Note – Until Marriage Do Us Part – Revocation of Wills by Marriage: *Re Estate Grant, Deceased*

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On 5 July 2018, Justice Lindsay of the New South Wales Supreme Court delivered judgment in *Re Estate Grant, deceased* ('*Re Estate Grant*').[1] This judgment touched on several important concepts of succession law including election to acquire property from an estate, extension of the right to elect and family provision orders. However, much of the judgment focused on whether the will of David Grant had been made 'in contemplation of marriage' and had, therefore, remained in force after his subsequent marriage. This specific determination by Justice Lindsay and his Honour's analysis of the complex factual scenario is the focus of this case note.

I THE FACTS OF RE ESTATE GRANT

The decision about whether a will has been made in contemplation of marriage is extremely fact-sensitive.[2] Therefore, a discussion of the application of the law expounded by the judgment cannot be complete without a brief summary of the salient facts.

David William Grant ('Grant') passed away on 14 December 2015. He left four children (two biological and two step-children) from a previous marriage. This marriage had ended in April 2012. Between 2006 and 2012 Grant had engaged in an extramarital affair with another woman ('Katerina'). After the end of his first marriage, Grant began the relationship with Katerina in earnest. Grant and Katerina discussed marriage multiple times during the period between 2011 and 2015. On or about 3 January 2014 Grant executed a will disinheriting his former wife and one of his step-sons, leaving his estate to his remaining three sons. Katerina was not a beneficiary under the will. Grant and Katerina married on 19 September 2015 following a proposal by Grant on 6 June the same year.

The salient question before Justice Lindsay was whether the will executed on or around 3 January 2014 was made in contemplation of the deceased's marriage to Katerina. If it was not, then the deceased had died intestate and

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[1] [2018] NSWSC 1031.

[2] *Re Estate Grant* (n 1) [134].

50 per cent of the assets would vest, under the intestacy rules, in Katerina with the rest being split between his two biological sons. If the marriage did not revoke the will, the assets would be split between his two biological sons and one of his step-sons.

II 'In Contemplation of Marriage'

The marriage of a testator after executing their will is seen as revocation of the aforementioned will both in Australia,[3] and most other jurisdictions in the common law world.[4] This was historically an irrebuttable rule of succession,[5] but has since become a presumption which can be rebutted.[6]

One exception to such revocation is where a will has been made in contemplation of marriage. In South Australia[7] and the Australian Capital Territory,[8] this contemplation must be expressed in the will. However, in all other states, including New South Wales and Victoria, the contemplation may either be express or implied from the circumstances surrounding the making of the will.[9]

While the issue of whether a will has been expressly made in contemplation of marriage appears a straightforward concept, courts have experienced difficulty in determining whether marriage had been considered impliedly by the testator in the absence of an express statement within the will. The meaning of the term 'in contemplation of' and the word 'marriage' were considered in by Justice Lindsay in *Re Estate Grant*.

A *In Contemplation*

Using 'in contemplation of' in the context of marriage poses a number of unique challenges. This was recognised in 1838 when Baron Parke of the Court of Chancery stated '[c]ontemplation of marriage is a vague phrase. He might not know that she would accept him.'[10] Therefore, the resolution of *Re Estate Grant* required that some clarity be given to this concept beyond the factual circumstances of the particular case. This required consideration of divergent case law in New South Wales and Victoria.

