

Re Robustelle [2022] VSC 493 (McMillan J)

The Court dealt with a contest in which the caveator objected to multiple Wills. Following the authority in *Gardiner v Hughes* (2017) 54 VR 394, the case is a helpful guide about the way to challenge multiple Wills and relating issues about standing to issue a challenge to a grant application.

Re Winter-Cooke (No 3) [2022] VSC 468 (McMillan J)

This costs decision followed an unsuccessful application for extension of time in which to bring a family provision claim. The Court found that there was nothing in the Defendant executors' conduct to justify a departure from the usual order that costs follow the event. The Court accepted that that position was not altered by the disparity in the parties' financial positions in the circumstances of this case and costs were ordered against the unsuccessful party.

Walter v Hasslinger & Ors [2022] VSC 46 (Kaye JA)

An application was made to remove a trustee. The Court declined to exercise power under s 48 of the *Trustee Act 1958* to remove the trustee where the trustee did not consent and his conduct was not 'antithetical' to the interest of the beneficiaries. The Court also found that the Settled Land Act 1958 applied where orders were pursuant to Part IV of the Administration and Probate Act 1958 which created a life tenancy.

Re Roth [2022] VSC 511 (McMillan J)


An interesting refresher on the principles of construction of a trust instrument, by which the Court will ascertain the objective intention of the parties from the words of the instrument as a whole. The Court read the relevant trust deed and deeds of variation together but declined to take account of the terms of the Will in construing trust documents as they expressed only the deceased's subjective understanding of the trust. Also a great refresher on the law around the transition of the role of an executor to trustee.

Fahey v Bird [2022] VSC 533 (Mukhtar AsJ)

A rare example of an application for the termination of a trust in which the Plaintiff (who was 20) was found to have received the sole, absolute and indefeasible vested entitlement but which was deferred under the Will until she turned 21. The Court found that the Plaintiff could give a valid discharge for the gift (under the *Age of Majority Act 1977*, s 71) and orders were made under the principles espoused in *Saunders v Vautier* [1841] EngR 629; (1841) 4 Beav 115; 49 ER 282 (*CPT Custodian v Commissioner of State Revenue* (2005) 224 CLR 98 being the modern formulation) to allow the Plaintiff to access her gift in view of her dire financial circumstances.

Re Gradnski [2022] VSC 565 (JR Englefield)


The Court declined to summarily dismiss a claim by an alleged domestic partner (or former domestic partner) on the basis that the issue needed to be determined at trial.

 ***Re Cvitkovic [2022] VSC 571 (McMillan J)***

An application was filed by summons in a finalised proceeding seeking an executors' removal and an accounting. The Court directed that those issues ought to be raised in a new proceeding, failing which the applicant's share of the estate would bear the costs of the summons thrown away on an indemnity basis.

 ***Re Leopold; application by Gasbarro v Roache [2022] VSC 579 (McMillan J)***

A decision dealing with the proper form of an application for a grant in relation to an informal Will and issues related to standing. The principal beneficiary was the deceased's minor child. That child's parent resides in Italy. The Court accepted that the Plaintiffs (acting as attorneys for the mother) had standing to make the application. The Court was satisfied that the appropriate grant was a limited grant *durante minore aetate* under r 5.01 of the Supreme Court (Administration and Probate) Rules 2014. The Court found that r 5.02 (grant in peculiar circumstances), which is used for attorney grants, and s 30 Trustee Act 1958 (permitting the delegation of a trust while the trustee is abroad) were not relevant.

 ***Sampson v Charleron [2022] VSC 597 (Daly AsJ)***

The Court considered an application to remove an executor where the executor was antagonistic towards the legal personal representative of a deceased beneficiary's estate. The Court focused on the welfare of the beneficiaries and found that the hostility in respect of one beneficiary (and his estate) hindered the proper performance of the executor's duties and the finalisation of the estate. The executor was removed.

 ***Re Curtis [2022] VSC 621 (McMillan J)***

The Court examined in detail the requirements of the remote execution procedure that now applies to will making in Victoria and, in particular, the requirement that the testator and witness clearly see one another's signatures being made. The Court was not satisfied that the Will was executed in accordance with the remote execution procedure but was satisfied that the Will ought to be admitted under s 9 of the *Wills Act 1997*.


