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ADU [2024] QCAT 77

Year: 2024
Court/Tribunal: Queensland Civil and Administrative Tribunal
Judicial Officer/ Tribunal Member: Member Kanowski
Legislation: *Guardianship and Administration Act 2000* (Qld) s 104, s 109
Legal Issue: Whether the Tribunal was able to revoke or amend confidentiality orders.
Area of Law: Guardianship and administration – confidentiality orders
Vulnerability Criteria: Reduced decision-making capacity after stroke

Facts: This case concerns an interlocutory matter (disclosure of materials held by the court to the parties in the proceeding) within a substantive guardianship and administration case which included consideration of whether an attorney should be replaced because of allegations of abuse.

ADU was an 85-year-old woman who had been admitted to hospital on 8 September 2023. Her son ('SNA') is her only child. On 31 August 2023, ADU had made an Enduring Power of Attorney appointing SNA as first attorney and her niece's husband ('NPA') as successive attorney.

Alleging elder abuse by SNA, a hospital social worker applied to QCAT seeking the appointment of the Public Trustee as administrator and the Public Guardian as guardian for ADU and removing SNA as attorney.

In September 2023, another member of the Tribunal made a pre-hearing confidentiality order over various documents before the Tribunal, including the applications and submissions by the hospital applicant and the reports and notes of various health professionals. The order had the effect of preventing SNA, SNA's lawyers and NPA from accessing those materials. The orders also prohibited other active parties from divulging relevant information to SNA. This order applied until the

commencement of proceedings on 11 December 2023, at which time a further order to the same effect was made.

The reasons for the 11 December order included that there were allegations of physical violence and threats by SNA, and that SNA has been the respondent in two domestic violence orders made to protect ADU (one temporary, and one by consent without admissions). The 11 December order was described as a 'final order'.

On 11 January 2024, with the matter part heard, SNA applied for a revocation of the confidentiality orders, or in the alternative a variation of the orders such that the documents would be accessible to him in redacted form. He sought to defend the allegations against him and to maintain his role in his mother's life as well as for the purpose of needing to see the materials to be able to mount an effective defence to the application.

Member Kanowski held that members have power to revoke or amend confidentiality orders. He regarded the case of *HFI*, although not an authority on the issue, as broadly consistent with his view that the power to make a confidentiality order is a flexible procedural power.

As a result, he concluded that it was possible to revoke the confidentiality order of 11 December 2023.

Member Kanowski found that SNA could not respond to allegations against him if he is not privy to what the allegations are. It was not enough for the Tribunal to summarise the allegations according to the information permitted by the confidentiality orders. If SNA was not given this opportunity, there was a serious risk that he would be stripped of decision-making capabilities for ADU, contrary to the wishes of both SNA and ADU herself.

The question was whether, if he saw the documents, SNA was likely to cause 'serious harm' (a prerequisite for exercising the power in GAA s 109) to hospital staff or his mother's friend who had made allegations against him.

Member Kanowski found that it was unlikely that SNA would perpetrate serious harm; a confidentiality order was therefore not necessary to avoid serious harm. Member Kanowski also referred to GAA s 104, which emphasises that each party should be entitled to access information before the tribunal that is relevant to the proceedings. In this regard, the current confidentiality orders 'gravely impede[d]' SNA's ability to present his case. Member Kanowski, therefore, revoked the confidentiality orders.

Likewise, Member Kanowski added that there was no reason to prohibit NPA from accessing these same documents.

Link: *ADU* [2024] QCAT 77

Other cases referenced: *HFI* [2018] QCAT 279

Anderson v Anderson [2013] QSC 8

Year: 2013
Court/Tribunal: Queensland Supreme Court
Judicial Officer/ Tribunal Member: Dalton J
Legislation: *Power of Attorney Act 1988* (Qld)
Legal Issue: Whether the deceased executed a transfer of her home to the defendant by way of gift; whether the plaintiff proved that the deceased lacked the relevant capacity at the time of the transfer.
Area of Law: Succession - undue Influence
Vulnerability Criteria: Dementia, dependence on son

Facts: John and Malcolm Anderson were the only children of Roma Anderson. Roma made a will on 22 November 2007, shortly before her husband's death, and left her property equally between John and Malcolm. She appointed John and (in the event of his death) his wife Deborah as executors of the will.

