue so long as there is reason for retracting the renunciation, e.g. if it is the best method of administering the estate.

**Minicozzi v Starr [2019] SASC 55** An executor de son tort may be allowed to renounce executorship.

**Re Mitchell deceased (1941) 42SR (NSW) 19** If one of two or more executors is making a claim against the estate then he or she does not have to renounce probate but could proceed by serving notice of the application on the co-executor.

## Chain of Executorship

**Maddock v Registrar of Titles (Vic) (1915) 19 CLR 681** At common law, where the sole executor, or the last surviving executor, of a deceased's will dies testate without having completed the administration of the head estate, the office of executor devolves upon the executor's own executor – also known as 'chain of representation'; however, upon the death of an administrator, a new administrator should be appointed by way of a grant of administration de bonis non.

## Vesting of Property on Death and Grant of Probate

**Re Cameron 1982 WAR 55** Notice to quit of leased premises to be served on Public Trustee where there had been no grant of representation made.

**Ex parte Callan: Re Smith [1968] 1 NSW 443** The doctrine of relation back under section 8 Administration Act 1903 (WA) is similar to that under section 44 of the now repealed Will Probate and Administration Act 1898 (NSW) in that it does not have an unlimited expansive operation but is confined and limited to the operation of that doctrine at common law.

**Ryan v Davies Bros Ltd (1921) 29 CLR 527** An action commenced by the deceased prior to their death may be continued by the executor, notwithstanding that the action would not otherwise have survived the death of the testator where the deceased left a will naming an executor who accepts the office and obtains a grant of probate. The executor or executors derive title to the property of the deceased from the will and not from the grant of probate.

**Re Doolette (1933) 36 WALR** The property of the testator vests in the executor or administrator upon a grant.

**Re Birch; Ex parte Public Trustee (1951) 51SR (NSW) 345** An executor de son tort who meddles with the estate of a deceased person without authority is liable to be sued by the rightful personal representative, creditors or beneficiaries of the deceased estate for any property received or loss or damage to the estate arising from his or her actions, and has all the liabilities but none of the privileges of an executor; the fact that the estate of the deceased before a grant is deemed to vest in the Public Trustee 'in the same manner and to the same extent as aforesaid, the personal estate and effects vested in the Ordinary' does not mean that the Public Trustee has power, in respect of the estate of a deceased person, before grant of administration, to bring an action to recover property transferred as a result of undue influence or unconscionable conduct.

## Duties and Powers of Executors

**National Trustees Executors and Agency Co of Australasia Ltd v Dwyer (1940) 1** The duty of the legal personal representative is to administer the estate according to law. If the legal personal representative cannot or will not do so, or does not do so properly, or is unsure of how to proceed and wants the guidance and direction of the court administration proceedings are available to beneficiaries, creditors or the legal personal representative. The court has an inherent equitable jurisdiction to oversee and even undertake the administration of the estate.

**Re F [1941] VLR 6** The legal person representative is not obliged to be a partner in deceased's partnership.

**Re Atkinson (deceased) [1971] VR 612** If a legal personal representative, without application to the court, fails to take necessary action to collect estate assets and enforce any right, title or interest of the testator in a particular asset, the legal personal representative must justify that inaction by showing that any proceeding would have been fruitless.

**Dalrymple v Melville (1932) SR (NSW) 596** A legal personal representative is not generally liable for a breach of duty committed by their co-legal personal representative, but if they are at fault in allowing or not taking care to prevent a co-legal personal representative from committing a breach of duty then the legal personal representative will be personally liable for the breach which in fact becomes their own.

**Re Hayes Will Trusts (1971) 2 All ER 341** The legal personal representative must consider beneficiaries as a whole and not favour one over another.

**Re Marsden, Bowden v Layland (1884) 26 Ch D 783** The executor is bound by a most direct trust to deal properly with the assets and to apply them in due course of administration of the estate. They are personally liable in equity for all breaches of the ordinary trusts which are considered in equitable courts to arise from their office. Acquiescence or consent by a beneficiary can be a good defence to a claim for breach of trust.

**Re Chapman [1893] 2 Ch 763** If the will gives a power to retain or convert then executors will not be liable for any loss suffered if the executors act honestly and in what they consider the best interests of the estate in delaying the conversion of the estate.

**Joliffe v Ferra [1973] 2 NSWLR 702** Upon the death of one of several executors of a will or administrators of the estate of a deceased person, the survivor or survivors may exercise all the powers originally vested in the full complement of grantees.

**Sutton v Wahlen [2000] NSWSC 1063** The factors that a court considers where there is more than one executor and they cannot agree on the sale of real estate.

**Boord as Executrix of the Estate of Roman Iwankiw v Iwankiw [2021] WASC 13** Judicial advice.

### **Legacies to Executors**

**In the Will of Steele (1915) 15 SR (NSW) 247** There is a presumption that a legacy given to a person named in the will as executor is conditional upon the named executor acting in that capacity.

**Kane v Radley-Kane (1999)** Executor cannot appropriate non-cash or non-cash equivalent assets to themselves to pay a legacy unless all beneficiaries are sui juris and consent.

### **Passing Executor's Accounts**

**McLaughlan v Prince [2001] WASC 43** The court may exceptionally order that a legal personal representative account on the basis of wilful default which binds the legal personal representative to account not only for what they have actually received but also for what they would have received but for their neglect or wilful default.

**Re Ellis [2015] WASC 77** Passing of executor's accounts and consequences of accounts being taken.

### **Commission**

**Knuckey v Knuckey [2022] WASC 367** Executor's right to commission.

**Bassett v Atherley [2011] WASC 117** An executor's right to commission may be reduced or negated where the will provides a legacy or remuneration in favour of the executor.

### **Judicial Advice**

**Littlely as executor of estate of Littlely v Leslie Raymond Gard [No] 5 [2022] WASC 394** Application by executor for sale of land.

**Simon Dirk Kenworthy-Groen as executor of the estate of William Grove v Grove [2023] WASC 67**

Judicial advice application and whether section 92 Trustees Act (1962) (WA) informs section 45 Administration Act 1903 (WA).

## Trustees

**Re Chapman; Cocks v Chapman [1896] 2 Ch 763** The court will not be quick to fix liability upon a trustee who has committed no more than an error of judgment provided he or she is honest and reasonably competent and acts with reasonable care, prudence and circumspection.

**Re Gillespie deceased [1965] VR 402** If a testator designates with sufficient precision a class of persons or objects to be benefited, he or she may delegate to his or her trustees the selection of the individual person or object within the defined class.

**Bartlett v Barclays Bank Trust Co Ltd (No1) [1980] Ch 515** It is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent person of business would extend towards his or her own affairs bearing in mind that the business of the trustee is looking after the property of others for the short and long term benefit of others for whom the trustee felt morally bound to provide; the standard to be applied is the standard of the reasonable prudent person of business, and it is immaterial that the trustees are not people of business.

**Re York deceased; Stone and Another v Chataway and Another (1997) 4 All ER 907** The liability of trustees and beneficiaries upon a distribution in the face of contingent liabilities.

**Murray v Schreuder [2009] WASC 51** No claim of professional privilege can be made by a trustee against beneficiaries who seek to inspect trust documents.

**Tsaknis as Executor of the Estate of Lilburne (deceased) v Lilburne [2010] WASC 152 Section 52 Trustees Act 1962 (WA)** remains available to trustees to seek directions from the Court in situations where they are uncertain of the appropriate course of action.

**Plan B Trustees Ltd v Parker [2012] WASC 392** Legislative history purpose and operation of section 92 Trustees Act 1962 (WA) relating to applying for judicial advice.

**Thompson v Gamble; Gamble v Thompson [2010] NSWSC 878** Principles relating to the liability of trustees to creditors and beneficiaries.

