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Précis Paper

The Present Challenges Enforcing an Informal Will – Re Deegan [2020] VSC 763

Abstract – The present challenges encompassing legal disputes regarding informal wills, requirements of a valid will, and the Courts view of a penultimate will are issues raised in Re Deegan's recent decision [2020] VSC 763.

Discussion Includes

- Background on Re Deegan [2020] VSC 763
- Requirements for a will to be valid in Victoria
- Comparison of the penultimate and informal will in *Re Deegan*
- The Court's view of a penultimate will
- Duration of the application process
- Unsuccessful claims of this nature
- The beneficial practice of clients signing solicitors' notes

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The Present Challenges Enforcing an Informal Will – Re Deegan [2020] VSC 763

1. In this edition of BenchTV, Alison Umbers (barrister), and Peter Pascoe (barrister), Discuss the present challenges surrounding enforcing an informal will in the context of Peter Pascoe's recent case *Re Deegan.*[1] Discussion topics include the requirements of a valid will in the State of Victoria, background info on the case mentioned above, the application process, and three other key court determinations.

Background on Re Deegan [2020] VSC 763

2. Mr Francis Deegan ('the deceased'), aged 62 years, died on 2 June 2019. He was survived by Adele Marie Goldsmith ('Adele'), his domestic partner, Fredrick Deegan, Patrick Deegan and Francis Deegan, his adult sons.
3. Consequently, an issue arose regarding his informal will, as it was not executed before the deceased's death, pursuant to the *Wills Act* (1997) (Vic) s 7 ('Wills Act'). Accordingly, the plaintiff sought a probate grant under section 9 of the Wills Act to admit the informal will.
4. The case concluded with the informal will document implemented by Francis Deegan as allowed to be admitted to probate.

Requirements for a will to be valid in Victoria

5. Division 2 of the Wills Act specifies the criteria for exercising a will.
6. Starting at s7 of the Wills Act, the testator must sign the document with two witnesses present, yet the two witnesses need not sign in each other's presence. The testator's signature must be made with the intention of executing a will. The words 'informal will' do not appear in the legislation.

Comparison of the penultimate and informal will in *Re Deegan*

7. There is a significant variation between the earlier will, created in the year 2000 ('the penultimate will'), and the informal document, primarily due to a change in circumstances. The penultimate will largely favored the deceased's parents, while his children were only to receive about twenty percent, due partly to their young age at the time. Moreover, the deceased's three brothers are also favored in the penultimate will. The will at that stage

[1] [2020] VSC 763.

sought to distribute relatively evenly the deceased's wealth throughout his family members. However, he had only not long met Adele.

8. Moving forward to 2017 there was much to change. The personnel who were the subject of the dispositions had changed substantially. The deceased's father had passed away, as had one of his brothers, there was a falling out with another brother, which required an intervention order, and his relationship with Adele had flourished.
9. As well as the above changes in circumstances, the deceased business circumstances had changed somewhat, and his three sons were now adults. Thus, it was necessary to create a new will to redistribute his wealth more appropriately, which he readily adopted.

The Court's view of a penultimate will

10. In an application such as *RE Deegan,*[2] the penultimate will is very relevant for numerous reasons. Firstly, It proves that the deceased was aware of formalities for executing a valid will, which can be something that causes a degree of difficulty further when attempting to prove the informal document. However, that hinges on the facts of the case at hand.
11. Going back to the procedural step, acquiring the consent of all the persons who might be affected by the Court's termination, those who come under the penultimate will, and those who fall under the new will, the previous will plays a significant role regarding the preparation of the application.
12. It was known from the start that *Re Deegan,*[3] needed to be put before the Court because of the breakdown between the deceased and his brother, and that his brother's consent would be unobtainable.
13. The date of execution of the penultimate will also needed to be put forward to the registrar to prove that it had been created after the dissolution of his marriage.