 ***Maher v Burden [2022] VSC 617 (Moore J)***

An interesting discussion of the application of s 60 of the *Bankruptcy Act 1966* to stay a family provision claim. The Plaintiff filed the claim and was subsequently declared bankrupt. The Court considers in detail the authorities about whether s 60(2) of the Act applied. That section provides that an 'action' commenced by the bankrupt is stayed

pending a decision by the bankruptcy trustee to discontinue or prosecute it. The Court considered whether s 60(2) was constrained by the operation of s 58 (relating to the vesting of 'property' in the trustee) so that the only 'action' that could be stayed was a chose in action (proprietary right) vested in the trustee rather than the personal right in the provision claim. Moore J found that s 60(2) did apply.

 ***Re Dove Family Trust [2022] VSC 625 (Moore J)***

The Court considered an application for judicial advice relating to a lost trust deed. The Court found that there was 'clear and convincing' proof that the trust was established, the deed was lost and as to its contents. The Court declined to grant declaratory relief but gave judicial advice (under Order 54 of the Supreme Court (General Civil Procedure) Rules 2015 that the Plaintiff was justified in managing and administering the trust according to the copy of the trust deed that was before the Court.

 ***State Trustees v Wu [2022] VSC 756 (Garde J)***

The deceased died intestate and was survived by a son and no other relatives. An application was made by STL and the Royal Melbourne Hospital to dispose of the deceased's body. The son had the best right to administer the estate and would have the power to dispose of the body. However, he had not provided any instructions to the hospital for three months since the deceased died. STL were authorised to make arrangements to dispose of the body.

 ***Lotoanui v Helu [2022] VSC 675 (Forbes J, Practice Court)***

The Court considered competing claims to the right to dispose of the body, having regard to the person with the best right to administer the estate and the wishes of the deceased regarding disposal of their body. In this case, the mother of minor children was found to have the right to dispose of the body (based on the children's rights to the estate) and it was found that the deceased had no strongly held beliefs regarding the disposition of their body.

 ***Re Gyss [2022] VSC 689 (McMillan J)***

The Court found that a passing over application was misconceived and amounted to personal adversarial litigation rather than probate litigation that should be paid for by the estate. The Plaintiff was ordered to pay the Defendant's and his own costs on an indemnity basis without reimbursement from the estate.

 ***Lynch v Perpetual Trustees [2022] VSC 702 (Walker JA)***

An appeal from a decision of an Associate Judge. Probate was granted in respect of a Will but not a later codicil. The appellant initially made an application to revoke the

grant on the basis that the deceased had capacity at the time a subsequent codicil was made. However, at first instance, it was found that (among other things) there was not a prima facie case to show testamentary capacity at the time the codicil was made. The Court allowed the appeal in part, finding that the appellant had a prima facie case that the deceased had capacity when the codicil was made. However, the Court also found that the Defendant had a prima facie case that the testator lacked knowledge and approval of the contents of the codicil.

Re Sambucco [2022] VSC 699 (Moore J)

The Court considered an application to revoke a grant of letters of administration on intestacy. The deceased had an estate worth in excess of \$5m. He made a Will in 2015 which gave his estate to his family (parents and siblings). In 2019 he participated in a 'religious wedding ceremony' with his (then) partner. The question for the Court was whether the marriage was valid and therefore revoked the Will under s 13 of the *Wills Act 1997*. The deceased and his partner had given notice of intention to marry but, due to health reasons, engaged in a ceremony prior to the usual minimum notice period expiring. They and their celebrant – unaware of provisions in the *Marriage Act 1961* which 'saved' a marriage that did not comply with certain formal requirements – participated in the ceremony but were mistaken in their belief that it would not be a binding marriage due to non-compliance with the formal requirement of the Act. For that reason, they referred to it as a 'religious ceremony' and a certificate of 'commitment' rather than 'marriage' was issued. It was alleged by family members that the marriage was invalid and that the deceased did not consent to it. The Court found that the parties intended to be married and were not mistaken about the nature of the union they intended. Rather, they were only mistaken about the legal effect of the ceremony. Moore J stated that "a mistake as to the effect of a ceremony does not vitiate a party's consent to a marriage". The marriage was valid and a declaration made that the Will had been revoked.