

## **MICHAEL MEEK SC, TEP**

### **CURRICULUM VITAE - ABRIDGED**

(as at September 2020)

Admitted as a solicitor in 1986.

Admitted to the Bar on 7 February 1992.

Appointed as Senior Counsel on 29 September 2009.

#### **Degrees and awards**

BEC LLB (Univ. Syd 1984,1986).

Recipient R S G Rutherford Award (Final year – First Economic Statistics) Univ. Syd. 1983 (shared).

#### **Professional Association & Recognition**

Michael has been a Member of the esteemed international Society of Trusts and Estates Practitioners STEP since 2014.

Michael is listed in Doyle's Guide of leading Wills and Estate Litigation Lawyers (identified by peers for expertise and abilities in the area) as one of the Preeminent Senior Counsel in New South Wales for 2017-2020 and is listed as one of the Leading Senior Counsel in Australia.

#### **Leading cases**

Michael has been briefed in significant estate litigation including in the estates of the late Bart Cummings and the late Reg Grundy.

Michael has been at the forefront of the law regarding Statutory Will applications, appeared for the applicant in the first application to be determined in NSW– see the decision of Justice Palmer in *Fenwick, Re; Application of J R Fenwick and Re Charles* (2009) 76 NSWLR 22; (2009) 1 ASTLR 440; [2009] NSWSC 530.

Michael further appeared in the first statutory will appeal in NSW: see *Small v Phillips* [2019] NSWCA 222, *Small v Phillips (No 2)* [2019] NSWCA 268; *Small v Phillips (No 3)* [2020] NSWCA 24 and the subsequent special leave application to the High Court – *Phillips v Small & Ors* [2020] HCATrans 96 (3 July 2020).

#### **Practice – Estate, trusts, charities & protective law**

Michael currently and has had for a number of years a leading practice in the area of estates, trusts, charitable trusts and protective law - including contested applications for probate & administration, disputes regarding administration of estates, trusts (private and charitable), protective jurisdiction (including statutory wills and financial management) and family provision applications.

#### **Practice - Other**

In relation to other practice areas Michael has been involved with Commercial litigation and also taken briefs in significant Common Law cases including the *Chelmsford litigation*, the *Tamworth Bus Crash Litigation* and the *Thredbo Landslide Commercial Claims litigation*.

A schedule of cases (2009-2020) in which Michael has appeared, resulting in judgments is attached.

**Mediation**

Michael completed the LEADR Mediation workshop course (December 2012) and was assessed as having demonstrated the competencies required for accreditation under the National Accreditation System. Michael has mediated many estate and family provision claims.

**Legal education and writing**

For 15 years Michael was one of the contributing authors for “*Ritchie’s Uniform Civil Procedure*” – LexisNexis (2005-2020).

Michael has prepared and delivered papers for CLE purposes in Estate law, the more recent of which are noted below.

Michael has had involvement in the Equity Component of the Bar Practice Course of the NSW Bar Association. Michael has also previously assisted in the legal education activities of the College of Law and the Law Faculty University of Technology Sydney.

Michael is and has been for many years a contributor or assistant editor for both LexisNexis/Butterworths and Thomson.

**Current Publications**

- Nutshell Book “Australian Legal System” 5<sup>th</sup> Edition (2016) – Thomson Reuters Legal
- “Grants in administration of Deceased estates” Michael Meek SC & Paul Studdert (2016) 43 Aust Bar Rev 115

**Other**

- Australian Encyclopaedia of Forms and Precedents – Bonds Title – LexisNexis (up to July 2012)
- NSW Court Forms Precedents & Pleadings – LexisNexis
  - Affidavits title (updated)
  - Default & Summary Dismissal Title (original precedents and revisions to text and precedents)
  - Motions, Elections titles

**Estates-Trusts-Wills CLE papers/seminars delivered**

- University of NSW Faculty of Law CLE Seminar Succession Law: Wills, Estates & Inheritance Disputes – “Challenges to wills – proving lack of capacity, lack of knowledge and approval and undue influence” (30 March 2017) – Grace Hotel, Sydney
- JNF Australia in conjunction with the NSW Society of Jewish jurists and lawyers - “Where there is a will...estate planning – current issues and challenges” - recent contested estate cases (15 March 2015) – Sydney
- University of NSW Faculty of Law CLE Seminar Succession Law: Wills & Estates Update - “Discretionary Trusts – Consideration of recent Court of Appeal decisions regarding the trustee’s power to distribute the rights of beneficiaries” (4 November 2015) - Sydney
- The New South Wales Bar Association & The Law Society of New South Wales - Estate administration: a course of seminars – The Protective, Probate and Family Provision Jurisdictions of the Supreme Court of New South Wales - Seminar No. 4: Grants in

administration of deceased estates – (30 June 2015) NSW Bar Association Rooms - I presented with Paul Studdert Senior Deputy Registrar Supreme Court of NSW