Duration of the application process

14. The application process of *Re Deegan,*[4] was long. The informal document has its origins being 17 March 2017, in which the drafting process began. There were four revisions created in total, with the last being finalised in November 2018.
15. During the above period, it is worth noting that the deceased had a stroke in July 2017, which sent him into a recovery period for quite some time.
16. Following the deceased death on 2 June 2019, the application process commenced in late 2019, and the judgement was received on 17 November 2020.

[2] [2020] VSC 763.
[3] Ibid.
[4] Ibid.

Unsuccessful claims of this nature

17. For the most part, there is a combination of success rates among claims of this nature. Peter researched successes in all such cases over the past few years. The year 2019 saw four successful claims and two failures, yielding a 67% success rate. In 2020 there was an even (50%) success rate.
18. However, the success of the case undoubtedly hinges on the facts of the case. *Re Deegan*[5] was one of the successful cases, but there was the case of *Phillipson,*[6] handed down just after. In *Phillipson,*[7] the applicant failed on the key point that *Re Deegan* was successful, the adoption by the deceased of the newer versions of the document at two different points in time prior to his death.
19. Furthermore, solicitors need to gather evidence while keeping in mind that they must satisfy the civil burden of proof.[8] However, numerous judgements of this nature are replete with reference to the standard of proof being the Briginshaw Standard.[9] The Briginshaw Standard is known to be a combination of the *Evidence Act* 1995 (Cth), s 140, and the High Court Case of *Briginshaw v Briginshaw.*[10] The Briginshaw Standard essentially distils what the civil burden is characterised as 'reasonable satisfaction', or 'comfortable satisfaction' with the evidence.

The practice of clients signing solicitors' notes can be beneficial to a case

20. If a client cannot sign the final document, signed solicitors' notes can very well make a case. In general, this can be a good idea. However, it is not widely adopted.
21. In *Howe v Fischer,*[11] The Court dispensed with the appeal, disagreeing with the primary judge, and affirming that the most a solicitor could be required to do, is to explain to a client the benefits of creating an informal will.
22. The case of *Re Prien,*[12] was a case that relied upon a solicitors' notes. The solicitors' notes were quite abbreviated and hard to read. The client signed the solicitors notes and added 'by signing this, I confirm my instructions to be my will'. However, this was not sufficient in the given facts of the case. The Court was not satisfied that the deceased knew and approved

[5] [2020] VSC 857.
[6] Ibid.
[7] Ibid.
[8] *Evidence Act* 1995 (Cth) s 140.
[9] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
[10] Ibid.
[11] [2014] NSWSC 286.
[12] [2019] VSC 74.

of the contents of the notes or that by signing them she intended that they were to have immediate effect as a testamentary document.

BIOGRAPHY

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Alison practises in both bankruptcy and corporate insolvency. She is a member of the Commercial Bar Association of Victoria, the Law Institute of Victoria and 'WPC (Victoria) (International Women's Insolvency and Restructuring Confederation). Alison has also served on boards of not for profit organisations. Including St Laurence Community Services and the Geelong Community Legal Service.

Peter Pascoe

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Since coming to the Bar in 1988, Peter has developed a specialist practice in the areas of Wills. Estates. Probate/TFM. Equity. Trusts and Superannuation. Peter is also a nationally accredited Mediator. He is also the Victorian Contributing Editor to the recently published 5th edition of De Groot & Nickel Family Provision in Australia

BIBLIOGRAPHY

Focus Case

Re Deegan [2020] VSC 763

Judgment Link

http://www.austlii.edu.au.ezproxy.lib.uts.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/763.html?context=1;query=re%20deegan%20[2020]%20vsc%20763;mask_path=au/cases/vic/VSC

Cases

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Howe v Fischer [2014] NSWCA 286
Re Prien [2019] VSC 47
Re Phillipson [2020] VSC 857

Legislation

Evidence Act 1995 (Cth) s 140
Supreme Court (Administration and Probate) Rules 2014 (Vic) r 2.08-2.09.
Wills Act 1997 (Vic) s 7, 9