## Improper Transfers and Equitable Claims

**Savage v Union Bank of Australia Ltd (1906) 3 CLR 1170** (undue influence is the improper use by the ascendant person of the ascendancy for the benefit of himself or another so that the acts of the influenced person are not free and voluntary)

**Dowsett v Reid (1912) 15 CLR 695** (one of the specific categories of relationship where a presumption of undue influence may rise is client and solicitor or legal adviser)

**Spong v Spong [1915] VLR 80; (1914) 18 CLR 544** (weakened mental capacity due to old age or recent bereavement of the donor may raise the presumption of undue influence)

**Linderstam v Barnett (1915) 19 CLR 528** (independent advice may be important but is not essential to rebut the presumption, particularly if it would be unlikely to affect the transaction)

**Equity Trustees Executors & Agency Co Ltd v Haskew [1918] VLR 571** (one of the specific categories of relationship where a presumption of undue influence may rise is patient and medical adviser or medical assistant)

**Haskew v Equity Trustees, Executors and Agency Co Ltd (1919) 27 CLR 231** (independent advice may be important but is not essential to rebut the presumption of undue influence)

**Harris v Jenkins (1922) 31 CLR 341** (even if a relationship of confidence is proved, the influence must be undue before a transaction will be set aside; the presumption of undue influence does not apply to gifts of small value reasonably to be explained by friendship, gratitude or some similar consideration)

**Johnson v Buttress (1936) 56 CLR 113** (this case is an example of where actual undue influence was alleged, rather than being a category of case where the relationship between the parties raised a presumption of undue influence; however, a presumption of undue influence may arise from the particular circumstances in which the parties find themselves, where the relationship is such that the donee is in a position to exercise dominion over the donor by reason of the trust and confidence reposed by the donor in the donee. weakened mental capacity of the donor due to old age may raise the presumption; habitual dependence on others may raise the presumption; want of business experience may raise the presumption; the presumption of undue influence arises equally with contracts as with gifts but becomes easier to rebut the more adequate the consideration; the presumption of undue influence can be rebutted by showing that the transferor's act is the result of the free exercise of an independent will; independent advice may be important but is not essential to rebut the presumption, particularly if the element of gift is not large)

**Kerr v West Australian Trustee Executor & Agency Co Ltd (1937) 39 WALR 34** (one of the specific categories of relationship where a presumption of undue influence may rise is child and parent)

**Brunker v Perpetual Trustee Co (Ltd) (1937) 57 CLR 555** (the consent of a party to an inter vivos transaction may be vitiated by such influence from another party as to deprive the weaker party of the free use of his or her judgment; if so, equity will rescind the transaction, order restitution of property which has passed and, if necessary, follow it into the hands of innocent third parties; a presumption of undue influence may arise from the fact that a gift was made on the donor's death-bed to the person caring for him or her)

**Yerkey v Jones (1939) 63 CLR 649** (in all cases where a presumption of undue influence arises, it is unnatural to expect one party to give property to the other - the character of the relationship does not explain the transaction)

**Parbs v Garrett [1941] SASR 1** (alcoholism of the donor may raise the presumption of undue influence)

**Bank of New South Wales v Rogers (1941) 65 CLR 42** (one of the specific categories of relationship where a presumption of undue influence may rise is beneficiary and express trustee; independent advice may be important but is not essential to rebut the presumption, particularly if the transaction is simple in character)

**Blomley v Ryan (1956) 99 CLR 362** (the presumption of undue influence may arise and the transaction may be set aside even if full consideration was provided; the transferor acting independently may have preferred to retain the property sold)

**Bester v Perpetual Trustee Co Ltd [1970] 3 NSW 30** (one of the specific categories of relationship where a presumption of undue influence may rise is ward and guardian)

**Union Fidelity Trustee Co of Australia Ltd v Gibson [1971] VR 573** (undue influence may exist even though the transferor is perfectly competent to understand and intend what was done; one of the specific categories of relationship where a presumption of undue influence may rise is penitent and religious adviser; independent advice may be important but is not essential to rebut the presumption, particularly if the parties are not in very unequal positions.



**Whereat v Duff [1972] 2 NSWLR 14** (a presumption of undue influence may arise from the particular circumstances in which the parties find themselves, where the relationship is such that the donee is in a position to exercise dominion over the donor by reason of the trust and confidence reposed by the donor in the donee)

**Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447** (equity has jurisdiction to set aside transactions, including gifts, procured by unconscionable conduct; such unconscionable conduct ordinarily arises from the conjoining of three factors – (1) the relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; (2) the donee's unconscionable exploitation of the donor's disadvantage; and (3) the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interests; unconscionable conduct bears some resemblance to the doctrine of undue influence but there are differences between the two; in undue influence, the will of the innocent party is not independent and voluntary because it is overborne by the influence of the stronger party; with unconscionable conduct, the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he or she is placed and of the other party unconscientiously taking advantage of that position; unconscionable conduct looks at the conduct of the stronger party in attempting to enforce or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that the stronger party should do so; once the weaker party has demonstrated special disadvantage and knowledge on the part of the stronger party, the onus then shifts to the stronger party, who may escape liability by showing that the transaction was fair, just and reasonable; the adequacy of consideration is one relevant factor in showing that the transaction was fair, just and reasonable; it is not, however, essential to show that the transaction has been for inadequate consideration)

**Louth v Diprose (1992) 175 CLR 621** (it may no longer be right to presume that there has been undue influence where a woman has made a substantial gift to her fiancé; there is not in the generality of cases a dependence of fiancée on fiancé which would justify the recognition of a universal presumption)

**Australian Competition and Consumer Commission v Radio Rentals Ltd (2005) 146 FCR 292** (there is a knowledge requirement when proving unconscionable conduct; it is enough that the stronger party knew or ought to have known of the special disadvantage of the weaker party or if the disability was sufficiently evident for the stronger party to make it prima facie unfair or unconscientious that he or she procure or accept the weaker party's assent to the impugned transactions in the circumstances in which he or she procured or accepted it; the question is whether a reasonable person in the stronger party's position would suspect from what is evident that the state of affairs giving rise to the special disability exist; constructive notice of a special disability is insufficient)

**Wittman v Wittman [2006] QSC 116** (ill health or mental disorder may raise the presumption of undue influence)

**Lee v Chai [2013] QSC 136** (for a relationship to be treated as presumptively one of influence, it should go beyond one of mere confidence and influence, to one involving dominion or ascendancy by one over the will of the other, and correlatively dependence and subjection on the part of the other')

**Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392** (special disadvantage is an element of undue influence - equity exercises this jurisdiction whenever one party to a transaction is at a special disadvantage in dealing with the other where illness, ignorance, inexperience, impaired faculties, financial need or other circumstances, or age, sex, lack of assistance or explanation (where assistance or explanation is necessary) or lack of knowledge of something material to making the judgment affect the ability of the weaker party to protect his or her own interests and the other party unconscionably takes advantage of the opportunity; equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind;

heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose; the principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction; inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned)

## Claims Against Attorneys Post Death

**Watson & Ors v Watson [2002] NSWSC 919** This was a decision of Berecny AM in the Supreme Court of New South Wales Equity Division. It involved a family provision claim brought by three of the children of the deceased against his estate. A central issue, however, was what the estate was comprised of and in particular whether property transferred by the deceased's son (the defendant) to himself using an enduring power of attorney granted to him by his father, was held by him on trust for the estate. The son had used his power as enduring attorney to transfer his father's house into his own name for the consideration of \$1.00. As a result, when the father died, his estate was only worth \$44,500. The claimants sought a declaration that their father's house was held by the brother on trust for the father's estate. They argued that the brother's conveyance of the house to himself for \$1.00 was not to the benefit of the father. Against that, the brother argued that the conveyance of the house was effected with his father's consent and with his full knowledge and approval.[1] It was clear by the terms of the father's Will that he had contemplated that his house would form part of his estate when he died. In particular, by his Will he granted to his children a right to reside in the house for so long as they desired. On the last of the children vacating the house, it was to be sold and the proceeds divided equally amongst the four children. At [48], Berecny AM noted that the granting of the power of attorney placed the son (donee) in a fiduciary duty in relation to the father (donor) and required that he accord priority to the interests of the father where there was a conflict between the interests of the two. At [49], Berecny AM said: "The use of the power of attorney by the donee contrary of the known wishes and directions of a donor is a breach of trust – see *The Margaret Mitchell* 166 ER 1174 at 1199. In *Powell v Thompson* [1991] 1 NZLR 597 at 605 per Thomas J, his Honour said: 'The powers of attorney are specifically directed at the management of the principal's affairs: it is not open to attorneys to either obtain an advantage for themselves or to act in a way which is contrary to the interests of their principals.'" Berecny AM noted that the enduring power of attorney was signed five days before the father's last Will in which the father had clearly expressed his intention that his daughter Suzanne and the defendant, his son, should have a right to occupy the family home on certain conditions and that on their vacation of the property, the house should be sold and the net sale proceeds divided equally between the four children. It was clear, then, that any exercise by the son of his authority under the power of attorney was to be done in a manner which was not inconsistent with the known intentions of his father as expressed in the Will or contrary to the interests of the father. Berecny AM held that the act of the son in transferring the family home to himself in exercise of his power as attorney was an act which was prima facie inconsistent with the interests of his father. There was no evidence that the father was even aware that his son had transferred the family home into his name. In taking the action he did, the son ignored the fact that there was a conflict of interest between his father and himself and that such action amounted to an abuse of his position as attorney. The son made a profit from the transaction carried out by him as attorney and by that transaction he defeated the testamentary intention of his father.[2] In the event, the Court declared that the son held the family home on trust for the father's estate and ordered him to reconvey the family home to the father's estate. Accordingly, it is part of a donee's fiduciary obligation that they must not profit from their position as attorney. If a donee breaches this fiduciary obligation, the donee is liable to account to the donor and this is illustrated in the case of *Klotz & Klotz v Neubauer & Klotz* [2001] SASC 454.

