COVID, capacity challenges, and costs

WITH CHRISTINE SMYTH

Home detention gives us much to contemplate about COVID-19, nothing more so than our mortality in the face of a life-threatening pandemic.

With that, it seems there has been a rush by the general community to make wills.[2] However, the combination of section 10(3) *Succession Act 1981*, the uncertainty around what constitutes presence,[3] COVID-19 social distancing laws,[4] and lack of available witnesses[5] have conjured up circumstances in which a cauldron of conspiracies can thrive.

None more so than those around the validity of wills undertaken during this pandemic, particularly where they do not comply with the strict execution provisions. This is despite attempted innovations, such as law firm carparks becoming the site for drive-by executions[6] and the Queensland Government finally passing laws to provide a limited form of witnessing by audio-visual means.[7]

Unlike the general law,[8] wills do not carry a presumption of mental capacity. In any probate application, the propounder of the will carries the onus of proof.[9] However, where a will is rational on its face[10] and duly executed,[11] the presumption of capacity is in favour of the propounder.[12] Where it is not duly executed, then the onus shifts back. And it is at that point we might expect the cauldron to bubble over.

However, before your client(s) toil over their troubles and rush to litigate, they might pause and reflect on the decision of *The Estate of Milan Zlatevski; Geroska v Zlatevski (No.2)* [2020] NSWSC 388. That matter addresses the issue of costs arising from the substantive contested probate application.[13]

In the substantive matter, her Honour Henry J found the testator had testamentary capacity, granted probate of the will in solemn form and dismissed the cross claim by the deceased's son (the defendant),[14] ordering that he pay the costs of the proceedings.[15] The son, not dissuaded by his loss, then made an application to vary the costs order on the basis that his challenge to testamentary capacity was as a result of "the deceased's conduct and it was reasonable for him to have investigated the deceased's will".[16]

> **"Fair is foul, and foul is fair."**
>
> The witches' philosophy of life.[1]

The son contended that it was reasonable for him to raise the substantive challenge because of his father's conduct. First he contended that statements made by the testator to his solicitor about various transactions were based on delusions.[17] The court rejected that contention, distinguishing between delusion and mistaken belief.[18] Second, the son contended the deceased's action of excluding "his only son, from his estate and with whom the deceased lived with for 25 years"[19] was sufficient to justify the application.

Her Honour rejected both propositions[20] and dismissed his application for costs. In doing so she set out the following analysis of the law in relation to costs in probate litigation:

1. "The general rules applicable to the award of costs apply to probate litigation, as they do to other contested litigation. This means that the Court has a broad discretion to award costs and, ordinarily, orders for costs should 'follow the event', with the consequence that the unsuccessful party is ordered to pay the successful party's costs: *Civil Procedure Act 2005* (NSW), s98; *Uniform Civil Procedure Rules 2005* (NSW), r 42.1; *Walker v Harwood* [2017] NSWCA 228 at [52] per Macfarlan JA."[21]
2. "Two exceptions to the general rule that costs follow the event have been recognised to apply in probate litigation, being:
   (a) where the testator has, or those interested in the residue have, been the cause of litigation, the costs of the party who unsuccessfully challenged the will may be paid out of the estate; and
   (b) if the circumstances reasonably called for an investigation of the will, the costs may be left to be borne by those who incurred them.

   See: *Re the Estate of Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698 at 709; *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [13]-[14]; *Shorten v Shorten (No.2)* [2003] NSWCA 60 at [14]-[15]."[22]
3. "A case does not fall within the first exceptional category merely because a party raises a triable issue as to a deceased's testamentary capacity: *Shorten v Shorten (No.2)* [2003] NSWCA 60 at [27]."[23]

   Relevantly, "[i]n cases where a challenge is made to testamentary capacity, more than mental frailty or the incapacity of the deceased is required to say that the testator caused the litigation and that the case falls within the first exception: *King v Hudson (No.2)* [2009] NSWSC 1500 at [12]."[24]

The son relied on the quality of the instructions given to the testator's solicitor to evidence actions by the testator as justifying his cause to investigate.[25] He focused his submissions on the fact that the solicitor did not have a recollection of the instructions, independent of his notes, and that those notes did not record the solicitor administering a *Banks v Goodfellow* test, nor did the notes identify the solicitor adhering to 'best practice' in taking the instructions.[26]

On these points the court observed that there was no medical nor lay evidence of lack of capacity, no prior competing will, nor issues raising doubt as to the testator's capacity.[27] In fact, the court found that the solicitor's will notes were integral to assisting the court in coming to a view that the testator had capacity.[28] The detail in the notes and the cogency of the explanations recorded "demonstrated the deceased's testamentary capacity, rather than providing a reason for investigation of the will on that basis".[29] Ultimately, the son's challenge to the will was founded in the fairness or otherwise of the terms of the will[30] and he paid the costs for that exercise.

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Notes

1. William Shakespeare, *Macbeth*.
2. abc.net.au/news/2020-04-18/coronavirus-wills-finances/12155576.
3. Refer to my article in the May edition of *Proctor*, page 44.
4. health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/social-distancing-for-coronavirus-covid-19.
5. qld.gov.au/law/legal-mediation-and-justice-of-the-peace/about-justice-of-the-peace/search-for-your-nearest-jp-or-cdec.
6. ctpost.com/local/article/Attorneys-offer-drive-up-legal-service-for-15180636.php.
7. parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T636.pdf, see section 9 and legislation.qld.gov.au/view/html/asmade/sl-2020-0072.
8. *Gibbons v Wright* [1954] HCA 17; 919540 91 CLR 423.
9. *Bailey v Bailey* [1924] HCA 21, (1924) 34 CLR 558, 570-572. *Re Hodges; Shorter v Rogers* (1988) 14 NSWLR 698, 704-707; *Worth v Clashom* [1952] HCA 67; (1952) 86 CLR 439, 453.
10. *Gomall v Masen* (1887) 12 PD 142; *Bailey v Bailey* [1924] HCA 21, (1924) 34 CLR 558; *Bull v Fulton* [1942] HCA 13; *Fisher v Kay* [2010] WASC 160, [83]; *Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757,[44]-[45]; *Veall v Veall* [2015] WSCA 60, [168]; *Power v Smart* [2018] WASC 168, [604] *The Public Trustee v Nezmeskal* [2018] WASC 393, [44].
11. *Wheatley v Edgar* [2003] WASC 118; *Wade v Frost* [2014] SASC 162; *Tsagouris v Bellairs* [2010] SASC 147
12. *Shorten v Shorten* [2002] NSWSCA 73, [54].
13. *The Estate of Milan Zlatevski; Geroska v Zlatevski* [2020] NSWSC 250.
14. At [2].
15. At [3].
16. At [4].
17. At [11].
18. See *The Estate of Milan Zlatevski; Geroska v Zlatevski* [2020] NSWSC 250 at [17],[35],[81],[83],[112]-[148].
19. At [12].
20. At [13].
21. At [7]; for Queensland, the applicable rule is 681(1) of the *Uniform Civil Procedure Rules 1999*.
22. At [8].
23. At [9].
24. At [9].
25. At [11].
26. At [20]-[22].
27. At [20]-[28].
28. At [16]-[18] also at [28]-[29].
29. At [28].
30. At [32].

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