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Elder law & succession: April 2026

BY DARRYL BROWNE - APR 10, 2026 8:00 AM AEST

KEY DECISIONS

- *Polites v Salkanovic* [2026] SASCA 2 (letters of administration)
- *Nordeck v NSW Trustee & Guardian* [2026] WASC 19 (barring order, judicial advice) and *Janssen as administrator of the estate of Dr Jurg Dieter Krone* [2026] WASC 23 (judicial advice)
- *Legal Services Commissioner v Biggs* [2026] QCAT 20 (power of Attorney)
- *Lord v Craig* [2026] NSWSC 17 (costs capping)
- *Di Trapani v Di Trapani* [2026] QSC 20 (will construction)

Appellate discussion of limited letters of administration

Florence Polites died in 2024. She appointed her son, George Polites, as her executor. He did not seek probate as he considered the estate fully administered and insolvent. A grandson of the deceased, Mark Salkanovic, received an annuity in the will of $5,000 per annum but wanted to file proceedings seeking family provision. To that end, he sought a grant of letters of administration *ad colligenda bona* (to collect the goods).

The Court made orders largely in accordance with draft orders tendered by the applicant. The executor appealed, arguing the Court's orders went beyond a grant *ad colligenda bona*. In the course of dismissing the appeal, the Court of Appeal of South Australia, in ***Polites v Salkanovic* [2026] SASCA 2** (Bleby JA; Doyle and David JJA agreeing), described the different limited grants of administration as traditionally configured and the modern approach to making grants of administration.

As well as *ad colligenda bona*, the Court described the following traditionally configured limited grants:

- *ad litem*('for the suit'), which 'describes a grant made for the purposes of enabling the estate to be represented by an administrator so as to defend, commence and prosecute legal proceedings' (at [100]);
- *pendente lite*(to permit administration of an estate to carry on while litigation of a claim to a general grant is pending);
- *de bonis non*(where an executor or administrator dies or goes missing before fully administering an estate);
- *durante minore aetate*(during the minority of an executor or some other person entitled to a grant);
- *durante absentia*(for a period of absence from the jurisdiction of an executor or other person entitled to a grant); and
- *durante dementia*(while an executor or administrator is incapacitated) (at [73]).

However, the Court explained (from [72]):

> 'When describing the different forms of grant in the contemporary context, it is necessary to bear in mind that the jurisdiction of the Court is flexible, in that it can tailor the form of a grant to the needs of the estate at a given time...
>
> [74] Limited grants may therefore be for a confined purpose or for a confined period of time (or both). Each described form is, in its essence, directed to the specific requirements of the estate in circumstances where a general grant is, for whatever reason, not available.'

The Court decided the executor's argument—that the application, because it referred to a grant *ad colligenda bona*, was confined to a grant that met the archetype of such a grant—misconceived the nature of the jurisdiction (at [147]). The Court's jurisdiction was 'to make a limited grant in whatever terms are necessary to protect the interests of the estate' (at [117]).

Order barring beneficiary's claim and advising administrator against pursuing a debtor

Alan Foster died intestate. He was not married and did not have a de facto partner at death. His parents had died before him. He had an adopted brother but no other siblings. The fate and whereabouts of the brother were unknown. The person most likely to have been the brother died almost 10 years previously but there was no evidence of a grant of administration being made in relation to his estate. As a consequence, by virtue of section 61 of the *Probate and Administration Act* 1898 (NSW) ('***PoA Act***'), the brother's estate was vested in NSW Trustee & Guardian. After the brother, the next claimants on an intestate estate were the deceased's aunts and uncles. The deceased had three of these.

The administrator of the deceased's estate sought a barring order under Western Australian legislation which was substantially the same as section 93 of the *PoA Act*. The Court determined there was no prospect proceedings would be commenced in respect of any claim by the brother's estate. It made orders barring any claim by the brother as beneficiary of the deceased's estate (***Nordeck v NSW Trustee & Guardian* [2026] WASC 19** (Russell M) at [40]). This enabled a distribution of the deceased's estate to the aunts and uncle.

The administrator also sought judicial advice that she was justified in not taking steps to enforce an unsatisfied costs order or claim compensation against, and distribute the estate without recovery money from, a Mr Jones. Jones had occupied the deceased's house following the deceased's death. An eviction and costs order were obtained against Jones. The administrator considered it uncommercial to seek to recover costs or compensation. The Court advised the administrator was justified in distributing the estate on that basis (at [65]).