On 26 September 2008, Roma executed a new will drawn by a different solicitor. This will made both of her sons executors and named both of them as beneficiaries. On the same day, Roma executed a transfer of her home in favour of Malcolm by way of gift, effectively rendering John's rights to the estate practically nugatory. John sought a declaration that this transfer was void, or voidable, relying on Roma's lack of capacity and Malcolm's undue influence over her.

Legal Conclusion: The court found that there was insufficient evidence that Roma lacked capacity at the time of executing the transfer. It nevertheless found that Roma was pressured and influenced by Malcolm in relation to her giving instructions in 2008 to change her will and transfer the property.

In the circumstances, Roma was elderly, sick and isolated, dominated by Malcolm across a range of events (such as questioning John's dealings with her finances),

dependent on Malcolm (with whom she also lived) for day-to-day care and experienced symptoms of memory loss and dementia.

The nature of the relationship between Malcolm and Roma gave rise to a presumption of undue influence, which was not able to be rebutted by Malcolm.

The available evidence suggested that Roma was, in fact, being dominated and influenced by Malcolm. The transfer was suggested by Malcolm, and Roma in substance did not receive independent advice; all but one of the consultations with the solicitor were in the presence of Malcolm, and there were no indications that she had understood the advice that she was given in any meaningful capacity.

The court also held that Malcolm's conduct likely amounted to unconscionable conduct, as he took unfair advantage of Roma's vulnerable position.

Link: *Anderson v Anderson* [2013] QSC 8

Baker v Affoo [2014] QSC 046

Year: 2014

Court/Tribunal: Queensland Supreme Court

Member: Jackson J

Legislation: *Guardianship and Administration Act 2000* (Qld) s 12; *Powers of Attorney Act 1988* (Qld) s 87; *Succession Act 1981* (Qld) s 41

Legal Issue: Whether the presumption of undue influence under s 87 of the *Powers of Attorney Act 1998* (Qld) had been rebutted.

Area of Law: Succession - undue Influence, constructive trust

Vulnerability Criteria: Mild cognitive impairment, mild memory impairment, widowed, physically dependent on others

Facts: Edward 'Ted' Blair and William 'Bill' Affoo were long-time neighbours and friends. Bill and his wife Rhonda provided ongoing care and support to Ted. In 2004, Ted made an *inter vivos* transfer of his rural property to Bill's sons as trustees of the Somerset View Trust (of which Bill and his wife were potential beneficiaries) in anticipation that Bill would continue to provide care to the end of the donor's life. About the time of the transfer, Ted made a new will leaving $200 to each of his children and the residue of his estate to Bill.

This decision was deliberately not made known to his children. The evidence suggested that Ted had no reason to disinherit them; the relationship between Ted and his children was distant but reasonable. Ted had previously expressed an intention (including in a previous will), that he would leave the property to his eldest son on behalf of all of them. However, there was some evidence that Ted believed that his children were going to have him 'committed'.

Ted did not receive independent legal advice regarding the transfer. At the time of the transfer, Bill held an enduring power of attorney granted for Ted. Each of the transactions were made between Ted and a relation of Bill. Accordingly, s 87 of the

Powers of Attorney Act 1998 (Qld) gave rise to a presumption that he was induced to enter the transaction by Bill's undue influence.

The applicants were three of Ted's children. In addition to a family provision claim under of the *Succession Act 1981* (Qld) s 41, they also claimed that Bill's sons held their interests as trustees in the property on constructive trust for Ted's estate as having been induced by Bill's undue influence.

Legal Conclusion: Bill did not discharge his onus to rebut the presumption of undue influence. Jackson J, relying on McMurdo J's reasoning in *Smith v Glegg*, stated that Bill was required to show that the transactions were not ascribed to the inequality between them which arose from Bill's stronger position and that the gift was the independent and well-understood act of Ted in a position to exercise a free judgement based on information as full as that of the donee.

Several factors indicated that this requirement was not satisfied. Ted made transactions after receiving advice from Mr Scales (who was Bill's accountant) and a Mr Oakley (apparently a solicitor, but from whom no evidence was adduced); however, there was no evidence that independent advice was given to Ted. In circumstances where Ted was elderly, recently widowed, physically dependent on Bill and his wife and had mild cognitive impairment, Bill taking a gift of a large amount from Ted was, at face value, unconscionable because Bill was in a position where great confidence was reposed in him by Ted. As Bill had the benefit of legal advice as well as financial advice, he ought to have realised that it was necessary to establish that Ted's decision was made with the benefit of independent legal advice. Jackson J noted that in many authorities, the presence or absence of independent advice is significant (critical) to the court's decision on the question of undue influence. Ted making his decision without telling his children was also relevant.