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[3] See, eg, *Succession Act 2006* (2006) s 12(1); *Wills Act 2008* (Tas) s 16(1)(a); *Wills Act 1997* (Vic) s 13(1). In Tasmania, the Australian Capital Territory and Queensland this includes revocation on the registration of a deed of relationship or civil partnership: *Wills Act 2008* (Tas) s 16(1)(b); *Wills Act 1968* (ACT) s 20(1); *Succession Act 1981* (Qld) s 14A(1).
[4] See, eg, *Wills Act 1837* 7 Wm 4, c 26, s 18(1).
[5] New South Wales Law Reform Commission, *Community Law Reform Program: Wills – Execution and Revocation* (Report No 47, March 1986) [9.3].
[6] *Marston v Roe de Fox and Halton* (1838) 112 ER 742, 758.
[7] *Wills Act 1936* (SA) s 20(2).
[8] *Wills Act 1968* (ACT) s 20(1).
[9] See *Succession Act 2006* (NSW) s 12(3); *Succession Act 1981* (QLD) s 14(3)(a); *Wills Act 2008* (Tas) s 16(3); *Wills Act 1997* (Vic) s 13(3)(a); *Wills Act 1970* (WA) s 14(3)(b).
[10] *Marston v Roe de Fox and Halton* (n 6) 747.

1 *New South Wales*

In the New South Wales case of *Hoobin v Hoobin* 'in contemplation of' was defined as 'intending proposing or expecting a marriage, or having a marriage in mind as a contingency to be provided for or as an end to be aimed at…'.[11] In New South Wales this determination focuses on the intention of the testator, ensuring that the will was made with the impending marriage in mind. If this intention was present then presumably the testator had made a will which would be satisfactory both before and after the marriage, allowing the will to survive marriage.

Hoobin v Hoobin was relied on heavily by Justice Lindsay to determine the typical approach in New South Wales.[12] The determinative point in that case regarding whether the will was made in contemplation of marriage was the difference between the definition of 'contemplation' and 'to contemplate'.[13] Previously, the requirement was that marriage must only have been in the periphery of the testator's mind when the will was being made, aligning with the definition of 'contemplation'.[14] Justice White preferred the definition of the verb 'contemplate'. This required a specific state of intention from the testator. [15] Ultimately, his Honour determined that the state of mind required was one of expecting or intending to propose or marry, rather than mere cognisance of the possibility of a future marriage which 'contemplation' prescribed.[16]

2 *Victoria*

Victorian courts have settled on a diametrically opposed interpretation in comparison to the interpretation found in New South Wales. In *Steel v Ifrah* the decision and reasoning of *Hoobin v Hoobin* was examined by Justice Dixon.[17] Instead of promoting consistency by agreeing with the reasoning of Justice White in *Hoobin v Hoobin*, Justice Dixon looked to Irish case law for context and support in determining the meaning of 'in contemplation of marriage'.[18] With this support, Justice Dixon found that the term 'made in' should not be construed narrowly.[19] Secondly, his Honour found that the term 'in contemplation of marriage' did not require any intention or contemplation that the will would continue after the marriage in order to be satisfied.[20]

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[11] [2004] NSWSC 705, [53]. This interpretation of 'in contemplation of' has also been adopted in Western Australia: *Berry v Bell* [2012] WASC 197, [8] (Beech J), citing with approval *Hoobin v Hoobin* [2004] NSWSC 705.
[12] Ibid [96], [102].
[13] Ibid [41]–[42].
[14] *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60, 67 (Mahoney JA), quoted in *Hoobin v Hoobin* (n 11) [39].
[15] Ibid.
[16] Ibid [53].
[17] [2013] VSC 199.
[18] *Steel v Irfah* (n 17) [18], citing *Re Estate of O'Brien* [2011] 4 IR 687.
[19] Ibid [9]–[11].
[20] Ibid [18].

Had this reasoning been adopted in *Re Estate Grant*, the outcome may have differed. With no direct intention necessary, it is likely that the consistent references to marriage within discussions between the testator and Katerina may have demonstrated that marriage was contemplated in the future. This is especially true when the tenor of these communications changed from 'if' to 'when' the couple would marry. Unfortunately for the three children, Justice Lindsay did not prefer this interpretation.