- The College of Law – Advanced Wills and Estates Conference “Administration of estates demystified - Duties of the executor in distributing an estate ” (17 February 2015) Sydney
- University of NSW Faculty of Law CLE Seminar Succession Law: Wills and Estates Update – Powers of Attorney revisited (12 November 2014) – UNSW CBD Campus O’Connell Street, Sydney, Sydney
- The College of Law – Advanced Wills and Estates Conference “The statutory power of appropriation on intestacy - the difficult question of shareholding & other issues ” – 6 August 2013) Sydney
- The College of Law – Advanced Wills and Estates Conference “Recent Case Law Update” – 5 September 2013) Sydney
- Heart Foundation Annual Working Lunch for Solicitors - “Judicial Advice Applications – Breach of trust allegations and right to indemnity in respect of legal costs” (5 August 2013) - Sydney
- Australian Charity Law Association Conference 2010 – Co-presenter Case study (Session – drafting charitable trusts – trust purposes, constitution objects and wills) (11 September 2010) - Novotel Sydney Brighton
- Lexis-Nexis - 8th Annual Conference Series: Wills & Estates NSW, Crowne Plaza Darling Harbour (17 March 2010) – Chairperson
- University of NSW Faculty of Law CLE Seminar Succession Law: Essential Topics in Practice – Rectification and Construction of Wills (5 March 2010) – Grace Hotel, Sydney
- “Implications of the Amendments to the Succession Act 2006 by the Succession Amendment (Family Provision) Act 2008” – College of Law 13<sup>th</sup> Floor Series (March 2009) – also delivered to Legal Aid (March 2009)
- “Implications of the Succession Amendment (Family Provision) Bill 2008” – 13<sup>th</sup> Floor Chambers Seminars (September 2008)
- “Family Provision Act Claims” University of NSW Faculty of Law CLE Seminar on Inheritance Disputes and Family Provision Claims (August 2008)
- “Charitable Trusts – addressing Failures in Purposes & Administration” University of NSW Faculty of Law CLE Seminar on Inheritance Disputes and Family Provision Claims (November 2007)

### **Current Memberships**

- TEP - Full member of Society of Trust and Estate Practitioners (STEP)
- FLCA - Fellow of the Commercial Law Association of Australia Ltd

### **Other**

- Michael is an active member of the Anglican Church of Australia and the Chancellor of the Anglican Church of Australia Diocese of Sydney.

**CASES SCHEDULE (2009-2020)**

**Trusts, estates, probate & protective matters**

**High Court**

- *Phillips v Small & Ors* [2020] HCATrans 96 (3 July 2020)

**Court of Appeal**

- *Wardy v NSW Trustee and Guardian* [2020] NSWCA 169 (White JA, 3 August 2020) Civil procedure — Court of Appeal — Injunction – Whether executor ought to be restrained from selling, encumbering or otherwise dealing with certain real property which forms part of the factual substratum of the appeal – Where insufficient liquid assets in the estate to meet debts and administration expenses – Where undertakings proffered by the applicant, who is also the primary creditor of the estate, not to seek to enforce or charge interest on the debts until resolution of the appeal – Interlocutory injunction granted – Whether other injunctions ought to be made restraining the executor from dealing with other real property – Undertaking proffered by executor – Injunctions refused
- *Cowap v Cowap* [2020] NSWCA 19 (19 February 2020) Succession – family provision – competing interests of disabled adult son and elderly widow – whether provision ordered in favour of son manifestly excessive – whether “adequate weight” given to widow’s claim to continue to reside in former matrimonial home – appeal dismissed
- *Small v Phillips (No 3)* [2020] NSWCA 24 (26 February 2020) Civil procedure – Court of Appeal – Costs orders – Costs orders for proceedings in the exercise of protective jurisdiction – Whether the appellant’s costs should be paid on the ordinary basis or the indemnity basis.
- *Small v Phillips (No 2)* [2019] NSWCA 268 (4 November 2019) Succession – Whether the Court should make an order under the Succession Act 2006 (NSW) for a statutory will to be made on behalf of the fourth respondent – Whether a will in accordance with the Summary Reasons is, or is reasonably likely to be, a will that would have been made by the fourth respondent if she had testamentary capacity – Whether it is appropriate for an order authorising such a will to be made – Whether the standard of review is met for the Court to re-exercise the jurisdiction conferred by s 18 of the Succession Act 2006 (NSW)
- *Small v Phillips* [2019] NSWCA 222 (11 September 2019) Succession – whether the Court should make an order under the Succession Act 2006 (NSW) for a statutory will to be made on behalf of the fourth respondent – whether the draft will reflects the fourth respondent’s wishes as to the disposition of her estate
- *Strang v Steiner* [2019] NSWCA 143 (19 June 2019) Succession – family provision orders under Succession Act 2006 (NSW) – whether exercises of discretion miscarried and the amounts of additional provisions ordered should be reduced – whether exercise of discretion miscarried with respect to who should bear the burden of additional provisions Appeals – nature of appeal – standard of review applicable to family provision orders under s 59(1)(c) of the Succession Act 2006 (NSW)