**Klotz & Klotz v Neubauer & Klotz [2001] SASC 454** In this case, the plaintiffs sought orders requiring the defendants to account for their conduct as attorneys of the late Franz Klotz. The deceased had four children

namely, John, Margaret, Steve and George. John and Steve were the plaintiffs in this action and Margaret and George were the defendants. In 1989, Franz Klotz and his wife entered into an agreement with Margaret and her husband to the effect that, in consideration of Franz and his wife paying Margaret and her husband the sum of \$40,000, Margaret and her husband would construct extensions to their house in Adelaide (Margaret's Extensions) and permit Franz and his wife to reside in those extensions for the rest of their lives.[3] Margaret's Extensions were duly constructed and Franz and his wife moved into the extensions later in 1989. Franz's wife died in 1990. After that, Franz moved out of Margaret's Extensions because, due to their proximity to Margaret's house, he felt he was unable to enjoy privacy and peace and quiet. Franz stayed briefly with his son, Steven, before relocating into hostel accommodation. Franz stayed at the hostel accommodation from 20 November 1990 up until 17 October 1992 when Margaret and George removed him from that accommodation. Margaret and George then arranged for Franz to be examined by a clinical psychologist, who reported to a solicitor acting for Margaret and George to the effect that Franz had testamentary capacity. Franz then executed a new Will in which he appointed Margaret and George as executors and divided his estate equally between three of his four children, namely John, Margaret and George excluding his fourth child Steve. On the same day Franz executed a power of attorney appointing Margaret and George as his attorneys. After October 1992, Franz resided at different times at two homes for aged persons in Adelaide. Later, Margaret and George arranged for Franz to be moved to a nursing home in Perth. Steve contended that he didn't know where Franz was during this time and that Margaret would not allow him to see his father. In April 1996, Steve applied to the Guardianship and Administration Board of Western Australia for an order that the Public Trustee be appointed as Franz's administrator. The Board granted the application and directed the Public Trustee to apply for an order revoking the enduring power of attorney under which Franz appointed Margaret and George as his attorneys.[4] On 4 November 1996 Steve arranged for Franz to be returned to South Australia, where he lived until his death on 19 April 1997. The proceedings before the court were proceedings brought by Steve and his brother John calling for Margaret and George to account for the expenses incurred by them when acting as Franz's attorneys. Steve and John challenged a number of expense items. All items in dispute, bar one, were resolved by compromise and as part of that compromise, Margaret and George agreed to repay some \$26,000 to the estate. The remaining item in dispute arose from the moneys expended by Margaret and George as Franz's attorneys on fees for Franz's accommodation at rest homes over the period 17 October 1992 to 4 November 1996. The argument was that these costs should not have been necessary as Franz had an ongoing right to reside, or to resume residence, in Margaret's Extensions. In accepting this argument, Debelle J found that, although there was evidence to explain why Franz moved out of Margaret's Extensions in November 1990, there was no evidence to explain why, after 17 October 1992, when Margaret and George removed him from the hostel accommodation Steve had organised for him, he could not then have resumed occupation of the extensions (which right he had already paid for). Debelle J noted that, in their role as attorneys, Margaret and George owed fiduciary duties to Franz, including the duty not to profit from Franz's estate and, if they did profit, to account for that profit.[5] Debelle J noted at [35] that Margaret in particular had a conflict of duty and interest, arising from the following circumstances: Franz had paid \$40,000 to Margaret and her husband to provide accommodation for him (in Margaret's Extensions); that payment enabled Margaret and her husband to create an asset which they could use and enjoy when Franz no longer lived at Margaret's Extensions; it was clear that Margaret had a duty to permit Franz to resume his residence in Margaret's Extensions and not to do anything to prevent his quiet and peaceful occupation of those extensions; instead, however, Margaret and George incurred fees payable from Franz's estate to accommodate Franz at rest homes, when he could have resumed residence in Margaret's Extensions at no further cost. Debelle J found that Margaret and George had not proved why it was necessary for Franz to reside in rest homes rather than in Margaret's Extensions. At [36], Debelle J held: "Mrs Neubauer [Margaret] has profited from being able to use the extensions at her house by accommodating her father elsewhere. In the absence of any explanation, the defendants must account for the profit." Accordingly, Margaret and George were ordered to

refund to Franz's estate the accommodation costs incurred by them as Franz's attorneys over the period 17 October 1992 to 4 November 1996.

## **Intestacy**

**In re Plaister: Perpetual Trustee Company v Crawshaw (1934) 34 S.R. (N.S.W.) 547.**

**Grainger v Public Trustee in and for the State of Western Australia. (SC(WA) Steytler J, CIV 1127/95, 6 December 1995, unreported BC9502708).**

**Re Estate of Frederick Raymond Reeve Perriman (DEC) [2003] WASC 192 PER Barker J.**

## **Litigation**

### **Administration Actions (Directions/Judicial Review)**

**Rules of the Supreme Court 1971(WA), Order 58 Rule 2 Administration Act 1903 (WA), s. 45**

**Trustees Act 1962 (WA), s.92**

**Australian Legion of Ex-Servicemen and Women [2021] NSWSC 149, [44] to [45]**

**Blatchford v Laine [2018] WASC 207**

**In re Atkinson (decd) [1971] Vic Rp 73; [1971] VR 612, at p 615**

**In re Beddoe; Downes v Cottam [1893] 1 Ch 547\***

**Macedonian Orthodox Community Church v His Eminence Petar & Anor (2008) 237 CLR 66, 84; [2008] HCA 42;**

**Pacella v Sherborne [2009] WASC 58, [9]\***

**Plan B Trustees v Parker [No 2] [2013] WASC 216, [42] to [52]\***

**Salmi v Sinivuori [2008] QSC 321, [15]**

**Tsaknis v Lilburne [2010] WASC 152, [38]\***

**Wendt & Ors v Orr & Anor [2004] WASC 28, [109]**

**Wood v Wood [No. 4] [2014] WASC 393, [103]**

**Kenworthy Groen v Grove [2023] WASC 87\***

### **Probate Caveats**

**Administration Act 1903, ss 63, 64**

**Non Contentious Probate Rules 1967, rr 3, 5, 6, 33**

**Heydon v Bond [2003] WASC 96**

**McHugh Pettit v Waters-Pettit [2024] WASC 328, [17]**

**De Bruin v De Bruin [2004] WASC 20**

**Pearse v Michael & Anor [2002] WASC 135**

**Brockhurst v Andre Das [2023] WASC 226**

**Richardson v Devine [No. 2] [2018] WASC 59**

### **Proportionality and costs**

**Miller v Taylor [2018] WASC 75**

**Palmer v McGowan (No.6) [2022] FCA 921, [33]**

### **Construction of Wills**

**s. 28 Wills Act 1970.**

**Rules of the Supreme Court 1971 (WA), Order 58, Rule 10**

**Fell v Fell [1922] HCA 55; (1922) 31 CLR 268, 273- 276, 281- 282**

**Perrin v Morgan (1943] AC 399,420**

**Lemon v Mead [2017] WASCA 215, at [151]**

**Walsh v Sloan [2019] WASCA 107, [24]**

**Sidle v Queensland Trustees Ltd [1915] HCA 48.**

**Parnell v Hinkley [2007] WASC 102, [14].**

**Muir v Winn [2009] NSWSC 857, [3]-[4]**

**Koh v Samuel Conrad Buckeridge as executor of Leonard Walter Buckeridge (No. 2) [2012] WASC 14**

**Johnston v Green [2022] WASC 393\***

### **Disposal of Body/ Memorials**

*No one owns the body of a deceased*

**Williams v Willaims (1882) 20 Ch D 659, at 653**

*Right to arrange burial/funeral*

**Donaghy v Carrol (1910) 11 SR (NSW) 9.** The legal personal representative has a right to possession of the body of the deceased and a duty to arrange for burial or cremation of the deceased.

**Britt v Office of the State Coroner [2022] WASCA 75\***

**Smith v Tamworth City Council (1997) 41 NSWLR 680.** The principles to be taken into account with regard to burial or disposal of the body of the deceased.