B *Marriage*

While not forming a large part of Justice Lindsay's reasoning, some thought was directed at character of marriage that must be in the contemplation of the testator. While his Honour found that the character of marriage should not be overly prescriptive in regards to the necessary attributes, there remained some characteristics that must be present.[21] In this way, drawn from the judgment in *Commonwealth v Australian Capital Territory;*[22] the character of marriage required was one of a consensual union between two persons recognised to endure and be terminable only through law.[23]

The crucial nature of this determination in this case, however, was that 'marriage' does not include de facto partnership because de facto relationship status still offers mutual freedom from the formalities of marriage.[24] In the judgment of Justice Lindsay, it was the legally recognised status of marriage along with the duty to care for and protect a marriage partner that set this relationship apart. Therefore, the de facto relationship between the testator and Katerina was insufficient to establish that they were contemplating marriage. Rather, it was evidence of the opposite view due to both parties apparent happiness with their de facto arrangement when the will was executed in 2014.[25]

III The Reasoning of Justice Lindsay

The application of the New South Wales case law and interpretation of made in contemplation of marriage is an interesting one. In order to answer the question of contemplation Justice Lindsay approached 'contemplation' via the following question:

> [W]hether in the process of making his will…the deceased had ever had in mind a prospective marriage to Katerina or, incidentally to such a marriage,

[21] *Re Estate Grant* (n 1) [137].
[22] (2013) 250 CLR 441, cited in *Re Estate Grant* (n 1) [137].
[23] *Re Estate Grant* (n 1) [137], citing *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [33]–[34].
[24] *Re Estate Grant* (n 1) [141].
[25] Ibid.

> any claim on his bounty that she, or children they might have together, might reasonably have.[26]

This interpretation was used in two main ways to determine that the will had not been made in contemplation of the testator's marriage with Katerina: first, that no disposition had been made to Katerina, and secondly, that no disposition had been made to their possible future children.

A *Lack of Disposition or Notification to Katerina*

One of the focuses of Justice Lindsay was that Katerina had not been included within the will that was to be revoked by their marriage.[27] A predominant point in the judgment was that for a will:

> To have been "made in contemplation of a particular marriage" a will must be expressed to have been so made or it must have been made by a will-maker otherwise proven to have been at that time conscious of claims on his or her bounty arising from the marriage in question.[28]

This means that the fact that Katerina received no benefit under the will was a factor that weighed heavily on the decision. His honour thought that if Grant had contemplated the marriage, he would have left his future wife a portion of his assets after his death.[29]

While this would be true for many testators, the facts of *Re Estate Grant* do not lend themselves solely to that determination. One circumstance that might support an alternative view was that Katerina herself was and remained a successful businesswoman whom the testator mentored. Moreover, the three children included in his will were not as established in their lives at the time of its creation. This is demonstrated by the testator's statement that the disposition to the three children was for a deposit on an apartment or house.[30] Secondly, though perhaps less convincingly, it was possible although unclear that the testator knew that Katerina would be able to gain a family provision order through sections 59(1)(c) and 59(2) of the *Succession Act 2006* (NSW).

In these circumstances, the testator's disposition to the children, rather than Katerina, does make some sense. This could have meant that the will was made in contemplation of marriage, especially due to the amount of discussion, dating back to 2011, between the testator and Katerina about 'when' they would get married. If so, it may explain why Katerina was not notified of the will, nor was the solicitor preparing the will told about

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[26] Ibid [136].
[27] Ibid [155]
[28] Ibid [150].
[29] Ibid [155].
[30] Ibid [76].

Katerina. It would be unlikely that the testator would notify his de facto partner that she had not been placed in his will. If these assertions are correct, then by taking into account this factor, and the lack of consideration for future children, the court invalidated the testator's wishes. Although this resulted in all parties eventually gaining some of the estate, it sets a worrying precedent for the disregard of testator's intentions in future cases.

