LSJ ONLINE

Elder law & succession: May 2026

BY DARRYL BROWNE - MAY 05, 2026 4:10 PM AEST

KEY DECISIONS

- *Nicholson v Sheils* [2026] VSC 18 and *Rance v Dempsey (No 5)* [2026] NSWSC 270 (Intestacy)
- *Dedousis v Gooley as Executor of the Estate of the late Melville William Gooley* [2026] NSWCA 28 (Negligence)
- *Canniford v Boles* [2026] TASSC 8 and *Singer v No Defendant* [2026] NSWCA 38 (Power of attorney)
- *Burke v Australian Executor Trustees Ltd* [2026] VSC 178 (Executor)
- *Muhvich v Arena* [2026] NSWSC 333 (Informal will)

Distribution on intestacy where more than one spouse

The relevant Victorian provisions are in substantially the same terms as Part 4.2, Division 3 of the *Succession Act 2006* (NSW). Those provisions state that, where a deceased dies intestate and leaves more than one spouse, the spouses can agree on distribution of the whole of the estate. If there is no agreement, the Court may make a distribution order. Otherwise, the estate is divided in equal shares. Those provisions were considered in ***Nicholson v Sheils* [2026] VSC 18** (Moore J).

The deceased, Christopher Sheils, married Jembra Sheils in 1990. They separated around 2003 but never divorced. The deceased formed a de facto relationship with Sally-Anne Nicholson around 2016 to 2018 (continuing until the deceased's death). The deceased died intestate in 2023. The Court decided that it was just and equitable that the whole estate be paid to the de facto spouse. Chief among the Court's considerations were (at [32]):

- the deceased and de facto spouse lived in a fully committed domestic relationship at the time of his death;
- there was no evidence that the deceased and the estranged wife maintained any sort of relationship after 2018, and they had separated some 20 years before the deceased's death;
- the deceased and the estranged wife severed their financial relationship around 2018;
- the deceased's only asset of significance was a half interest in real estate co-owned with the de facto spouse and acquired during their relationship;
- the deceased and de facto spouse were financially interdependent;
- the de facto spouse was in a weak financial position: her monthly living expenses substantially exceeded her income and her limited savings were being rapidly depleted to fund the shortfall;
- the de facto spouse suffered from a variety of health issues.

Attempt to resist sale of real estate pending claim by alleged spouse

In earlier proceedings, the Court determined that Ian Astill (the deceased) and Glynis Dempsey, who were registered as owning real estate as joint tenants, owned the real estate according to their contributions of 82.43 per cent and 17.57 per cent respectively. The deceased died intestate. The administrator of the deceased's estate sought an order for the appointment of trustees to sell the real estate. Dempsey asserted she was the deceased's spouse and had elected to acquire the real estate pursuant to *Succession Act 2006* (NSW), s 115. This was contested.

The court's power to appoint trustees for sale pursuant to *Conveyancing Act 1919* (NSW), s 66G is discretionary, but the applicant is generally entitled to an order as of right (***Rance v Dempsey (No 5)* [2026] NSWSC 270** (Cavanagh J) at [25]). The onus falls on the person opposing the order to so persuade the court (at [27]). A reason not to make orders is that it undermines a statutory remedy (at [48]).

The Court made a qualitative assessment of Dempsey's claim. The Court noted she had not adduced evidence enabling assessment of the strength of her case, and that in earlier proceedings the Court had not accepted she was the deceased's spouse. Also, there was significant delay in asserting her election (at [49]). The Court decided Dempsey's claim did not cause it to decline to make the order sought (at [52]).

Claim of negligence by executor against testator's geriatrician

The testator, Melville Gooley, made a valid will in 2010. From August 2012 to August 2017, the testator came under the care of a geriatrician, Dr Chris Dedousis. The testator made six further wills in that time. After Gooley's death, each of those six wills was held to be invalid because of the testator's lack of testamentary capacity at the time of making them. The executor spent $2,491,771.01 defending the wills. It brought proceedings against the geriatrician alleging negligence. This was recognised as a novel claim for pure economic loss.