**Reece v Little [2009] WASC 30**

**Thorne v McGuire [1999] WASC 137**

**Burrows v Cramley [2002] WASC 47**

**Bertani v Bertani [2017] WASC 78** (injunction sought to restrain burial taking place)

Pryor v Huata [2024] WASC 13

Hart v Cooper [2023] WASC 132\*

## **Equitable Claims Generally**

### Resulting Trusts

Calverley v Green [1984] HCA 81; (1984) 155 CLR 242

Anderson v McPherson [2012] WASC 19

### Constructive Trusts

#### *(a) Common Intention*

Allen v Snyder [1977] 2 NSWLR 685 at 690

Green v Green (1979) 17 NSWLR 343

Oates v Blackburne & Anor [1999] WASC 112

#### *(b) Joint Endeavour*

Llloyd v Tedesco [2002] WASCA 63

Muschinski v Dodds [1985] HCA 78; (1985) 160 CLR 583

Baumgartner v Baumgartner [1987] HCA 59; (1984) 164 CLR 137 at 148

West v Mead [2003] NSWSC 161

#### *(c) Equitable Estoppel*

Walton Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387 at 423.

The Commonwealth of Australia v Verwayen (1990) 170 CLR 394 at 497.

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10 at [6].

Flinn v Flinn [1999] VSCA 109.

DeLaforce v Simpson-Cook [2010] NSWCA

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19 at [2].

Doueihi v Construction Technologies Australia Pty Ltd (2016) 92 NSWLR 247; [2016] NSWCA 105 at [132].

Browne v Browne [No 2] [2017] WASC 375; Browne v Browne [2019] WASCA 1

Q v E Co (2020) 383 ALR 469; [2020] NSWCA 220 at [15]-[16].

Rowe v The Roman Catholic Archbishop of Perth (No 2) [2022] WASCA 28 at [29].

Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd (2016) 260 CLR 1; [2016] HCA 26 at [35]

Currie v Currie (No 2) [2019] WASCA 2

Rodda v Rodda [2015] SASC 95

Kramer v Stone [2024] HCA 48.

## Citations

**Pontifex v Kittelty [2013] WASC 296, [18]** (Consequence of)

**Carr v Larussa Pastoral Holdings Pty Ltd [2015] WASC 300**

## Limitation Periods

Limitation Act (WA) 2005

Limitation Act (WA) 1932

**Dewar v Ollier [2020] WASCA 25, at [162] to [169]** (Time to commence claims for breach of trust)

*Rule in Cherry v Boulton*

**Cherry v Boulton (1839) 4 My & Cr 442; 41 ER 171**

**Gray v Guardian Trust Australia [2002] NSWSC 1218, [108]**

**Re Akerman; Akerman v Akerman [1891] UKLawRpCh 118; [1891] 3 Ch 212**

**Re Peruvian Railway Construction Co. Ltd [1915] 2 Ch 144, at 150**

**HBSY Pty Ltd v Lewis [2022] NSWSC 481, [58]**

## Missing Persons - Presumption of death

**Lashko v Lashko [2011] WASC 214**

**Re Application for Grant of Presumption of Death; Ex Parte Craig Charles Park [2022] WASC 230**

## Compromise - Order 70 Rule 10

Rules of the Supreme Court 1971, Order 70 Rules 10 and 11

**Sosa v Carter [1978] WAR 123;**

**Sergi v Sergi [2012] WASC 18.**

## Statutory Will applications

Wills Act 1970 (WA) s.40, s.41, s.42, s.43

**Supreme Court Consolidated Practice Directions 2009, 9.3.1**

**In the Will of Doris May Frances Davies (Unreported, Supreme Court of Western Australia, CIV 3332 of 2011)**

**Re Fenwick [2009] NSWSC 530 at [127],**

**R v J [2017] WASC 53 at [16], [19], [20], [31] and [58]**

**Stasinowsky v Shack [2013] WASC 439**

**Britton v Britton [2023] WASC 352**

**Doughan v Straguszi & Ors [2013] QSC 295**

**Re Matsis, Charalambous v Charalambous & Ors [2012] QSC 349**

## **Removal of Trustees and Executors**

### By revocation of grant

Order 73 Rules 1(2) and 2

### Executors

**Bates v Messner (1967) 67 SR (NSW) 187**

**Porteous v Rhinehart [1998] WASC 270**

**Cardaci v Cardaci [No.5] [2021] WASC 331, [743]\***

**Woodley v Woodley [No 2] [2017] WASC 94, [46]\***

**The Estate of Erminia Agnes Rogers v Rogers [2009] WASC 358, [32] - [33]**

**Mavrideros v Mack [1998] NSWSC 583\***

Relinquishment of trust (s. 20 Administration Act 1903)

**Kramer v Evans [2022] WASC 381\***

### Administrators

**Grey v Youngson [2006] WASC 123**

### Trustees

**Miller v Cameron & Ors (1936) 54 CLR 572 at 580 - 581**

**Estate of Gibbs [2004] WASC 132**

## **Solemn form proceedings**

### General

**Estate of Kirs (1990) 55 SASR 61**

**Re Levy (dec'd) [No2] (1957) VLR 662;**

**Hoare v Reyburn [2010] WASC 301.**

**Barry v Butlin [1838] Eng R 1056**

**The Public Trustee v Royal Perth Hospital Medical Research Foundation Inc [2014] WASC 17 at [168]**

### Proving Capacity

**Timbury v Coffee [1941] HCA 22,**

**Bull v Fulton [1942] HCA 13**

**Worth v Clasohm (1952) 86 CLR 439**

**Bailey v Bailey [1924] HCA 21 ; (1924) 34 CLR 558, at 570–572**

**Smart v Power [2019] WASCA 106\***



**Attwell v Morgan [2019] WASC 182\***

**Public Trustee v Alzheimer's Australia WA Ltd (No 2) [2014] WASC 337, [37].**

*Suspicious Circumstances*

**Nock v Austin [1918] HCA 73; (1918) 25 CLR 519**

*Undue Influence*

**Wingrove v Wingrove (1885) LR 11 PD 81, at 82 -83**

**Nicholson & Ors v Knaggs & Ors [2009] VSC 64**

*Putting propounder to proof*

Order 73 Rule 15

*Compromising a probate action*

**Rules of the Supreme Court 1971(WA), Order 73 Rules 18 and 19**

**Wheatley v Edgar [2003] WASC 118 at [20]**

**Murphy v Lewis [2021] WASC 251\***

**Estate Kouvakas; Lucas v Konakas [2014] NSWSC 786, [251], [262] to [263]**

**Re Will & Estate of Trinidad (Dec'd) WA Supreme Court Library No 980504**

*Contest over who should be appointed (receive grant)*

**In the Goods of Loveday [1900] P 154, at 156**

**Hart v Hart [2010] WASC 329.**

**Bourdales v Carroll; Estate of Holbrook [2007] NSWSC 1057, [6]**

**Estate of O'Loughlin [2013] SASC 20, [18] to [22]**

### **Rectification of Wills**

**Willa Act 1970, ss 49 and 50**

**Supreme Court Consolidated Practice Directions 2009, 9.3.1**

**Josef Bernhard Nies (Dec'd) [2014] SASC 93; [28] to [29]**

**Downes and Paust v Paust [2020] WASC 351**

**Douglas v Douglas [2017] WASC 184**

**Lauder v Lauder [2018] WASC 91**

**Shirdon v Cox [2019] WASC 433**

## Guardianship and Administration and Advance Care Planning

**Brightwater Care Group (Inc) v Rossiter [2009] WASC 229** (legal obligations of medical service provider for care of mentally competent patient)

**Re CY; ex parte PY [2011] WASAT 156** (enduring power of attorney - recognition of enduring power of attorney created in another jurisdiction - whether the power of attorney corresponds sufficiently in form and effect to a power created under the Western Australian legislation)

**S v State Administrative Tribunal (WA) (No 2) [2012] WASC 306** (appropriateness of appointment of guardians by WASAT over person with mental health and intellectual disability; judicial review of WASAT decision, procedural fairness grounds raised, decision of WASAT set aside)

**SM [2019] WASAT 22** (WASAT determined that it cannot confer on an administrator a power to make or confirm a BDBN of a represented person)

**Re MH [2022] WASC 74** (discussion of senile squalor syndrome; tribunal's decision of incapacity and appointment of guardian based on that rather than on dementia)

**AB and CD (2024) WASAT 6** In this case the meaning of "ordinarily resident" under the Voluntary Assisted Dying Act 2019 WA was in dispute and the tribunal gave a statutory interpretation of the phrase in the context of the legislation

**FY [2019] WASAT 118** Case on the meaning of the term "mental disability" within the G&A Act. Finding that the term is inclusive and does not have to be permanent.

**NB [2023] WASAT 88.** Discussion of different types of evidence – medical evidence, screening tools and real-world actions- in determining that despite the person's intelligence and only mild cognitive impairment- her demonstrated and continued susceptibility to scammers made the appointment of an administrator necessary.