B *Lack of Consideration for Future Children*

Another example of potential invalidation was the consideration of the lack of provision for children who might be born from his marriage with Katerina. Justice Lindsay looked to the relationship of the deceased with his children, both biological and step, and determined that, if the will had been made in contemplation of marriage, a provision for future children would have been made.[31]

There was some evidence that the deceased had contemplated children with Katerina, both before and after his cancer diagnosis. Prior to that diagnosis, both he and Katerina had inquired into the possibility of having children if he could have a previous vasectomy reversed.[32] He had also had sperm preserved to be made available to Katerina after the diagnosis.[33] In these ways, it could be said that the deceased was intending to have children, either before or after his death, and in contemplation thereof he would have made some allowance for future children. However, again this is not the only possible view of these facts.

The timeline of these events could equally support a testator who was looking forward to having children but was not sure if that possibility would eventuate. There were fears in early 2013 about whether the reversal of his previous vasectomy would be successful[34] and whether Katerina would be able to have children.[35] This process occurred before his diagnosis with brain cancer and it may have been his intention that if the couple were to have a child, that child could be written into the will at a later time. At this stage, there was no evidence that the testator was ill or would not be able to modify the will for a child if required.

This argument would not work regarding the frozen sperm which the testator had made available to Katerina after his cancer diagnosis. At that time the testator had knowledge that he may not be able to change his will if a child was born, due to his illness. This still does not deny the view that the will was made in contemplation of marriage. This factor was not known

[31] Ibid [155].
[32] Ibid [74].
[33] Ibid [77].
[34] Ibid [74](g).
[35] Ibid [74](h).

to the testator when making the will. At the time his will was made, being the time marriage needed to be in contemplation, he was still acting free of the burden of his cancer diagnosis which would surface over a year later. Therefore, future children arising from the frozen sperm would not have been a possible consideration when making the will.

It would be unfortunate for courts to act on the presumption that a testator would, in contemplation of a new marriage, wish to make a disposition to their new partner or children to the detriment of children from previous relationships. This was recognised in *Steel v Ifrah*. After discussing the changing attitude of Australians towards concepts such as blended families Dixon J stated that:

> An expectation of a second marriage, or a marriage following a union that resulted in children, may result in an intention to protect the entitlement of the children of that former union, rather than an intention to recognise the claims of or through a new marriage partner.[36]

That the overall reasoning of Dixon J was not followed in *Re Estate Grant* does not detract from this statement. Justice Lindsay recognised the love that the testator had for his children, both biological and stepchildren. Instead of using this as a reason why the will may have been made in contemplation of the marriage in order to protect the disposition to the children he loved, Justice Lindsay used this as a reason why the will was not made in contemplation of marriage.[37]

The final point that should be emphasised is that the test for whether the will should be revoked is that marriage should have been in the contemplation of the testator in the process of making the will. While the testator was fond of his previous children this does not automatically translate to having future children, the possibility of which was in doubt, in mind at the same time as marriage. Omission to provide for future children, while perhaps lacking foresight, does not seem to in any way show that the testator did not contemplate marriage in making the will. This, it is submitted, is one of the shortcomings in the judgment of Justice Lindsay.

IV Conclusion

Ultimately, Justice Lindsay found that the will had been revoked by the testator's second marriage. However, as demonstrated, this decision was not without difficulty. *Re Estate Grant* highlights the difficulty in applying various mental state tests which have been developed in the 'in contemplation of marriage' test to the factual circumstances of cases. It has been argued that some of the factors examined by Justice Lindsay were

[36] *Steel v Ifrah* (n 17) [12].
[37] *Re Estate Grant* (n 1) [155].

open to alternative interpretations and should not have been used in that way. Interpreting these factors changed the express intentions of the testator in a case where the Court should not have done so. The judicial interpretation of whether the testator had in contemplation marriage by relying on the absence of certain provisions in the will opens a concerning new pathway in determining whether or not the will should stand. In this case, it is possible that applying these principles changed the testator's own plan for the distribution of his estate and substituted the court's own view: a view based on absence rather than presence of information.