Order advising administrator regarding proprietary estoppel claim and pursuing debtor

The administrator of Jorg Krone's estate sought judicial advice concerning two causes of action. The first was a claim made against the deceased's long term de facto partner by an employee of the deceased to which the deceased's estate was joined. The employee alleged that real estate registered in the name of the partner was held by the partner on a resulting trust for the deceased. The employee alleged the deceased promised to transfer ownership of the real estate to the employee if she stayed employed with him and declined alternate employment which offered better pay and conditions. The employee sought alternative relief of $800,000 equitable compensation from the estate. The administrator estimated the costs of defending these proceedings at $250,000 to $350,000.

The Court explained its role was not to assess the correctness of the administrator's decision to take the proposed action, but to assess whether the administrator had taken proper advice and considered all relevant matters before arriving at a reasoned and appropriate decision (***Janssen as administrator of the estate of Dr Jurg Dieter Krone* [2026] WASC 23** (Lundberg J) at [23]). The Court was so satisfied and advised the administrator it was justified in taking a neutral stance on the resulting trust and proprietary estoppel claims but defending the equitable compensation claim.

The second cause of action arose from an informally documented loan made by the deceased to the employee for $140,000 plus interest at four per cent per annum. The employee asserted the loan had been forgiven in recognition of her long-term employment. The costs of taking the claim to a hearing were estimated at $50,000 to $70,000. If the claim failed, the estate would most likely bear the employee's costs. Nevertheless, the Court advised the administrator was justified in pursuing this claim.

Lastly, the administrator's costs in seeking judicial advice were ordered to be paid from the estate on an indemnity basis.

Unsatisfactory professional conduct to not comply with attorney's instructions

The practitioner involved in ***Legal Services Commissioner v Biggs* [2026] QCAT 20** was charged with unsatisfactory professional conduct for failing to comply with a request for documents from the client's attorney. The practitioner did not accept the opinion of health professionals concerning the client's decision-making capacity. He sought his own assessment. The result was a delay of 16 months in the solicitor providing the requested documents.

The practitioner stated he had concerns over elder abuse by the client's children and this required him to be particularly vigilant. The Tribunal considered there was no call for the practitioner to make his own inquiries about the client's decision-making capacity (at [57]). Further, there was no reasonable excuse for the practitioner's failure to accept the attorney's instructions (at [59]). The practitioner purported to be acting for the client but his actions were described as dilatory, petty and unsatisfactory. The practitioner had an unblemished legal career of over 42 years but was held to have engaged in unsatisfactory professional conduct.

First pre-emptive costs capping order

In ***Lord v Craig* [2026] NSWSC 17** (Meek J), the Court identified its decision as the first time 'a contested application for a cost capping order has been both made and heard prior to completion of all interlocutory steps and in advance of the allocation of a hearing' (at [10]).

The net estate was $135,674. It was left to one child. Another of the deceased's five children sought an order for family provision. The claim was not resolved at mediation. The parties' combined costs to that stage were $62,416 or 46 per cent of the net estate. The Court forecast that the total costs to a hearing would consume the entire estate.

The Court's review of cost affidavits in the Family Provision List disclosed that cost estimates to mediation were very regularly in the order of $35,000 to $50,000 (and closer to $50,000 if any defendant's reply evidence was put on) (at [152]). The Court stated:

> 'In cases where costs exceed [this] range..., the costs affidavit ought to as a matter of transparency explain the reasons for the large amount of costs whether it be dint of the complexity, the charging rates or otherwise' (at [153]).

The Court stated its supervision of the Family Provision List from 2023 to 2025 and anecdotes suggested 'currently a "standard case" will involve costs in the order of $90,000 to $100,000 for a one to two day hearing and $100,000 to $120,000 for a 3 day (more complex) hearing' (at [158]).

In small estates, forensic moderation was required:

> '[I]n simple cases in small estates the essential work done [should be] suitably pared and refined so that the costs to carry a matter to mediation on each side should be much closer to $20,000 to $30,000 for each side' (at [180]).

The Court ordered, 'pursuant to UCPR r 42.4 and subject to further order, that the maximum professional legal costs and disbursements that any party may recover from any other party, or out of the deceased's estate in these proceedings is specified as $22,500 (inclusive of GST)' (at [57]).

The Court made it clear that 'the purpose of a capping order is not to impinge upon rights as between an individual party and their solicitors as to costs' (at [249])

Further, because capping was interlocutory, it was capable of being varied where it was in the interests of justice to ameliorate unfairness, such as where there has been a later material change of circumstances (at [106] and [207]).

Who thinks it is a good idea to have your accountant draft your will?