- *McCarthy v Tye* [2017] NSWCA 284 (6 November 2017) Succession – family provision – appellant claimed to be de facto partner of the deceased – primary judge rejected claim but found appellant was an “eligible person” under s 57(1) of the Succession Act 2006 (NSW) as he had been in a “close personal relationship with the deceased” – primary Judge awarded the appellant \$85,000 out of estate valued at about \$900,000 – whether any error in primary Judge’s findings of fact or evaluative judgments
- *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431; [2015] NSWCA 156 (9 June 2015) Equity – trusts – express trust – discretionary – construction – services trust used by large accounting firm – potential objects of trust included spouses of partners and persons nominated by partners – partner nominates spouse as a potential object – distributions paid to a bank account in joint names of the partner and their spouse – spouse unaware of entitlement or that distributions paid into joint account – whether the trust deed permitted interim distributions of ‘income’ – whether trustee had benefit of discharge afforded by the trust deed on payment of distributions into bank account – whether the trustee owed a duty to inform the beneficiary of their entitlement – whether trustee entitled to exemption from liability under the trust deed
- *Salmon v Osmond* [2015] NSWCA 42 (10 March 2015) Succession – family provision – provision for adult children – appeal against orders made under the Succession Act 2006, s 59– whether regard can be had to reasoning or motives behind testator’s bequests– whether regard must be had to the claims of other beneficiaries in determining whether provision was inadequate – whether regard must be had to the claims of other beneficiaries in determining quantum of additional provision– whether proper provision to an adult child extends to provision of own home – appeal against findings of fact – effect of breaking up estate assets – farming business conducted as integrated operation over several properties Evidence – admissibility of additional evidence on appeal – where evidence could have been led at trial – where additional evidence explained evidence given at trial – where updating evidence is available Costs – Uniform Civil Procedure Rules 2005, r 42.15A – what constitutes an offer of compromise – where compromise is only as to costs – costs at first instance – discretion under Succession Act 2006, s 99 – additional costs considerations for family provision cases – “overall justice of the case” – where plaintiff partially successful– costs on appeal – inapplicability of Succession Act 2006, s 99 – where appellants substantially successful; *Salmon v Osmond (No 2)* [2015] NSWCA 131 (18 May 2015) - Uniform Civil Procedure Rules 2005, rr 36.16, 36.17 – slip rule – whether no order as to costs prior to offer of compromise; *Salmon v Osmond (No 3)* [2015] NSWCA 271 (9 September 2015) Costs — Succession — One claimant partially successful on claim — Another claimant unsuccessful on claim — Whether unsuccessful party should bear entire cost of defending the proceedings — Unsuccessful party to bear portion of costs attributable to her claim.
- *Ell, Richard Austin v Ell, Stephen Maxwell* [2015] NSWCA 38 (6 March 2015) Contract – agreement between testamentary beneficiaries on conditional release of debt to the estate – whether agreement created debt enforceable by executors – effect of termination of agreement Estoppel - estoppel by convention – whether agreement between beneficiaries of the estate founded on common assumption that there was an enforceable debt to the estate – whether agreement revealed adoption of common assumption Succession – wills – construction of will – whether the will released debt owing to the testator – whether release conditional upon debtor having provided registered security for debt – use of evidence of surrounding circumstances evidence to identify knowledge and intentions of testator

- *Fairbairn v Varvaressos* (2010) 78 NSWLR 577; (2010) 15 BPR 28,269; [2010] NSWCA 234 (15 September 2010) - Construction of will - vested and future contingent interests — Whether limitation amounts to vested remainder or contingent remainder – appeared for respondent

**Supreme Court**

- *KJ v SJ (No 2)* [2020] NSWSC 1100 (Williams J, 19 August 2020) Costs – departure from the usual rule – protective jurisdiction – where applicant unsuccessful in seeking a declaration and orders under s 86 of the *NSW Trustee and Guardian Act 2009* (NSW) – where applicant reasonably commenced and maintained the application – where conduct of application as a whole not adversarial in nature – where applicant’s financial manager adopted a neutral position and provided valuable assistance to the Court – appropriate that all parties’ costs be paid out of the applicant’s estate on an indemnity basis
- *KJ v SJ* [2020] NSWSC 932 (Williams J, 23 July 2020) Guardianship – protected person – application pursuant to s 86 of the *NSW Trustee and Guardian Act 2009* (NSW) (“the Act”) for revocation of a declaration made that the applicant is incapable of managing her affairs and of orders that the applicant’s estate be subject to management under the Act – where applicant suffered a traumatic brain injury in an accident as a child – where applicant received a significant sum of money in a settlement of legal proceedings commenced following the accident – where applicant is presently married, works part-time and is the primary carer of three children – where memory and insight following the accident is and continues to be poor – where applicant suffers from executive dysfunction – where applicant experiences difficulty in managing household and personal finances – application dismissed
- *Jalife v McIntyre* [2020] NSWSC 799 (Davies J, 26 June 2020) Succession - family provision - approval of release under s 95 Succession Act 2006 - where plaintiff was the owner of property and defendants and their children (both minors) moved to property to care for plaintiff - defendants were daughter and son-in law of plaintiff - where relationship has broken down and plaintiff now seeks possession of property – cross-claim by defendants for constructive trust - settlement of proceedings at mediation – where settlement involves selling property, distributing balance between the plaintiff and defendants, and paying grandchildren a portion of the estate upon plaintiff’s death – where defendants and grandchildren seek approval of release of rights – whether release should be approved by Court – whether agreement was advantageous, prudent and fair and reasonable for the defendants
- *La Valette v Chambers-Grundy* [2019] NSWSC 1355 (Ward CJ in Eq, 9 October 2019) Civil Procedure – issue of notice to produce documents recording communications with overseas medical practitioners – whether merely a fishing expedition Private International Law – Application for leave to serve subpoenas and accompanying letters of request in Bermuda, Nevada, Florida and California for production of medical records – whether jurisdiction pursuant to the Hague Evidence Convention or inherent jurisdiction of the court.
- *Re Estate Grundy (No. 2)* [2018] NSWSC 1495 (Lindsay J, 5 October 2018) Civil procedure — Discovery — Classes or categories of documents – Whether a proper forensic purpose has been identified – Discovery limited by nature of proceedings and considerations of reasonableness – Discovery granted Succession - Family provision and