**C [2024] WASAT 50** Case on the ability to make reasonable judgments about specific medical decisions.

The person was under both a guardianship and an administration order, but the full bench determined that did not mean she lacked the capacity to make reasonable judgements as to whether a particular procedure should be performed on her

**VA [2024] WASAT 68** Discussion on the need for appointment of an administrator and whether less restrictive options- informal assistance, EPA, EPG, would be more appropriate. Existing informal arrangements no longer worked, and family members appointed as administrator and guardian.

**SMM [2020] WASAT 85.** Case confirming that under an unconditional Enduring Power of Attorney the donor of the power has parallel authority with the attorney so long as they retain capacity unlike a conditional EPA when the attorney only has power when a declaration is made by the Tribunal under Sec 106 of the G& A Act.

**QU [2024] WASAT 92.** Case detailing the obligations under sec 51 of the G& A Act of a guardian appointed under an Enduring Power of Guardianship to act in the best interests of the represented person. in the instant case the guardian was acting as case guardian for the represented person in Family Court proceedings and in the view of the Member did so to the detriment of the represented person. The EPG was revoked.

**W v S [2025] WASCA 21.** This decision deals with the question of whether a person engaging in court proceedings has a disability which requires the appointment of a case guardian (which can be done in the Family Court) or a next friend or litigation guardian under the Public Trustee Act. In the instant case it was determined that the appellant was incapable of managing his affairs to conduct the litigation. However, due to conflict problems the Public Trustee could not be appointed and the Court made orders that the Public Advocate should investigate as to whether an application should be made to SAT for a guardian or administrator to be appointed to act as the appellant's next friend

**PNQ and LPQ [2015] WASAT 5.** This case deals with the Tribunal's power to award costs under sec 16(4) of the G & A Act and how it exercises its discretion.

**QR [2024]WASAT 2** This decision provides a summary of the cases dealing with the rights of persons who have a proper interest to apply under sec 109 of the G & A Act to the Tribunal for orders requiring the donee of the enduring power of attorney to file with SAT records and accounts of all dealings and transactions made by the attorney under the power, and to have those documents audited. The Member noted that the powers of the Tribunal are limited and any remedy or cause of action that might arise from the records or accounts, such as a breach of fiduciary duty, must be pursued another jurisdiction.

## Real Property

**Wiscot's Case (1599) 2 Co Rep 60b; 76 ER 555** (where one joint tenant acquires a further interest in the land after the creation of the joint tenancy and the interest is different from that already held, the joint tenancy is severed because the two interests merge and unity of time is destroyed)

**Oates v Jackson (1742) 2 Stra 1172; 93 ER 1102** (as all joint tenants take a vested interest at the same time and by virtue of the same event, where the attainment of a vested interest depends on the individual fulfilment by each of the potential grantees of a contingency that cannot occur at the one time (such as attaining a particular age) then generally their interests cannot be held as joint tenants – one exception to this general rule is where the interests are created by Will)

**Swift v Roberts (1764) 3 Burr 1488 at 1496-7; 97 ER 941 at 946** (although a joint tenant may dispose of the interest held in joint tenancy during life, because of the right of survivorship, it is not possible to dispose of that interest by testamentary disposition)

**Campbell v Campbell (1792) 4 Bro CC 15; 29 ER 755** (where two or more people hold land as co-owners and the necessary conditions for a joint tenancy have been met (the four unities), then in the absence of any indication to the contrary, the parties would be deemed at law to hold as joint tenants)

**Wilkinson v Haygarth (1847) 12 QB 837; 116 ER 1085** (trespass will lie between co-owners if one has ousted another; where this has occurred, the excluded co-owner may be entitled to mesne profits)

**Kennedy v De Trafford [1897] AC 180** (co-owners per se are not in a fiduciary relationship and do not owe fiduciary duties to each other; at common law, a co-owner who takes a disproportionate share of the rents and profits of the land is not accountable to the other co-owner; an action against one party for taking a disproportionate share of rents and profits will only be sustained if they had agreed to a particular division)

**Re Woolley [1903] 2 Ch 206** (equity presumes that parties hold property as tenants in common unless there is evidence of an intention to the contrary)

**McCormick v McCormick [1921] NZLR 384** (generally a co-owner in sole occupation is not liable at law or in equity to pay occupation rent to the non-occupying co-owners, however there are exceptions to this)

general rule, one being where one co-owner occupies and uses the property pursuant to an agreement with the other owner)

**Wright v Gibbons (1949) 78 CLR 313 at 323** (each joint tenant is jointly entitled to the whole estate so that there is a unity of the rights of joint tenants; there are four aspects of this unity and each is essential to the existence of a joint tenancy – unity of possession, unity of interest, unity of time and unity of title; the right of survivorship was explained)

**Re North [1952] Ch 397; 1 All ER 609** (words of severance are any words in the grant which indicate that the co-owners are to have divided, distinct or individual shares; the underlying concept is that, although the land is not physically divided, and although unity of possession exists, the shares or interests in the land are divided; hence any indication that the interests are unequal indicates a tenancy in common, not merely because the proportions are unequal but from the mere fact of there being proportions)

**Spence v Cmr of Taxation (Cth) (1967) 121 CLR 273 at 280** (persons may hold the legal title to property as joint tenants but in equity hold their interests as tenants in common)

**De Campo Holdings Pty Ltd v Cianciullo [1977] WAR 56** (in Western Australia, the court may order a statutory trust for sale on an application for partition; however, sale is an alternative to partition and can only be ordered if requested by a party; this means that a co-owner has a right to partition upon application unless another co-owner requests a sale; in the absence of such a request, there is no onus on the co-owner applying for partition to satisfy the court that partition is better than sale)

**In the Marriage of Slater (1979) 24 ALR 501** (severance of joint tenancy by alienation can be effected by one joint tenant acting independently without the knowledge or consent of any of the other co-owners)

**Catanzariti v Whitehouse (1981) 55 FLR 426 at 429** (the unity of possession is essential to all forms of co-ownership – each co-owner is entitled to possession and enjoyment of the whole of the land and therefore cannot exclude the other co-owner from any part of the land)

**Patzak v Lytton [1984] WAR 353** (a joint tenant may sever the joint tenancy by transferring their interest to themselves, but only if the formalities to complete the conveyance or transfer at law are observed, for example where a transfer of Torrens title land has been registered)

**Calverley v Green (1984) 155 CLR 242** (where co-owners contribute the purchase money in unequal proportions, they hold in equity in proportion to their contribution to the purchase price; however, this presumption will not apply where the beneficial interests of the parties are declared in the conveyance)

**Malayan Credit Ltd v Jack Chia MPH Ltd [1986] 1 AC 549** (persons who are business partners, whether formally or informally, will hold property of which they are co-owners as tenants in common in equity although they may be joint tenants at law)

**Delehunt v Carmody (1986) 161 CLR 464** (equity follows the law and recognises a joint tenancy where the parties have contributed equally to the purchase of the property)

**Re Francis; Ex parte Official Trustee (1988) 19 FCR 149** (under section 58 of the Bankruptcy Act 1966 (Cth), a joint tenancy of Torrens title land is severed in equity upon the bankruptcy of one joint tenant, such that the registered proprietors hold their interest on trust for the trustee in bankruptcy and the solvent joint tenant; this is because the unity of title is destroyed as the trustee and the solvent joint tenant did not acquire their interests under the same instrument)

**Green v Green (1989) 17 NSWLR 343** (whether the relationship is a joint tenancy or tenancy in common will ultimately depend on the intention of the grantor)

**Corin v Patton (1990) 169 CLR 540** (severance of a joint tenancy may occur by mutual agreement between the parties in writing, by any course of dealing sufficient to indicate that the parties treated their interests as constituting a tenancy in common or by the act of any of the joint tenants operating on their individual share; a joint tenancy may be severed by the gift by one joint tenant of his or her interest to a third party; the conveyance of a joint tenant's interest will sever the joint tenancy; a declaration of intention to sever the joint tenancy by one joint tenant is not effective to do so)

**Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635 at 643** (with tenancy in common, each co-owner is regarded as having a separate interest in the property, and as being entitled to a distinct or undivided share; of the four unities, only unity of possession is necessary for a tenancy in common)

**Miller v Dudman [2002] WASC 99** (s 126 of the Property Law Act 1969 (WA) and resulting trusts)

**Bombara v Bombara [2010] WASC 314** (conduct of a sale under s 126 of the Property Law Act 1969 (WA))

**Council Club Pty Ltd v Paradise Island Pty Ltd [2020] WASC 218** (a unit holder in a unit trust can have a caveatable interest)

**H v D [2012] WASC 291** (s 126 of the Property Law Act 1969 (WA))

**Corlett v Field [2018] WASC 243** (s 126 of the Property Law Act 1969 (WA), adverse possession, entitlement to proceeds of sale of land)

**Trainor v Trainor [2021] WASC 40** (s 126 of the Property Law Act 1969 (WA))

## Superannuation

**Compton v Commissioner of Taxation (Cth) [1966] HCA 1; (1966) 116 CLR 233** - This case addressed the scope of the "sole purpose test" in superannuation law, clarifying that it was not intended to proscribe every related party transaction.

