

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Alexakis v Masters (No 2) [2023] NSWSC 509

Supreme Court of New South Wales, Henry J, 16 May 2023

Which of two contested wills made in 2017 was valid.

Key words: Will, New South Wales, Revocation, Validity, Undue Influence, Fraud, Unconscionable Conduct

1. The deceased, Raymond McClure, died on 21 November 2017 at the age of 84. He never married, had no children or close family, and very few friends. On his death, his net estate was valued at approximately \$27 million.
2. In the six months before he died, the deceased made two wills that left large bequests to his general practitioner, Dr Peter Alexakis, who was the plaintiff in these proceedings.
3. The first of these wills was made on 8 June 2017 (June will) while Mr McClure was in hospital. Under the June Will, Mr McClure left 65% of his estate to Dr Alexakis with the remainder divided between three people whom Mr McClure had known for many years: Frank Camilleri, the second defendant; Hildegard Schwanke, the third defendant; and Mrs H Schwanke's daughter, Irmgard (Marianne) Schwanke, the fourth defendant.
4. Mr McClure's second and final will was made on 10 July 2017 (July will) while he was at home. Under the July Will, Mr McClure increased the bequests made to Dr Alexakis by giving him Mr McClure's home in Strathfield (Strathfield Home) and 90% of the residue of his estate. The balance of the residue, some personal items and a monetary gift of \$10,000 were left to Mr Camilleri, Mrs H Schwanke and Mr McClure's carer at the time.
5. The June and July Wills (together, the 2017 wills) were both prepared by Angelo Andresakis, a solicitor that Dr Alexakis introduced to Mr McClure.
6. The 2017 wills departed from the testamentary intentions expressed in Mr McClure's prior will, made on 27 May 2016 (2016 will), under which Mr McClure left the bulk of his estate to the Salvation Army (New South Wales) Property Trust.
7. In these proceedings, Dr Alexakis sought letters of administration of the July Will to be granted to him in circumstances where Mr Andresakis, the named executor under the July Will, renounced his appointment on 9 September 2021. In the alternative, Dr Alexakis sought a grant of probate of the June Will as the named executor under that will.
8. Dr Alexakis' application was opposed by the Salvation Army, Mr Camilleri and the Schwankes.

9. No challenge was made on the grounds that Mr McClure lacked testamentary capacity, or that the 2017 wills were not duly executed. There was no challenge to the validity of the 2016 will, other than that it had been revoked.
10. The position of the Salvation Army was that the 2017 wills were invalid because of undue influence and/or fraud, and that probate should be granted of the 2016 Will.
11. This was a different position to that of Mr Camilleri and the Schwankes, whose positions were aligned. They contended that the gifts to them under the 2017 Wills were unaffected by Dr Alexakis' alleged conduct and that they should be the recipients of the gifts to Dr Alexakis under whichever of the 2017 wills the Court determined was Mr McClure's last valid will. They argued that this was the appropriate outcome based on Mr McClure's clear and deliberate testamentary intention to remove the Salvation Army as a beneficiary of his estate and the fact that they were not involved in the preparation and execution of the 2017 wills.
12. The Court considered extensive evidence, and all the relevant facts. The deceased had made several wills over the years, but all were validly revoked by the next will made. Thus, the question was which of the 2017 wills was valid.
13. To determine this, the Court considered:
 - (a) whether the 2017 wills were made with Mr McClure's knowledge and approval of their contents;
 - (b) whether the 2017 wills or the impugned clauses were made by reason of undue influence on the part of Dr Alexakis; and
 - (c) whether the 2017 wills were vitiated by fraud on the part of Dr Alexakis.
14. The Salvation Army and the Schwankes referred to various matters which they alleged were suspicious circumstances attending the making of the 2017 wills to support their claims that the deceased did not know and approve of the contents of the 2017 wills or the impugned clauses. These included the deceased's age, health, social isolation, lack of family, short term memory loss, and reliance on Dr Alexakis for care.
15. A testator may know and approve the contents of their will even though the will does not reflect their true intention because its preparation is tainted by undue influence or fraud. Approval in this context concerns whether the testator has given assent to the contents of the will of which they have full appreciation.
16. In this case, the Court was of the view that the deceased had full knowledge of the contents of his wills, the latest of which was the July 2017 will. Nor could the Court find, after extensive consideration of the facts and evidence, that there was any undue influence, fraud, or unconscionable conduct on the part of Dr Alexakis. Therefore, the last will made (the July 2017 will) was granted letters of administration, and the gifts in that will to Dr Alexakis were valid.
17. The Court found that the Salvation Army's position was not supported as the 2016 will had been revoked by the 2017 wills. There was no need to consider any constructive trust of the proceeds of the will for any party.

COMMENT



There is a high bar to a finding of undue influence, fraud or unconscionable conduct in a will case. In this case, the deceased, although vulnerable in some ways because of his lack of social support, was of full capacity, having been a sophisticated businessman with a large share portfolio, which he managed himself online, and a detailed understanding of his financial position (an estate of more than \$37 million before debts and costs). Moreover, he had made very clear

that he no longer wished to advantage the Salvation Army upon his death, both in his oral statements, and his new wills.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/509.html>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

Date of creation: May 2023

Number of case: 2023-70

Disclaimer: The material included in this document is produced by QUT's [Australian Centre for Philanthropy and Nonprofit Studies](#) (ACPNS) with contribution from some authors outside QUT. It is designed and intended to provide general information in summary form for general informational purposes only. The material may not apply to all jurisdictions. The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

Commons licence: 

[This work is licenced under a Creative Attribution 4.0 International licence \(CC BY 4.0\).](#)

ACPNS acknowledges the funding assistance of Our Community to produce the ACPNS Legal Case Notes Series.



ACPNS SUPPORTING THE SECTOR

QUT's Australian Centre for Philanthropy and Nonprofit Studies is a small centre with BIG impact. Since 2001 it has taken a leading role in nonprofit teaching and research, benefiting the sector here in Australia and beyond.

RESEARCH

COURSES

RESOURCES

EVENTS