maintenance – Practice – Adequacy of disclosure by executor – Application for further discovery

- *Gall v Pham (No. 2)* [2019] NSWSC 1294 (Lindsay J, 27 September 2019) Procedure — judgments and orders — amending, varying and setting aside — notice of motion to set aside judgment— motion dismissed with costs.
- *Estate of the late James Sundell* [2019] NSWSC 1108 (Sackar J, 30 August 2019) Succession – wills, probate and administration – construction and effect of testamentary dispositions – handwritten annotations to existing will – s 8 of Succession Act 2006 (NSW)
- *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 (Lindsay J, 28 June 2019) Succession — Wills and Probate — Consideration of principles informing practice of the Court relating to compulsory production of documents — Before pleading and service of evidence Civil Procedure — Court administration — Overriding purpose — Just, quick and cheap resolution — Notices to produce — Before hearing — Probate proceedings — Practice Note SC Eq 11 — Subpoenas — To produce documents or things — Probate proceedings — Practice Note SC Eq 11
- *Church of the Foursquare Gospel (Australia) Ltd v New Hope Church Swansea Inc* [2019] NSWSC 519 (Bell P, 9 May 2019) Churches and religious associations – church property and trusts – identification of terms of trust – church property held on trust – change in denominational affiliation of church congregation. Equity – charitable trust for religious purposes – circumstances in which trust created – alteration of denominational affiliation of church congregation – church property held pursuant to charitable trust. Trusts – charitable trust for religious purposes – identification of terms of trust – replacement of trustee following change of denominational affiliation of church congregation
- *Re MP’s Statutory Will (No. 2)* [2019] NSWSC 491 (Lindsay J, 2 May 2019) Succession – Statutory Wills – Unsuccessful application for statutory will – Costs – Principles. Costs – Protective jurisdiction – Statutory will application – Principles. Civil procedure – Protective jurisdiction – Administration of estates – Application for statutory will – Costs - Principles
- *Re MP’s Statutory Will* [2019] NSWSC 331 (Lindsay J, 15 April 2019) SUCCESSION – Statutory Wills – Assessment of actual, or presumed, intention of person lacking testamentary capacity – No clear intention – Application for statutory will dismissed.
- *Lewin v Lewin* [2019] NSWSC 380 (Darke J, 5 April 2019) Personal property – co-ownership – statutory trust for sale – application under Conveyancing Act 1919 (NSW), s 66G(1) for appointment of trustees for sale by co-owner of shares in a home unit company – whether shares are “property” for the purposes of s 66G – whether shares held in “co-ownership” for the purposes of s 66G – whether ownership is “in possession” – appropriate for orders to be made appointing trustees for sale. Costs – proceedings for appointment of trustees for sale of property under Conveyancing Act 1919 (NSW), s 66G – departure from the usual rule – defendant resisted appointment of trustees for sale based on unsubstantiated allegations of impropriety or fraud – whether defendant’s conduct unreasonable – defendant’s conduct resulted in plaintiff incurring unnecessary legal costs

– half of the plaintiff's costs ordered to be paid out of the defendant's share of the proceeds of sale