**Driclad Pty Limited v Commissioner of Taxation (Cth) [1968] HCA 91; (1968) 121 CLR 45** - This case also dealt with the "sole purpose test," similarly concluding that not every related party transaction is prohibited under this test.

**Collins v AMP Superannuation Ltd (1997) 75 FCR 565** - This case ruled on the standing to challenge a death benefit decision, finding that complainants need some proprietary interest in or entitlement to the death benefit.

**Malek v FCT (1999) 42 ATR 1203; 99 ATC 2294; [1999] AATA 678** - This case defined what it means to be "financially dependent" within the context of superannuation law.

**Attorney-General (Cth) v Breckler (1999) 197 CLR 83; [1999] HCA 28** - It was determined that trustees of a superannuation fund are obliged to comply with the requirements of the Superannuation Industry (Supervision) Act 1993, including adhering to determinations by the Superannuation Complaints Tribunal.

**Retail Employees Superannuation Pty Ltd v Crocker (2001) 48 ATR 359** - This case clarified that the Tribunal's role is not to perform a judicial review but to decide if a trustee's or insurer's decision was unfair or unreasonable.

**Davis v Rio Tinto Staff Superannuation Fund Pty Ltd (2002) 118 FCR 170** - The court ruled that a party could appeal a Tribunal's decision on a question of law, emphasizing that factual findings must be based on evidence.

**Lock v Federal Commissioner of Taxation [2003] FCA 309** - This case defined what it means to "acquire" an asset in the context of superannuation, including passive receipt such as contributions.

**Hourn v Farm Plan Pty Ltd [2003] FCA 1122** - It was decided that the Tribunal could request original documents for further inquiry but was not mandated to conduct an inquiry.

**Asgard Capital Management Ltd v Maher [2003] FCAFC 156** - The court addressed when superannuation benefits must be paid and when a trustee can follow a member's direction to pay benefits to a third party.

**Rhodes v Tower Australia Superannuation Ltd (as trustee for Tower Superannuation Fund) [2004] FCA 812** - The court stated that it could hear appeals from the Tribunal and make appropriate orders but could not award costs against a non-defending complainant.

**Ray v Superannuation Complaints Tribunal (2004) 138 FCR 548; [2004] FCA 1120** - This case determined the scope of an appeal from the Tribunal's decisions, specifically that only questions of law could be appealed.

**Rich v Australian Securities & Investments Commission (2004) 220 CLR 129** - It was found that the Commissioner of Taxation and the Federal Court have the authority to disqualify individuals from managing superannuation entities based on misconduct.

**LSWA Wills and Estates 2004 10** - Specific details on this case are not provided but it likely involves rulings relevant to wills and estates in superannuation contexts.

**HEST Australia Ltd v Sykley (2005) 147 FCR 248** - The Tribunal's authority to handle complaints was discussed, particularly when court proceedings on the same subject matter have commenced but are not yet resolved.

**Cameron Brae Pty Ltd v Commissioner of Taxation (2007) 161 FCR 468** - This case explored the definitions of "superannuation fund," "contribution," and "benefit" within superannuation law.

**Donovan v Donovan [2009] QSC 26** - The court addressed the formal requirements for binding death benefit nominations and their compliance with relevant rules and legislation.

**Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd [2011] NSWCA 204** - This ruling clarified the duties of trustees and directors under the Superannuation Industry (Supervision) Act covenants.

**Wooster v Morris [2013] VSC 594** - This case dealt with the validity of binding death benefit nominations.

**Ioppolo & Hesford v Conti [2013] WASC 389** - Addressed the validity of binding death benefit nominations in SMSFs, particularly when no valid nomination exists at the time of death.

**McIntosh v McIntosh [2014] QSC 99** - Examined the duty of a Legal Personal Representative on intestacy to account for superannuation death benefits, addressing conflicts when they can benefit personally.

**Brine v Carter [2015] SASC 205** - Dealt with the discharge of fiduciary duties by executors, particularly in cases where one co-executor claims superannuation death benefits personally.

**Munro v Munro [2015] QSC 61** - This case emphasized the importance of strictly adhering to fund rules and legal terminology in binding death benefit nominations.

**Ioppolo v Conti [2015] WASCA 45** - Clarified that the Superannuation Industry (Supervision) Act does not require the appointment of an LPR as a trustee of an SMSF upon a member's death.

**Shaw v Commissioner of Taxation [2015] AATA 288** - Discussed qualifications for trustees, particularly relating to disqualifications for dishonest conduct or insolvency.

**Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck [2016] NSWCA 218; Beck v Commonwealth Bank Officers Superannuation Corporations Pty Ltd [2017] HCATrans 56** - This case ruled that trustees could not consent to changes that adversely affect a beneficiary's accrued benefits without the rules allowing such changes.

**Cantor Management Services Pty Ltd v Booth [2017] SASCFC 122** - Focused on the formal requirements for delivering a binding death benefit nomination to a trustee and its validity.

**Ainsworth v Davern [2018] VSC 80** - Dealt with the removal of an SMSF trustee and the appointment of an independent trustee due to conflict.

**Re Narumon Pty Ltd [2018] QSC 185** - This case decided that an Enduring Power of Attorney can authorize making or renewing a superannuation binding death benefit nomination on behalf of a donor.

**Burgess v Burgess [2018] WASC 279** - This case involved a duty of an LPR on intestacy to claim superannuation death benefits for the estate, addressing conflicts from applying personally.

**Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation [2018] FCAFC 122** - Discussed the classification of certain investments as "in-house assets" and the leasing arrangements under the "sole purpose test."

**SM [2019] WASAT 22** - Addressed the limitations on a trustee company's authority to make or renew binding death benefit nominations on behalf of an incapable person.

**Gonciarz v Bienias [2019] WASC 104** - Ruled on the duties of an LPR on intestacy to claim superannuation death benefits for the estate, particularly when a conflict of interest is cured by the appointment of a replacement LPR.

**Dawson v Dawson [2019] NSWSC 826** - This case discussed the continuity of a substituted SMSF director or trustee upon the incapacity or death of a member.

**Wareham v Marsella [2020] VSCA 92** - Involved trustees of an SMSF failing to consider the interests of the dependents genuinely and impartially.

**Australian Financial Complaints Authority (AFCA) Case Number 736881 23 September 2021** - a mother claimed a death benefit following the death of her son on the basis of financial dependency; two years later, a daughter of the son complained that she should have received the payment; the mother's application did not reveal that she knew of the daughter and had arranged a DNA test on her after her son's death and before she made the application; AFCA held that sufficient enquiries had been made by the Superannuation fund; the daughter alleged fraud by the mother and breach of trust; any action against the mother would be costly and recovery problematic; it was held that use of the Funds money on such a case related to the management of the fund and was excluded under AFCA Rules; the mother was not a party to the daughter's complaint and no decision could be made about her ability to properly receive the death benefit; even if this complaint was not required to be excluded under the AFCA Rules, AFCA exercised its discretion to exclude the complaint)

**Hill v Zuda Pty Ltd [2022] HCA 21** - A landmark decision clarifying that specific regulatory requirements for binding death benefit nominations do not apply to SMSFs unless specified in the trust deed.

**Benz v Armstrong [2022] NSWSC 534** - Explored the application of notional estate rules to superannuation under the Succession Act 2006 (NSW), particularly how superannuation can be included in an estate for family provision claims despite a binding death nomination.

**Neal v Brown [2024] NSWSC 841** - This case delved into issues surrounding superannuation withdrawals just before death, affecting how benefits are distributed according to the will.

## Trusts and Taxation

**Commissioner of Taxation (Cth) v Whiting (1943) 68 CLR 199** (leading Australian case on present entitlement of a beneficiary arising during the course of administration of an estate – until an estate has been fully administered and the amount of the residue ascertained, the income of the residuary estate is the income of the executors and not of the residuary beneficiaries – except during the intermediate stage of estate administration, beneficiaries will be presently entitled to the income to the extent of the amounts actually paid to them or paid on their behalf). IT 2622.

