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Elder law & succession: March 2026

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KEY DECISIONS

- *Ward v Ward* [2025] NSWSC 1417 (disclosure)
- *Jaksic-Repac v Dundjerski* [2025] NSWCA 256 (lost will)
- *Wheatley v Peek* [2025] NSWCA 265 (informal will)
- *Meiners (by her next friend the Public Trustee) v Gunn (No 2)* [2025] WASC 529 (granny flat arrangement)
- *Bahnik v Budimir* [2025] NSWSC 1595 (proprietary estoppel)
- *Re the will of William Ian Southey* [2015] VSC 801 (construction)
- *Theocharous v Theocharous* [2025] NSWSC 45 (family provision)

Court orders party to authorise Australian Tax Office and Centrelink to provide records

Tim Ward brought proceedings to establish beneficial ownership of real estate registered in the name of his late father. Tim alleged an agreement whereby he would build a house on the deceased's land at his expense, maintain the real estate and pay expenses relating to it. In return, the father would transfer the real estate to Tim. He pleaded that the agreement was varied over time to include a loan from the father, repayment of the loan, transfer of the real estate by will and care for Tim's mother. Tim asserted he performed his end of the agreement but his father's last will did not leave him the real estate.

The interim administrator for the deceased's estate assumed the defence of Tim's claim. She filed a motion that the Court direct Tim and his wife to obtain documents from the Australian Taxation Office and Services Australia (including Centrelink). The parties agreed, and the Court accepted, it was not possible for the administrator to obtain the tax and social security records by issue of a subpoena (by reason of section 355-75 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) and section 207 of the *Social Security (Administration) Act 1999* (Cth) respectively) but that orders could be made for the relevant party to authorise the relevant entities to do so (***Ward v Ward* [2025] NSWSC 1417** (Bennett J) at [29]-[46]).

The Court proceeded on the basis that the administrator needed to satisfy the same test as required for a valid subpoena (at [53] and [57]), namely that the documents sought were:

> '"apparently relevant" to the issues in dispute by showing the documents sought will materially assist on an identified issue or that there is a reasonable basis beyond speculation that it is likely the documents will so assist. It will be sufficient that they could "possibly throw light" on the issues in the … proceedings' (at [57]).

The administrator submitted, and the Court accepted, that the facts in issue were Tim's capacity to make various payments and the source of funds from 1994 to 2019. The Court made orders largely as sought.

Appellate decision concerning a lost original will

By Mimi Berger's last formally executed will in 2015, she left her estate to a niece and grandniece. Whilst in hospital in 2022, she signed a document headed 'Codicil to my last will and testament of Mimi Jaksic Berger' which left real estate in Surry Hills to her neighbours and close friends. The document was not witnessed, with Berger saying she did not trust the hospital staff to do so. Upon her death, the original of Berger's will could not be found. At first instance, a copy of the will and document were admitted to probate.

On appeal, the Court (Bell CJ, Payne and Kirk JJA agreeing) explained the principles for a grant of representation for a copy will (***Jaksic-Repac v Dundjerski* [2025] NSWCA 256** from [18], citations omitted):

> 'Where a will (meaning the original and not secondary evidence of it such as a copy will) cannot be found upon a testator's death despite a diligent search, *and* provided the will was last traced to the testator's possession, a rebuttable presumption of fact arises that the will was destroyed with the intention of revoking it…
>
> [19] The strength of the presumption depends on the character of the testator's custody of the will, including the physical arrangements the testator has in place for it, who knows or has access to it, and the degree of care taken in looking after it…
>
> [20] The strength of the presumption also depends on the nature of the will itself… '.

The Court explained the presumption is not engaged if it is established that the testator never took possession of the original will because it was retained at a solicitor's office or was left with some other custodian (at [22]). This was the position with Berger's will as her actions were inconsistent with her ever being in possession of the original will following its execution. In addition, even if the presumption had applied, it was rebutted by Berger's actions in informing others of the will—this being inconsistent with her having destroyed the will. The appeal was dismissed.