- *Webster v Strang; Steiner v Strang [No 2]* [2018] NSWSC 1411 (Kunc J, 13 September 2018) Succession – family provision and maintenance – principles upon which relief granted – claim by adult children against large estate – application by beneficiaries not separately represented at earlier hearing to vary orders as to how additional provision should be borne among beneficiaries – application for stays pending appeal
- *LP v P & Ors* [2018] NSWSC 1168 (Hallen J, 2 August 2018) Mental health — Protected person — Appointment made in 2012 for financial manager of estate — Application by mother of protected person that the financial manager be removed and that a new nominated financial manager be appointed — Principles governing change of financial manager — Paramount consideration remains welfare, and interests, of protected person — Prudential management requires flexibility, consultation and respect for autonomy
- *Estate Reid; Roberts v Moses and Palmer* [2018] NSWSC 1145 (Lindsay J, 26 July 2018) Succession – Wills, probate and administration – Construction and effect of testamentary dispositions – Gift of income from dividends on shares owned only indirectly by testator through company owned and controlled by him – Gift of shares in that company to another person, subject to the gift of income – By accepting gift of shares, second person personally bound in equity to satisfy gift of income
- *Estate Grundy; La Valette v Chambers-Grundy* [2018] NSWSC 104 (Lindsay J, 15 February 2018) Family provision and maintenance – Practice – Administrator of deceased estate – Obligation of disclosure – Location, size and value of estate and notional estate – Obligation extends to property, and property transactions, outside territorial jurisdiction of court; Deceased person domiciled outside territorial jurisdiction of Court – Court's jurisdiction to make family provision order limited to property within territorial jurisdiction of Court – Existence of property, and property transactions, outside territorial jurisdiction of court relevant to determination whether to make family provision order affecting property within territorial jurisdiction; Courts – Administration of justice – Public interest in open justice – Application for suppression order – Probate – Non-dispositive provisions of will – No ground for suppression of information about those provisions; Succession – Wills, probate and administration – Omission of part of will from grant of probate – No allegation that will contains scandalous, offensive or defamatory material or is otherwise abuse of process of court – Application for suppression order in relation to non-dispositive provisions of will – Application dismissed – No ground for departure from open
- *Re LSC and GC* [2016] NSWSC 1896 (Lindsay J, 23 December 2016) - Protective jurisdiction – Protected estate management order - Voluntary transfer determination made by ASIC under the Corporations Act 2001 Cth Part 5D.6 does not, of itself, displace an order made by Court for ongoing management of a protected estate – Remedial orders made on exercise of protective jurisdiction Mental health - Guardians, committees, administrators, managers and receivers – Financial management orders – Revocation
- *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey (No.2)* [2016] NSWSC 1718 (Slattery J, 6 December 2016) -Succession – conflict of laws – whether deceased domiciled in New South Wales or Queensland at the date of her death –

whether mediation between claimants should take place before the issue of the deceased's Australian domicile is decided

- *Steiner v Strang* [2016] NSWSC 395 (Slattery J, 12 April 2016) - Succession – action by residuary beneficiary on behalf of estate for the recovery of monies claimed to be owed to an estate – executors unwilling to bring action – deceased worked in a bridal couturier business for approximately 25 years before her death. Gifts – two and a half years before she died, the deceased wrote a cheque in favour of her son-in-law for approximately \$1.2 million – whether the deceased gifted the cheque monies to her son-in-law and daughter, or whether the cheque monies were a loan to them from the deceased. Employment - beneficiaries claim the deceased was entitled under the Long Service Leave Act 1955 to long service leave in respect of her employment with a corporate entity controlling this business in which entity she held a substantial shareholding interest - whether the deceased was a ‘worker’ within the Act – whether the deceased worked continuously for the corporate entity – whether the deceased was entitled to long service leave. Restitution – the deceased requests her son-in-law to pay \$15,000 to her son on account of the son's then anticipated medical expenses – whether the sum of \$15,000 is recoverable by the son in restitution from the deceased's estate
- *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159 (Slattery J, 3 March 2016) - Trusts – Application for judicial advice – Trustee Act 1925 s63 – deceased died in 1982 – intestacy as to substantial parts of deceased's estate – whether judicial advice required – what judicial advice is appropriate. Domicile - deceased born in Queensland – deceased lived much of her life in New South Wales but moved to the United Kingdom where she was admitted into psychiatric care shortly before her death – whether deceased domiciled in New South Wales or elsewhere. Estate administration - bequests under deceased's will to charitable institutions - whether overpayment to University of Sydney – whether over payment made to the University by mistake - whether overpayment may be rectified by reimbursing residue of estate out of University's estate account. Taxation – estate has English assets liable to the payment of United Kingdom taxes - whether plaintiff would be justified in distributing the deceased's Australian estate without regard to United Kingdom tax liabilities.
- *Peta Roberts v Rupert James Moses* [2015] NSWSC 1504 (Kunc J, 14 October 2015) - Wills, probate and administration – Family provision and maintenance – Application for interim family provision order – Alternative maintenance distribution – Letters of administration ad colligenda bona defuncti – Succession Act 2006, s 62 – Probate and Administration Act 1898, s 92A
- *Re Estate GR, deceased* [2015] NSWSC 1584 (Lindsay J, 26 October 2015) - Probate and letters of administration – Grants of probate and letters of administration – Jurisdiction and discretion of court – Controversy attaching to validity of final will – Passing over final will - Grant of probate in common form of penultimate will – Reservation of liberty to apply for revocation of grant – Time to make such application limited
- *The Estate of Leslie Walter Morgan; The Salvation Army (NSW) Property Trust v Kenneth Mervyn Patteson* [2015] NSWSC 194 (Young AJA, 6 March 2015) Wills – Construction – gift with proviso – proviso fails – whether charitable trust – whether specific or general charitable purpose