The initial pleadings were struck out with leave to the executor to replead, but the proceedings were not summarily dismissed. The geriatrician appealed the decision to not summarily dismiss the proceedings. The Court of Appeal refused leave to appeal, observing that the question of whether an executor can maintain a claim for pure economic loss against the testator's treating doctor was not a pure question of law (unlike the interpretation of a statute) (***Dedousis v Gooley as Executor of the Estate of the late Melville William Gooley* [2026] NSWCA 28** (Payne and McHugh JJA) at [21]). The doctor's liability could 'be fully resolved only by reference to an identified set of facts (whether as alleged in a pleading or as found after trial)' (at [22]).

The Court commented that the geriatrician's 'arguments appear to have considerable force' (at [32]). However, 'it was not shown that the claim was so obviously untenable that it could not possibly succeed, such that the primary judge should have dismissed it summarily' (at [48]).

Freezing order made against attorney's assets

The son of Marien Canniford ('**the principal**') sought freezing orders against assets of his sister, Annette Boles, who was acting as the principal's attorney ('**the attorney**'), and ancillary orders against two firms of conveyancers and the banks involved in the attorney's sale of one residential property and the purchase of another.

The principal was 88 years old and lived in an aged care home in Queensland. The son was appointed her administrator by the Civil and Administrative Tribunal of Queensland. He gained access to his mother's bank statements. The son concluded the attorney had misappropriated a substantial amount of the principal's money, while purporting to act as her attorney. The son confronted the attorney who said she was selling her Tasmanian home.

The Court in ***Canniford v Boles* [2026] TASSC 8** (Daly AsJ) referred to evidence which, if accepted at trial, would establish the attorney used the principal's bank card for personal expenses including gambling and home improvements, and made large, unexplained withdrawals and transfers from the principal's bank accounts. These amounted to around $350,000. The Court was satisfied these actions breached the attorney's fiduciary and statutory duties to the principal (at [14]).

The Court concluded that, in light of the attorney's history of gambling, there was a real risk of dissipation of any equity she had in the recently purchased property. It made freezing orders of the type sought.

Rectification of defective s 19 certificate

The decision reported at Browne, *Effect of non-compliance with requirements for s 19 certificate in Enduring Power of Attorney*, LSJ Online November 2025 has been overturned on appeal on a basis not raised at first instance.

The proceedings concerned an instrument which was executed by the principal as an Enduring Power of Attorney ('**EPoA**') but lacked the statement required by *Powers of Attorney Act 2003* (NSW), s 19(1)(c)(iv) that the prescribed witness was not an attorney under the EPoA. The Court of Appeal in ***Singer v No Defendant* [2026] NSWCA 38** (Griffiths AJA; Bell CJ and Adamson JA agreeing) agreed with the trial judge that the statement must be given contemporaneously with the execution of the instrument by the principal (at [25]). The Court reasoned (at [24]):

'the apparent purpose and policy of the certification requirements is to set out a prescribed checklist of procedural steps that must be complied with by the witness in order to protect the integrity of the powers of attorney regime (which is capable of authorising a person to make significant decisions on behalf of another) and to ensure certainty as to when an enduring power of attorney is effectively created.'

On appeal, it was suggested that the certificate could be construed so as to include the missing words. However, the Court observed (at [28]) that the issue:

'involves the mistaken omission of words which, by virtue of statute, needed to be included in the relevant instrument to create an enduring power of attorney. It would be inappropriate for the Court to read into the Instrument the words of the omitted s 19(1)(c)(iv) statement to find that the formal requirements for the creation of an enduring power of attorney have been met.'

A further alternative was that the EPoA be rectified. The Court decided that rectification in equity was available (and appropriate) in the particular circumstances of the case where there was a clearly established common intention between the principal, prospective attorney and witness to create an EPoA through the execution of the instrument, and a common mistake in the failure to include the prescribed statement under s 19(1)(c)(iv) of the Act (at [39]). The Court granted leave to appeal and allowed the appeal.

As well as a rectification suit, an attorney who is concerned about taking action where there may be a faulty s 19 certificate should consider the application of *Powers of Attorney Act 2003* (NSW), s 31 (confirming powers) and s 38 (advice or directions).