Appellate decision concerning informal will

After Colin Peek's death, his solicitor found a document in the Notes application on his iPhone. The note gave instructions about dealing with Peek's property upon his death. The note was not executed in the manner required for a will. The issue in the proceedings was whether Peek intended the note to form his will, thus enabling the Court to dispense with the formal requirements for execution pursuant to section 8 of the *Succession Act 2006* (NSW).

At first instance, the Court expressed serious doubts about the solicitor's evidence. The solicitor also acted for the main beneficiary pursuant to the note despite being a witness and having a financial interest in the outcome of the proceedings. The solicitor was found to be in a position of conflict between his personal interest and his duty to the court. The Court stated that the fact the solicitor discussed with the main beneficiary the evidence he would give on matters on which there was overlap with the solicitor's own evidence was improper and seriously undermined the probative value of both witnesses' evidence. When he had possession of the iPhone, the solicitor deleted messages and other documents from it.

The Court of Appeal agreed with those concerns (***Wheatley v Peek* [2025] NSWCA 265** (Payne JA; Bell CJ and Mitchelmore JA agreeing) at [59]). However, the Court of Appeal did not consider that criticism to be determinative because it was common ground that the note was prepared by Peek, the note reflected his testamentary intentions, and Peek did not intend to leave the majority of his estate to the person who would inherit on intestacy (being the outcome if the note was not an informal will) (at [29], [60] and [67]).

The Court of Appeal allowed the appeal and ordered the formal requirements be dispensed with. In so doing, it was heavily influenced by the note's heading of 'Last Will', it being dated, signed (by the appearance of the deceased's initials) (at [46]-[50]) and in disposing of all Peek's significant assets (at [56]). Further, the note was made after Peek had a near death experience. After it was made, Peek told his cleaner he had finalised his will. He implied to the main beneficiary that he should not buy a small apartment as he would be coming into sufficient funds to buy something bigger (at [71] and [74]). Finally, the fact the will was not published in any way was explained by Peek's struggle with talking about his mortality (at [76]).

Failed granny flat arrangement

Hildegard Meiners made two transfers of money ($130,000 and $242,717) to one of her daughters, Debra Gunn, when the mother was 78 and 79 years of age. The daughter spent part of the money to purchase a unit in her sole name. The mother successfully argued the transfers were part of a failed joint venture pursued by mother and daughter. The joint venture was the purchase of residential property or properties to live in together or in close proximity, with the daughter providing care, comfort and assistance to the mother as she grew older.

The joint venture did not eventuate. The mother stated the effect of the transfers of money was a reduction in her fortnightly pension from $900 to $600 and a requirement to repay some money to Centrelink. The Court concluded it was unconscionable for the daughter:

> 'to retain the benefits of the entirety of [the mother's] contribution to the joint endeavour in circumstances where [the mother] has not received any benefit from the joint endeavour. That is, [the mother] does not have the benefit of ownership of a property or the money constituting the two transfers. [The daughter], on the other hand, has the benefit of the entirety of [the mother's] contribution to the joint endeavour, and has been able to purchase a property …' (***Meiners (by her next friend the Public Trustee) v Gunn [No 2]* [2025] WASC 529** (Seaward J) at [693]).

The Court is yet to decide the ultimate orders to be made.

Enforceable promise but not necessarily for the whole estate

Peter Kastropil died intestate at the age of 85 years in 2017. His closest relative was a cousin, Smiljana Budimir. Zeljko Bahnik ('**plaintiff**') claimed an entitlement to the whole of the deceased's estate of $7.8 million on the basis of proprietary estoppel. The plaintiff and the deceased met as co-workers in 1987. They developed a strong friendship which endured for 30 years. Considerable monetary gifts were made to the plaintiff by the deceased between 2005 to 2009.

From around 2005, the plaintiff provided care and support to the deceased and his wife. By 2010, they had become increasingly reliant on him due to their ages (78 and 73 respectively), serious health issues and a lack of other close friends or family in Sydney, where the deceased and his wife lived. In July 2010, the deceased was recovering from a stroke which impaired his vision and diminished his ability to care for his wife. She was entirely dependent on him due to a mental illness. The deceased looked to the plaintiff as the only person he could trust to provide the assurance he needed, both as to their future care while he was alive and his wife's future care if he should predecease her (***Bahnik v Budimir* [2025] NSWSC 1595** (Richmond J) at [168]).