- *Gregory Stuart Bowering v Deborah Jayne Knox and David John Bowering (No 2)* [2014] NSWSC 1749 (Sackar J 8 December 2014) Wills - Construction - where will establishes special disability trust - where discretionary powers of special trustee - nature of interest of beneficiary of special disability trust - whether certain clauses inconsistent with primary objects of trust - whether certain clauses contrary to public policy - whether trustee placed in position of conflict of interest - whether grant of declarations of any utility
- *Bowering v Knox* [2014] NSWSC 1107 (Sackar J, 15 August 2014) Application for appointment of tutor under UCPR r 7.18 — Where application made by opposing party — Where substantive dispute relates to construction of a will — Where individual for whom tutor is to be appointed suffers from chronic psychiatric condition — Where individual previously sought to make a submitting appearance — Whether submitting appearance the result of apathy or a considered approach — Appointment of tutor made.
- *Abu-Arab v NSW Trustee and Guardian* [2014] NSWSC 954 (Davies J, 25 July 2014) Parties — Identity of proper defendant — Claim for debt owing by deceased person — Deceased dies intestate — Estate insolvent — Next of kin do not apply for Letters of Administration — Creditor commences proceedings against NSW Trustee and Guardian claiming debt — Whether Trustee is the proper defendant. Succession — Whether the Trustee has the obligation or duty to apply for Letters of Administration — Whether the Trustee has any obligations by virtue of s 61 Probate and Administration Act — Whether the Trustee is proper defendant in a claim in personam where there is no in the estate
- *Carol Boian & Ors; Re Estate of Dan Antonio Boian* [2014] NSWSC 800 (Young AJA, 11 June 2014) Succession - deceased died intestate - letters of administration were granted to the deceased's widow and three of his adult children - whether administrators should exercise their statutory power of appropriation to distribute remaining estate assets where this involves dealing with assets not readily convertible into cash possibly for their own benefit as beneficiaries - whether conflict of interest and duty as trustees - whether adjustments in distribution of estate held shares should be made to account for majority and minority holdings - whether estate shares in company should be sold for a sum obtained through independent valuation
- *Cameron v Jeffress* [2014] NSWSC 702 (Hammerschlag J, 30 May 2014) [see also below] Trusts and trustees — Section 63 of the Trustee Act 1925 (NSW) — Application for judicial advice that trustees are justified in setting aside a particular sum to ensure payment of an annuity to be paid from a trust established under the will of the deceased — Section 81 of the Trustee Act 1925 (NSW) — Application for an order varying the trust instrument so as to permit accumulation of income and payment to beneficiaries which will have a beneficial tax effect on particular beneficiaries who would otherwise pay tax in an amount exceeding the full amount they will actually receive — Power of court to approve advantageous dealings — Whether applicable to amendment of trust instrument. Taxes and duties — Income tax and related legislation — Section 97 of the Income Tax Assessment Act 1936 (Cth) — Trust income — Income tax position of trust beneficiaries.
- *Re Rosewood Research Pty Limited* [2014] NSWSC 449 (Darke J, 17 April 2014) Trusts and trustees — Applications to court for advice — Charitable trusts — Proceedings against trustees for breach of trust — Trustees not alleged to be personally liable — Proceedings raise issues as to the terms of the trusts — Whether trustees justified in

defending proceedings in whole or in part — Whether trustees justified in obtaining opinion of counsel as to whether breach of trust allegations should be defended — Whether trustees justified in having recourse to trust funds to pay various costs