Challenging the commission charged by a trustee company

A beneficiary of three estates – her grandfather's, father's and aunt's – sought orders for removal of the professional executor of each estate. The Court described the executor's handling of the estates as involving:

'dilatory and ineffective communications with the beneficiaries (particularly in the earlier stages of the matter), and, above all, its inconsistent promises and conduct and its prevarications over the sale of [estate real estate], all left much to be desired and were substandard'

(***Burke v Australian Executor Trustees Ltd* [2026] VSC 178** (Gray J) at [372]). The Court also referred to a strong claim of *devastavit* (which it called 'wastage') (at [390]).

Because of the 'compelling claims' of *devastavit* against the executor, the Court considered that these needed to be investigated and an independent administrator should be appointed to undertake that task (at [503]). The Court reached that conclusion even though a majority of the beneficiaries of the estates did not support the removal. The Court stated that was not a decisive factor (at [515]). Nor were the further costs and delay occasioned by a new administrator. The Court considered the executor was unfit to continue in the role, so options such as giving it detailed advice and directions about future action were not viable (at [521]).

An issue in the proceedings upon which there didn't appear to be previous authority was whether the executor, as a licensed trustee company, could be held responsible if it had charged excessive fees. The Court noted that a licensed trustee company was regulated by provisions in the *Corporations Act 2001* (Cth) ('***Corporations Act***'), and that Act conferred no power on the court to reduce excessive fees and commissions charged by those companies. Moreover, certain relevant provisions of that Act were intended to apply to the exclusion of laws of a State or Territory, including laws that regulated the fees that may be charged by companies for the provision of traditional trustee company services and laws that required the disclosure of those fees.

However, the Court also noted an argument that a law such as the Victorian equivalent to *Probate and Administration Act 1898* (NSW), s 86A, which specifically allowed the court to reduce excessive fees, applied to a licensed trustee company by reason of regulation 8D.1.04 of the *Corporations Regulations 2001* (Cth).

The Court's preliminary view was that the relevant provisions of the *Corporations Act* left the court's legislative authority to reduce excessive fees free to operate on its terms (at [425]–[426]). However, the Court did not reach a concluded view but allowed the parties an opportunity to address on the issue. The Court was nevertheless satisfied there was a reasonable basis for reducing the commissions that might otherwise be payable to the executor by a substantial margin (at [435]).

Hospital notes make informal will

Colin Jameson was in hospital having been diagnosed with brain cancer. He was in rapidly declining health. The Court observed that he 'was a man facing the harsh reality of his imminent mortality' (***Muhvich v Arena* [2026] NSWSC 333** (McGrath J) at [202]). He wrote on two faded hospital food menu request forms ('**the hospital notes**'). The main issue in the proceedings was whether those forms comprised Jameson's 'informal will'.

The first of the hospital notes was dated, stated it was 'My Testament to My Will', and contained Jameson's name and address. It read in part 'I. WANT TO Leave my PROCESSIONS' (which the Court read as possessions) to a friend of 50 years (albeit that the friend's name was misspelt). The possessions were listed. Jameson signed the front page of the first hospital note.

Jameson told the beneficiary, Muhvich, of the hospital notes, gave them to him to read when he visited Jameson in hospital on the following day, and allowed them to be photographed. Thereafter Jameson kept the hospital notes in his wallet before presenting them to another friend, saying they were his new will and he left everything to Muhvich.

On leaving hospital, Jameson contacted his solicitor about a new will. The solicitor prepared a draft will which was sent to Jameson together with an account for $770. Jameson was upset with those costs, thinking he should only pay $100. He never executed the draft will.

The Court concluded that the front page of the first of the hospital notes ('**the front page**') was a document which purported to state Jameson's testamentary intentions. Whilst signed by Jameson, it was not executed in accordance with s 6 of the *Succession Act 2006* (NSW) ('**the Act**'). Having regard to the form and contents of the first page, the circumstances in which it was created and the communications which occurred surrounding its creation, the Court was satisfied Jameson intended it to form his will. The Court made a declaration in accordance with s 8 of the Act so that the front page was treated as Jameson's will.

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