The main promise was made around this time. It was premised on the plaintiff continuing to support and care for the deceased and his wife, and their affairs, until death. Satisfying the first requirement for proprietary estoppel, the Court considered the promise was clear and unequivocal as it was reasonable for the plaintiff to have interpreted the statement made by the deceased in July 2010 as meaning the deceased would leave him his estate. It was also reasonable for the plaintiff to rely on it by providing care and support to the deceased and his wife, which he did over the period from July 2010 to the deceased's death in 2017. Further, a reasonable person in the deceased's position must have intended the plaintiff would rely upon the promise in that way, and the Court inferred this was the deceased's intention when he made it (at [170]).

The Court accepted the plaintiff provided care and assistance in part out of friendship and gratitude for earlier gifts. But the level of care and support went far beyond that expected of a grateful friend. Further, the Court accepted that, if it wasn't for the promise, the plaintiff would not have retired early in 2011 and would have gone to Brisbane to live in 2016. He would have retired and gone to Brisbane if told the promise would not be kept (at [182]).

The plaintiff established detriment—in the sense of prejudice or disadvantage by reason of his change of position in reliance on the promise—if the promise was departed from (at [187]). However, the Court sought further submissions on the appropriate relief and, particularly, whether an order requiring the estate to make good the promise would be a disproportionate outcome (at [192]).

Effect of gift to non-existent beneficiary and construction of gift over clause

William Southey's will stated it was made in contemplation of possible marriage to Kyle Jackson but not conditional on the marriage occurring. Jackson was appointed executor. $100,000 was given to the deceased's former wife, Kay Moseley, and the balance of the estate was given to Jackson. Clause 5 stated that, if Jackson 'fails to survive me', the estate was given to Moseley.

The deceased only 'met' Jackson online. His existence could not be verified. The person with whom the deceased 'met' refused or ignored requests for video calls. Photo ID in the form of a US Passport was found to be fraudulent. Jackson was not known at the residential address provided.

If he was found to exist but could not be found, the executor suggested a *Benjamin* order would be appropriate. However, the Court concluded the person to whom the deceased intended to give his residual estate did not exist (***Re the will of William Ian Southey* [2025] VSC 801** (Goulden AsJ) at [25]).

The Court then needed to decide who inherited the deceased's residual estate. The Court considered the gift over in clause 5 did not apply on its terms as it required Moseley to remain alive after Jackson. This was not satisfied as Jackson never existed (at [31]). The executor argued that the 'rule' in *Jones v Westcomb* (1711) Prec Ch 316 applied because, if the deceased had contemplated the contingency that did occur, it was obvious the deceased must have intended the gift over would still operate (at [30]). The Court agreed, stating that the intention to provide a gift over in favour of Moseley, and the broad preference to avoid intestacy in favour of her, was 'rational, explicable and readily inferable from the deceased's prior testamentary instruments' which had all made provision for Moseley (at [33]).

Proper approach to pleading family provision claims

The Court, in ***Theocharous v Theocharous* [2025] NSWSC 45** (Parker J), suggested an applicant for family provision in the nature of a *Crisp* order would need 'to seek the relevant relief (an order for conveyance of a life estate) expressly and to plead the supporting facts' (at [44]). This was required by rule 6.12(1) of the *Uniform Civil Procedure Rules 2005* (NSW) which provides that '[o]riginating process must "specifically state" the relief sought by the plaintiff … Ordinarily, this is done by setting out the terms of the order which the plaintiff wishes the Court to make' (at [46]).

The Court considered that the practice in family provision proceedings should be no different, having regard to section 65 of the *Succession Act 2006* (NSW)— which is about the nature of orders (at [48]). In fact, 'proper practice requires that the originating process in family provision proceedings contain a prayer for relief expressed in the terms specified in s 65' (at [49]). The Court added:

> 'There are particular reasons why it is salutary to follow this practice in family provision proceedings. An application for provision should delay or interfere with the realisation of the estate assets, or with the distribution of those assets, only to the extent absolutely necessary. Precise identification of the orders sought by the plaintiff may allow unaffected assets to be realised and distributed in accordance with the executor's obligations' (at [50]).

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