- *Segelov v Ernst & Young Services Pty Ltd* (2014) 10 ASTLR 390; [2014] NSWSC 283 (Nicholas AJ, 21 March 2014) Trusts — Trustees — Duty to beneficiary — Discretionary trust — Whether trustee had a duty to inform beneficiary of entitlement once determined — Whether trustee had a duty to ensure beneficiary received the benefit of any distribution.
- *Richard Austin Ell v Stephen Maxwell Ell & Michael Richard Ell* [2014] NSWSC 259 (Robb J, 19 March 2014) Wills — Probate and administration — Construction and effect of will — Whether the court is entitled to rectify a will under s29A Wills — Probate and Administration Act 1898 (NSW) Contract — Breach of agreement — Whether an agreement was varied or terminated; *Richard Austin Ell v Stephen Maxwell Ell & Michael Richard Ell (No2)* [2014] NSWSC 259 (Robb J, 5 May 2014) Costs - Calderbank offer - whether offer embodied a genuine compromise - costs payable on ordinary basis
- *Coates v Wattson; Estate of Sullivan* [2013] NSWSC 604 Windeyer AJ, 17 May 2013) - Wills, probate and administration — Rectification of will under s 27 of Succession Act 2006 - Costs — Appropriate costs order in contested rectification suit
- *NSW Trustee and Guardian v The Attorney General in and for the State of New South Wales* [2012] NSWSC 1282 (Hallen AsJ, 30 October 2012) - Trusts and trustees - Application to the court for determination of how the estate of the deceased should be distributed - Composition of the beneficiaries having a beneficial interest in the estate - Which institutions or organisations are "public hospitals" in New South Wales
- *Estate of S* [2012] NSWSC 1281 (Ward J, 8 October 2012) Statutory wills - s 18 Succession Act - application for leave to make application heard with application for substantive relief - where testator lacks testamentary capacity - where proposed will is unexecuted - whether proposed will is one which the testator is reasonably likely to have made had she had testamentary capacity - consideration of actual, or reasonably likely, subjective intention of incapacitated person
- *NSW Trustee & Guardian v Halsey; Estate of von Skala* [2012] NSWSC 872 (White J, 25 July 2012) Wills - construction of will - informal testamentary instruments in existence prior to execution of will - intention to constitute will - duly executed will disposing of estate in accordance with handwritten instructions - whether deceased intended that handwritten instructions to form will, together with will of 15 August 2006 - informal instruments clearly embody deceased's testamentary intentions - applied intentionalist approach to construction
- *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSWSC 594 (Slattery J, 1 June 2012) Wills, probate and administration - making of a will - deceased creates a Microsoft Word document in his personal computer - document not executed in accordance with Succession Act, s 6 - whether the document expresses the testamentary intentions of the deceased - whether the deceased intended the document to be his will - Succession Act, s 8 - revocation - document printed out of deceased's computer but not found amongst his papers after his death - Microsoft Word document not deleted from deceased's computer - whether the deceased destroyed the printed version of the document - if so, whether the deceased intended to revoke the testamentary intentions expressed within the Microsoft Word document and/or the

printed document - whether the deceased no longer intended to treat the Microsoft Word document and the printed document as his will

- *Frohlich v Herborn* [2012] NSWSC 338 (Stevenson J, 10 April 2012) Trusts - whether deceased held property on a constructive trust for plaintiff as to a half share - family provision and maintenance
- *Parry v Haisma* [2012] NSWSC 290 (White J, 30 March 2012) Construction of will - words used - gifts in a will - "my nephews and nieces" - relationship with deceased - description of relationship - words used in a social context to display affection rather than convey meaning - deceased understood ordinary conception of nephew or niece - intended description includes nephews and nieces of the whole blood and of the half-blood - intention not to include nephews and nieces of testator's de facto partner - construction of will - words used - intended use of words other than ordinary meaning - intention of testatrix at the time of execution of will with regard to the admissible extrinsic evidence - "testator's armchair principle" - Succession Act 2006 s 32 not applicable to present will
- *Petrovski v Nasev; the Estate of Janakievaska* [2011] NSWSC 1474 (Hallen AsJ, 17 November 2011) – Wills validity – Testamentary capacity- Knowledge and approval – Undue influence; *Petrovski v Nasev; the Estate of Janakievaska (No 2)* [2011] NSWSC 1474 (Hallen AsJ, 28 November 2011) - costs
- *National Australia Trustees Ltd v Fazey; The Estate of Nancy Elaine Lees* [2011] NSWSC 559 (Windeyer AJ, 10 June 2011) – Informal wills - Whether informal document intended to be will at time written or at a later date
- *Smith v Magi* [2011] NSWSC 198 (Davies J, 25 March 2011) - Expert evidence — Testamentary capacity case; *Smith v Magi (No 2)* [2011] NSWSC 272 (Davies J, 20 April 2011) — Costs of probate action
- *Estate of the Late Morris Zion Forbes v State of New South Wales and Ors* [2010] NSWSC 1439 (Hallen AsJ, 16 December 2010) – Will construction - Whether gift to identified beneficiary (Hospital) lapsed — Whether organisation successor to beneficiary
- *In the Estate of O'Dell* [2010] NSWSC 678 (Slattery J, 25 June 2010) – Informal wills – alterations – whether revocation
- *Crowle Foundation v NSW Trustee and Guardian* [2010] NSWSC 647 (Ball J, 25 June 2010) Will construction - Charitable bequest – Charitable Trusts - identification of charitable purposes – Trusts— Removal of trustee by court - jurisdiction where property not yet vested in trustees
- *Eurella Community Services Inc v Attorney General for the State of NSW* [2010] NSWSC 566 (Slattery J, 31 May 2010) – Charitable Trusts - Scope of charitable purposes defined
- *Hadfield v Hadfield* [2010] NSWSC 561 (Rein J, 28 May 2010) – Will construction - occupancy and maintenance requirements — non compliance - acquiescence by plaintiff – Family provision
- *Manns v Attorney General of New South Wales and Ors* [2010] NSWSC 12 (Slattery J, 28 January 2010) – Will construction- Charitable trusts -gift for charitable or non charitable

purposes severed by application of s 23 Charitable Trust Act 1923 (NSW) — whether uncertainty in defining trust property and distribution mechanism; *Manns v Attorney General of New South Wales and Ors [No 2]* [2010] NSWSC 325 (Slattery J, 21 April 2010) – Costs