**Hobbs v FCT (1957) 98 CLR 151** (special tax treatment applies under section 102 of Income Tax Assessment Act 1936 (Cth) to revocable trusts - the Commissioner of Taxation may assess a trustee to pay the additional tax that the creator of the trust estate would have been liable for had the creator derived so much of the net income of the trust estate as is attributable to trust income or income from trust property in respect of which the creator has the power to revoke or alter the trusts and acquire a beneficial interest; this discretion extends to trust income payable to, accumulated for or applied for, the benefit of the creator's minor children)

**Taylor v Commissioner of Taxation (Cth) [1970] HCA 10** (present entitlement of a minor beneficiary for income arising under a trust for accumulation, which directed the trust income to be accumulated and paid to the beneficiary when he reached age 21 or, if he died before that age, to be paid to his estate)

**Deputy Commissioner of Taxation (Cth) v Moorebank Pty Ltd (1988) 165 CLR 55** (courts have an inherent jurisdiction to stay the enforcement of trust income tax assessments, issued on an alternative basis to different taxpayers in respect of the same income, before there is final resolution of a genuine dispute about their correctness)

**Trustee for the Estate of the late AW Furse No 5 Will Trust v Federal Commissioner of Taxation (1990) 21 ATR 1123** (the tax concession of treating trust income distributed to minors at the same marginal rates as if distributed to resident adults applies where the trust income comes from the deceased estate and assets acquired by the estate; in this case, the tax concession was held to extend to income from assets (units in a unit trust) acquired by the trustee using borrowed funds; this case has been negated by later statutory amendments to section 102AG of the Income Tax Assessment Act 1936 (Cth), including a major amendment taking effect from May 2018).

**Cajkusic v Cmr of Taxation (2006) 155 FCR 430; 2006 ATC 4752; [2006] FCAFC 164** (meaning of 'a share of the income of the trust estate')

**Raftland Pty Ltd v Cmr of Taxation (2008) 238 CLR 516; [2008] HCA 21** (present entitlements of beneficiaries not under a legal disability arising from reimbursement agreements concluded with the purpose of avoiding or reducing the tax otherwise payable by the trustee of a trust estate are subject to special tax treatment under section 100A of the Income Tax Assessment Act 1936 (Cth) but are to be disregarded for other purposes of the Act)



**Commissioner of Taxation v Bamford [2010] HCA 10** (landmark trust tax case – meaning of ‘a share of the income of the trust estate’ under section 97 of the Income Tax Assessment Act 1936 (Cth); proportionate approach confirmed when determining the assessability to a discretionary trust’s taxable income of beneficiaries presently entitled to its distributable net income)

**Commissioner of Taxation v Clark [2011] FCAFC 5** (continuity of trust estate or resettlement for tax purposes where changes made to the trust in accordance with variation power)

**Fundy Settlement v Canada [2012] 1 SCR 520** (guidance on how to determine the tax residency of a trust; there are many similarities between a trust and a corporation, and central management and control (CMC) is where “[the trusts] real business is carried on”; the Court applied the same test of residence to a trust as to a company; the fact that an inter vivos trust was formed in Barbados and had a Barbados trustee did not save it from being a resident of Canada, as the Court held that the CMC was in Canada with the trust’s settlor; the non-resident corporate trustee in that case deferred to the recommendations of Canadian resident beneficiaries in the substantive decisions made regarding the trusts)

**Howard v Commissioner of Taxation [2012] FCAFC 149** (example of how and when section 99B of the Income Tax Assessment Act 1936 (Cth) applies; in this case, section 99B was applied to proceeds of a share buy-back paid or applied from foreign trust Juris Trust (Jersey) to a foreign trust Esparto Trust (Jersey) and then to Mr Howard (Australian) in 2006)

**Campbell and Commissioner of Taxation [2019] AATA 2043** (example of how and when section 99B of the Income Tax Assessment Act 1936 (Cth) applies; in this case, section 99B was applied to trust money paid as distributions from Trust 3 of \$109,057 in the 2013 year and \$354,113 in the 2014 year)

**Peter Greensill Family Co Pty Ltd (as trustee) v FCT; Nicholas Martin & Anor v FCT [2021] FCAFC 99** (the distribution of capital gains of an Australian-resident discretionary trust, derived from the disposal of shares that were not taxable Australian property to a non-resident beneficiary, were deemed to be capital gains of the beneficiary and assessable to the trustee). TD 2022/12 and TD 2022/13.

**Commissioner of Taxation v Carter [2022] HCA 10** (tax effect of disclaimer of an income distribution by a beneficiary of a discretionary trust – disclaiming beneficiary will still be assessable on the income unless they disclaim by 30 June of the distribution year, even though either the trust, via accumulation, or a default beneficiary will benefit from that income). This case overturned the High Court decision in *Commissioner of Taxation v Ramsden* [2005] FCAFC 39 and ATO ID 2010185 and IT 2651.

**Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3** (recent decision on section 100A of the Income Tax Assessment Act 1936 (Cth) – held that primary judge did not err in finding that present entitlement to trust income did not arise out of a reimbursement agreement or by reason of any act, transaction or circumstance in connection with or as a result of reimbursement agreement).

**Commissioner of Taxation v Bendel [2025] FCAFC 15** held that an unpaid present entitlement (UPE) owed by a trust to a company is not a loan for Division 7A purposes.

## Family Provision

***Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9** (the terms “adequate” and “proper” are always relative)

***In re Dennis, dec* [1981] 2 All ER 140** (meaning of “maintenance”)

**Lieberman v Morris (1944) 69 CLR 69** (cannot contract out of the family provision legislation)

**Harris v Carter [2020] NSWSC 196** (observations on bare paternity)

**Singer v Berghouse (1994) 181 CLR 201** (sets out the two stage approach to the exercise of the statutory power)

**Browne v Macaulay [1999] WASC 208** (moral duty and estrangement)

**MacGregor & Anor v MacGregor [2003] WASC 169** (relevance of testator's reasons for making the will and he or she did, relevance of "prevailing community standards of what is right and appropriate")

**Mcgrath v Mcgrath (as administrator of the estate of Mcgrath) [2004] WASC 221** (no requirement for equality in outcome)

**Vigolo v Bostin (2005) 221 CLR 191** (claim by adult son of substantial means based not on financial need but on moral claim arising out of previous business and family dealings, claim failed)

**Bickford v Bickford [2006] WASC 268** (application for leave to apply out of time – application granted – arguable case – short delay adequately explained)

**Christie v Manera [2006] WASC 287** (weighing up competing claims of beneficiaries)

**Devereaux-Warnes v Hall (No 3) (2007) 35 WAR 127** (relevance of beneficiary not being a person with standing to claim, nor having any moral claim other than by virtue of their status as a beneficiary)

**Rutter v Mccusker [2008] NSWSC 269** (guidance for valuing shares in a proprietary limited company for the purposes of a claim)

**Kowal v Langlands as Executor of Estate of Wlodymyr Kowal [2008] WASC 27** (application to approve compromise settlement on behalf of person under a disability, relevant principles)

**Schaechtele v Schaechtele [2008] WASC 148** (application to vary will as agreed by beneficiaries to give effect to settlement - court's approach – if satisfied the settlement falls within the bounds of a reasonable exercise of discretion the court should make orders to give effect to settlement)

**Lathwell v Lathwell [2008] WASCA 256** (claim by adult daughters – estrangement – relevance of cause of estrangement)

**Andre v Perpetual Trustees WA Ltd** (as Executor of the Will of Barbara Helen Owen Stewart) [2009] WASCA 14 (application for leave to apply out of time – whether justice of the case required that leave be granted – no arguable case)

**Miller v Warren [2009] WASC 115** (estrangement)

**Taylor v Farrugia [2009] NSWSCA 801** (provision that is dependent upon the exercise of a discretion by a trustee of a discretionary trust will often, but not always, be inadequate)

**Butcher v Craig [2010] WASCA 92** (relative weakness of competing beneficiaries' moral claims is relevant to the first as well as the second stage of the test)

**Devenish v Devenish [2011] WASC 129** ("need" not determined by reference only to minimum standards of subsistence, the term "proper" prescribes a standard whereas the term "adequate" is concerned with quantum, admission of fresh evidence)

**Chappell v Alexander Robert Hewson by his next friend Christopher Robert Hewson [2013] WASCA 15** (importance of evidence, relevance of remoteness of relationship: it is the actual, not presumed remoteness of the relationship that is relevant)

**Christie v Christie [2016] WASC 45** (disentitling conduct, physical violence towards deceased)

**Lemon v Mead [2017] WASCA 215** (large estate, court's discretion not at large or unfettered)

**Miller v Taylor [2018] WASC 75** (consideration of what constitutes a de facto relationship, what conduct is sufficient to disentitle an applicant to relief – gambling addiction not disentitling conduct, provision made subject to a protective trust)

**Lysaght v Lysaght as Executor of the Estate of Lysaght [2018] WASC 88** (considerations to be borne in mind with claims by adult children, implications of estrangement)

**Balla v Roberto Bei as Executor of Estate of Late Giovanni Bei [2020] WASC 348** (standard of proof in establishing paternity, principles to be applied in claims by adult children, relevant of estrangement)

**Smart v Power [2021] WASC 18** (application for extension of time to bring family provision claim – applicable principles, the power to make orders after distribution)

**Cardaci v Filippo Primo Cardaci as executor of the estate of Marco Antonio Cardaci [No 5] [2021] WASC 331** (claim by widow, no competing claims, deceased failed to make adequate provision by failing to make direct provision for her, and by instead leaving her wholly dependent on the exercise of favourable discretions by deceased's brother as trustee for the testamentary trust established under the deceased's will)

**Musasghi v Gebremariam [2022] WASCA 37** (general principles, claim by widower, adequacy of provision)

**AB v FGH [2022] WASC 244** (impact of estrangement, impact of potential or actual insolvency on application)

**Keremestevski v Shaun McLeod [2024] WASCA 12 (S)** (the power conferred by s6(1) of the Family Provision Act 1972 (WA) is not a power to order that the deceased's will be amended. Rather it is a power to order that provision be made out of the deceased's estate. Section 10 of the Act provides that such provision is to operate and take effect as if it had been made by codicil.)