Elizabeth Di Trapani executed a will prepared by her accountant, Tony Lowe. The following clauses produced seven different disputes about their meaning:

> '8.4 **I GIVE** my Shareholding in Glutolo Pty. Ltd. A.C.N. 010 067 795 to the Trustees of my Will for the purpose of consolidate, disposal, and transfer or my assets in the Mario Di Trapani Discretionary Trust.
>
> ...
>
> 8.6 I further instruct my Trustees and Directors and Shareholders in Di Trapani Constructions Pty. Ltd. and Glutolo Pty. Ltd., shall not make any further claims against one another in any intercompany loans and advances as at the date of my death.
>
> 8.7 **I GIVE** my son **PETER DI TRAPANI** a sum of $400,000 in cash or equivalent.
>
> 8.8 I instruct my Trustees not to make any claim on any debt owed by my son **PETER DI TRAPANI** for the sum up to $400,000.00 or if there is no debt as at the date of my death, a bequest in cash or equivalent a further sum of $400,000.00.
>
> 8.9 **I GIVE** my son **PETER DI TRAPANI** all my estate and interest in the shed situated at 35 Kate Street, Kedron, Brisbane for his sole use and benefit absolutely.
>
> 8.10 **I GIVE** all my estate and interest in Unit 2, 4 Binkar Street, Chermside, Brisbane to my Daughter, **GINA LOFARO** for her sole use and benefit absolutely.

8.11 **I GIVE** all my estate and interest in Unit 1, 4 Binkar Street, Chermside, to my Grand Daughter **SAVANNAH JAYNE McDOWELL** to be held in Trust until she reaches 18 years of age, for her sole use and benefit absolutely.

8.12 **I GIVE** all my estate and interest in Unit 3, 4 Binkar Street, Chermside, to my Grand Daughter **ALEC JAMES McDOWELL** to be held in Trust until he reaches 18 years of age, for her sole use and benefit absolutely.

8.13 **I GIVE DEVISE AND BEQUEATH** the rest and residue of my Estate both real and personal of whatsoever nature and wheresoever situate to my Executor and Trustee **UPON TRUST** to sell, call in and convert into monies such part of parts of my Estate shall not consist of monies and from the proceeds of such sale calling in and conversation together with my ready monies to pay my debts including bank debts in 95 Blandford Street, Grange, funeral and testamentary expenses and all duties on my Estate or arising in the consequence of my death to stand possessed of the residue (herein after referred to as 'my residuary estate') **UPON TRUST** be divided amongst my children equally;

1. Peter Di Trapani
2. Gina Lofaro
3. Suzette Di Trapani
4. Linda McDowell

...

CLAUSE 10 ALLOCATION OF BURDEN TAX

To the full extent permitted by law, My Executor will allocate the burden of any pay any Commonwealth or State Tax imposed in the future on the capital of My Estate, as though it were a testamentary expense.

CLAUSE 11 PROFESSIONAL ADVICE

I wish my Executor to obtain and consider the advice of Mr Tony Lowe of T Lowe & Co. on substantial decisions. Should my Trustees fail to reach a decision on substantial matters Mr Tony Lowe is appointed as arbitrator to the resolution.'

In brief, the Court (***Di Trapani v Di Trapani* [2026] QSC 20** (McCafferty J)) decided:

- The real estate listed in clauses 8.9 to 8.12 was not owned by the deceased but upon trust by a corporate trustee, Glutolo Pty Ltd, of which she was one of three directors. The Court concluded:

  'First, clause 8.4 of the will has no effect in relation to the Trust and imposes no obligation on Glutolo as trustee. Secondly, the purported gifts in clauses 8.9, 8.10, 8.11 and 8.12 of the will fail. Thirdly, the term "my estate" used throughout the will, including in clauses 8.13 and 10, does not include assets owned by the Trust' (at [40]).

- It followed from the above that clause 10 had no impact.
- There were four possible constructions of the gift of shares in clause 8.4. The Court concluded it was a gift beneficially to the executors as they were the other directors of the corporate trustee (at [45]).
- Clause 8.6 was unenforceable as it contained a wish or desire she was incapable of giving effect to (at [51]).
- Clauses 8.7 and 8.8 conferred separate gifts (at [61]).
- Clause 11 could be ignored (at [62]-[64]).
- The requirement in clause 8.13 to 'pay my debts including bank debts' does not include any loan for which the testator was merely a guarantor (at [72]).

It is not clear whether the accountant's professional indemnity insurer would cover the executor's loss or whether the disentitled beneficiaries could successfully bring a claim against the accountant for negligence.

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