- *Tantau v Macfarlane* [2010] NSWSC 224 (Ward J, 25 March 2010) Will construction Principles of rectification and construction — Acceptance and disclaimer of gifts Charitable gifts - whether valid gift for charitable purposes — Whether general charitable intention — Cy-près schemes
- *Fenwick, Re; Application of J R Fenwick and Re Charles* [2009] NSWSC 530 (Palmer J, 12 June 2009) Application for a court appointed/statutory will
- *Public Trustee v Herbert* [2009] NSWSC 366 (Macready AsJ, 8 May 2009) - Will construction – Admissibility of evidence of surrounding circumstances— Identification of person referred to in will – Rectification of will
- *Fairbairn v Varvaressos and Ors* [2009] NSWSC 272 (Palmer J, 9 April 2009) – Will construction - whether remainder vested in interest

#### **Family provision - other**

- *Hinderry v Hinderry* [2016] NSWSC 780 (Hallen J, 20 June 2016); *Hinderry v Hinderry (No 2)* [2016] NSWSC 1577(Hallen J, 9 November 2016)
- *Kusumo v Kusumo* [2014] NSWSC 1704 (Hallen J, 2 December 2015)
- *Cameron v Jeffress* [2014] NSWSC 702 (Hammerschlag J, 30 May 2014) [see also above] Family provision and maintenance — Claim for family provision order by grandchild of the deceased — Family Provision Act 1982 (NSW).
- *Peters v Salmon* [2013] NSWSC 953 (Ball J, 19 July 2013); *Peters v Salmon (No 2)* [2013] NSWSC 1071 (Ball J, 17 September 2013)
- *McFarlane v Mador* [2013] NSWSC 399 (Windeyer AJ, 19 April 2013)
- *Davidson v Sampson* [2012] NSWSC 481 (Stevenson J, 11 May 2012)
- *Brown v Grosfeld; Fitzpatrick v Grosfeld* [2011] NSWSC 796 (White J, 5 August 2011); *Brown and Anor v Grosfeld* [2011] NSWSC 1429 (White J, 28 November 2011) - costs
- *Burton v Moss* [2010] NSWSC 163 (Macready AsJ, 22 March 2010)
- *Tsakonas v Chrisedoulou* [2010] NSWSC 80 (Macready AsJ, 18 February 2010)
- *Axiak v Axiak* [2009] NSWSC 1319 (Macready AsJ 2 December 2009)
- *Sayer v the Public Trustee* [2009] NSWSC 89 (Macready AsJ, 31 March 2009)

Equity, Commercial, OtherCourt of Appeal

- *Alliance Engineering Pty Ltd v Yarraburn Nominees Pty Ltd* [2011] NSWCA 301 (21 September 2011) Leases — Hotel lease — Construction of term prohibiting removal of a licence - poker machine entitlements - Gaming Machines Act 2001 – appeared for appellant
- *Refina Pty Ltd v Binnie* (2010) 15 BPR 28,633; [2010] NSWCA 192 (11 August 2010) – Real property - Torrens title — Possessory title — Real Property Act 1900, Pt 6A - Conveyancing Act 1919, s 195H — Correction of errors – appeared for the respondent
- *Murakami v Wiriyadi and Ors* (2010) 268 ALR 377; [2010] NSWCA 7 (15 February 2010) – Private International Law — Stay of proceedings — Clearly inappropriate forum test — Relevance of foreign law as substantive law of underlying legal relationship between parties – Choice of Law - appeared for appellant

Supreme Court

- *Dogrow Pty Ltd v Teakdale Pty Ltd* [2013] NSWSC 726 (Rein J, 31 May 2013) - Property — Whether the lease requires the lessee to maintain a minimum number of gaming machines entitlements that are held in connection with the lessee’s liquor license
- *Permanent Custodians Limited v Tong* [2012] NSWSC 1373 (Adams J, 16 November 2012) - Criminal assets confiscation - restraining order - effect of caveat - forfeiture order - effect on equitable interests - effect on innocent creditors - effect of writ of execution issued before forfeiture
- *Ray v Eastern Suburbs Motor Cycle Club Incorporated* [2012] NSWSC 1151 (Ball J, 26 September 2012) Associations - whether property held on trust for unincorporated association is now held on trust for incorporated association - whether unincorporated association is "former association of the incorporated association" - whether Associations Incorporation Act 1984 only provides one mechanism for replacing unincorporated association with incorporated association - held that it does not
- *Parker v Alessi* [2011] NSWSC 947 (Bergin CJ in Eq 25 August 2011) – Contract – terms of agreement regarding joint venture project — Contribution — Whether the plaintiffs entitled to contribution from other guarantors
- *Stein v Torella Holdings Pty Ltd ACN 086 346 614* [2010] NSWSC 1445 (Hallen AsJ, 16 December 2010) Contracts — Joint venture — Method of calculation of interest previously determined — construction of deed
- *Refina Pty Ltd v Binnie* (2009) 14 BPR 26,957 [2009] NSWSC 914 (Brereton J, 3 September 2009) Torrens title - Possessory title