## Trusts

**Saunders v Vautier (1841) 4 Beav 115** (a beneficiary who is of full age and has an absolute, vested and indefeasible interest in the capital and income of a trust may terminate the trust and require the transfer of the trust property to himself)

**Barnes v Addy (1874) LR 9 Ch App 244** (two alternative limbs of accessorial liability for breach of trustee's duty: knowing receipt and knowing assistance)

**Re Mary Donald Nominees Pty Ltd as trustee for The DJ Maccormick Family Trust [2024] WASC 284** (Trustees – judicial advice – s92 Trustees Act 1962 (WA))

**Wright v Stevens [2018] NSWSC 548** (rights of beneficiaries to inspect trust documents)

**Gartside v Inland Revenue Commissioners [1968] AC 553** (rights of a beneficiary under a discretionary trust, no beneficial interest in the trust property but a right to due administration of the trust and a right to be considered for distribution)

**Karger v Paul [1984] VR 161** (subject to one exception, the exercise by a trustee of a discretionary power will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present; the exception being that the validity of the trustee's reasons will be examined if the trustee chooses to state them)

**Wendt v Orr [2004] WASC 28** (power of court to review exercise of discretion by a trustee, duties of trustees, repayment of overpaid trust funds, removal and replacement of trustee)

**Kennon v Spry [2008] HCA 56** (limited protection provided by discretionary trusts against a family law property settlement by a spouse)

**Hancock v Rinehart [2015] NSWSC 646** (main considerations that inform the court in appointing a new trustee)

**Mercanti v Mercanti [2016] WASCA 206** (limitation of variation power in discretionary trust deed, invalid change of appointor)

**Blenkinsop v Herbert [2017] WASCA 87** (guardian or protector of a discretionary trust, nature of guardian's powers, whether personal or fiduciary, whether Court has power to remove guardian)

**Rigby and Kingston (No 4) [2021] FamCA 501** (whether spouse's interest in a discretionary testamentary trust is "property" or a "financial resource" within the meaning of the Family Law Act taking into account shared control of the trust with siblings)

**Cardaci v Cardaci [No 5] [2021] WASC 331** (validity of appointment of corporate trustees; grounds for removal of trustee of discretionary trust where breach of duty as trustee by making settlement offer, and by recharacterizing payments to beneficiary as loans, ignorance or failure to understand duties as trustee; whether receiver may be appointed over guardian of discretionary trust; status, relevance and effect of memorandum of wishes; court's power to appoint a receiver)

**Owies v JJE Nominees Pty Ltd [2022] VSCA 142** (trustee of discretionary trust's obligation to give real and genuine consideration to beneficiaries when making distribution decisions)

**Rojoda Pty Ltd (ACN 164 809 581) as trustee for the A & MMR Scolaro Partnership and the Scolaro Investment Company Partnership v Scolaro [2023] WASC 210** (whilst the provision of an opinion before applying for judicial advice may not be necessary in every case, the obtaining of an opinion from senior counsel is still relevant to assessing whether the trustee has properly considered whether the proposed course is in the best interests of the beneficiaries)

**Dryandra Investments Pty Ltd atf Dryandra Trust v Hardie by her guardian ad litem Blatchford [2024] WASC 248** (finding that court had power under inherent supervisory jurisdiction to remove and replace mentally incapacitated guardian and appointor of discretionary trust as such was necessary to secure proper administration and due execution of the trust).

## Wills

### Mutual Wills

**Dufour v Pereira (1769) 21 ER 332** (early mutual wills case where it was held that the last will the wife, made in breach of her agreed obligation to make a different will was void)

**Birmingham v Renfrew (1937) 57 CLR 666** (mutual wills. See especially judgment of Dixon J explanation of what is required for mutual wills)

**Low v Perpetual Trustees WA Ltd (1995) 14 WAR 35** (mutual wills case where surviving party wife had lost capacity)

**Barns v Barns (2003) 214 CLR 169** (High Court decided property the subject of a mutual wills contract was available to meet a family provision claim)

**Fazari v Cosentino [2010] WASC 40** (A Western Australian case where the problems arising out of mutual wills is discussed at length.)

**Butler v Butler [2025] WASC 79** Mutual wills agreement. Later will made by survivor. Legal principles which apply to mutual wills. Application for extension of time to bring Family Provision claim on death of the survivor.

### Informal Wills

**Oreski v Ikac [2008] WASC 220** (summarises the current state of the law on informal wills in Western Australia, application to prove an informal will failed, unexecuted document found in the deceased's car after his death)

**Mitchell v Mitchell [2010] WASC 174** EM Heenan J (draft will admitted to probate as an informal will where detailed instructions for the will were given to solicitors, who prepared a will in accordance with those instructions and delivered it to the testator in hospital for execution, and the testator died suddenly before executing will; held that deceased had authenticated and adopted the draft will he having stated on the morning of his death of his desire to sign the will as a matter of priority.)

**Butterworth v Woods [2010] WASC 176** EM Heenan J alterations made on existing will.

**Public Trustee v Gerritsen [2012] WASC 201** Will signed by the deceased but not witnessed intended to be a will.

**D'Unienville v Sakalo [2013] WASC 469** EM Heenan J requirements to informally revoke a will

**In the Estate of Peter Anthony Pitman (Dec'd); Ex Parte Rosemary Machin Pitman & Anor [2018] WASC 237**(application for video files to be admitted to probate as an informal will refused)

**Dolan v Dolan [2007] WASC 249** Case on costs in probate proceedings including informal will proceedings.

### Testamentary capacity

**Gibbons v Wright (1954) 91 CLR 234 at 427.** Whether a person has capacity varies with the decision to be made.

**Banks v Goodfellow (1870)** (classic test of testamentary capacity)

**Estate of Tucker 1962 SASR 99** The will drafter should not assume that the testator has capacity. The instructions for the will and the signing of the will all done by letter as the testator lived in the country.

**Kenward v Adams [1975]** The Times 29 November and *Re Simpson* (1977) 121 SJ 224 Lord Templeman 'The Golden Rule' must have a medical practitioner witness a will where the testator is aged or has been seriously ill. This rule not adopted in Australia.

**Nicholson v Knaggs [2009] VSC 64** (case on testamentary capacity and requirements of a valid will, testamentary undue influence, need for a considered and appropriately structured interview with the client when taking instructions)

**Scarpuzza v Scarpuzza [2011] 65 EM Heenan J** Reading over and knowledge and approval.

**Power v Smart [2018] WASC 165** Derrick J summarised the legal principles relating to testamentary capacity. Also discusses the taking of notes and undue influence.

**Smart v Power [2019] WASCA 106** (case on testamentary capacity, knowledge and approval approved the decision of Derrick J above.)

**Attwell v Morgan [2019] WASC 182** (case on testamentary capacity, knowledge and approval)

**Gangemi v Monaco [2020] WASC 183** (the critical time at which testamentary capacity is to be determined is at the date that the will was executed)

**Marmion v Keogh [2022] WASC at 425** Testamentary capacity and knowledge and approval legal questions not medical ones.

**NB: It is stressed that the above list is not intended to be an exhaustive list and that any matter relevant to practice in Wills and Estates Law may be examined.**

**Schedule 4 of the Guidelines indicates the range of topics which candidates might be asked to address in the assessment programme.**

**Schedule 5 of the Guidelines gives an indication of the legislation and other materials which candidates might be asked to address.**

**Candidates will be examined on the law as it stands at the date of assessment.**