Jackson J declared that Ted's transfer of his rural residence to Bill's children on trust was induced by the undue influence of Bill and ordered that Bill's children hold the residence on constructive trust for Ted's children as beneficiaries of his estate.

Link: *Baker v Affoo* [2014] QSC 046

Other cases referenced: *Smith v Glegg* [2004] QSC 443

CI [2024] QCAT 83

Year: 2024
Court/Tribunal: QCAT 83
Member: Member Casey
Legislation: *Guardianship and Administration Act 2000* (Qld) s 15; *Powers of Attorney Act 1998* (Qld)
Legal Issue: Whether CI has capacity to make personal and financial decisions; whether the current decision-making process for CI's personal and financial decisions adequately protect her interests.
Area of Law: Guardianship and Administration
Vulnerability Criteria: Permanent and significant cognitive impairment

Facts: CI was 87 years old at the time of the Tribunal and has been a widower since September 2020.

On 10 November 2020, CI appointed her son (SN) as her Enduring Power of Attorney for personal/health and financial matters, both commencing upon the loss of decision-making capacity. She also appointed her daughters, (DA and DB) as successive attorneys, should SN be unable to act.

In May 2021, SN and his wife moved into CI's home on her rural property. At that time, CI was moved into a dwelling that had been recently relocated onto her property. CI's two daughters, DA and DB, reside in separate locations to her, (i.e., interstate and in a different regional area of Queensland).

On 12 October 2023, the Tribunal received applications from DA and DB in which they sought appointments as guardians and administrators for CI. Their applications expressed concern about SN's care of CI and the exercise of his power of attorney over her affairs.

Legal Conclusion: The Tribunal found CI's capacity to make personal and financial decisions was impaired by increasing cognitive decline due to vascular dementia.

Due to her cognitive deficits, the Tribunal found the presumption of CI's capacity in these matters to be rebutted.

The Tribunal found that SN failed to keep CI's property separate, in his financial decisions on her behalf, when he and his wife moved into her main dwelling and spent around $76,000 of CI's funds on renovations. He also spent approximately $49,000 of CI's funds to relocate a dwelling onto her property for their accommodation. These actions gave rise to a presumption of undue influence. SN also admitted to a lack of diligence, especially as SN did not protect all of CI's assets, maintain accurate records, or consult adequately with CI's other attorneys. Furthermore, the Tribunal noted SN's lack of understanding of CI's dementia diagnosis and the need for extensive support. CI remained mostly unsupported on her property, and SN did not meet the legal standards required for effective decision-making under the *Powers of Attorney Act 1998* (Qld). In summary, the Tribunal was not satisfied that SN did or could effectively handle CI's personal and financial matters.

Notably, DA and DB's applications to be appointed guardians and administrators for CI were denied by the Tribunal. The Tribunal found that both DA and DB were aware that SN was not keeping CI's financial interests separate from his own when making financial decisions on her behalf. They were also aware of the benefits SN gained from this conduct. DA and DB claimed that, if their applications were successful, they would liaise with SN to help with their decision-making for CI; however, the Tribunal rejected their applications on the basis of a history of conflicts and poor communication between the siblings and that they had been unsuccessful in their attempts to communicate with SN to date. The Tribunal was also concerned that CI's interests may be at risk if another conflict were to arise between SN and DA and DB. The Tribunal noted that decisions made by an administrative would impact SN and his wife and that this would be detrimental to the relationships between the siblings. It found DA and DB would therefore be unlikely to be able to comply with the legislative requirements for guardians and administrators. Consequently, the Tribunal appointed a Public Guardian for the matters of CI's accommodation,

provision of services, and health care, and appointed the Public Trustee of Queensland for financial decision-making matters in accordance with s 15 of the *Guardianship and Administration Act 2000* (Qld).

Link: *CJ* [2024] QCAT 83

Fletcher v Queensland Nursing Council [2009] QCA 364

Year: 2009
Court/Tribunal: Queensland Court of Appeal
Member: de Jersey CJ, Muir JA, Chesterman JA
Legislation: *Nursing Act 1992* (Qld)
Legal Issue: What constitutes undue influence and unsatisfactory professional conduct and whether charge of abuse of position of influence and trust requires an element of intent
Area of Law: Succession - undue influence
Vulnerability Criteria: Hospitalisation - diagnosed with chronic illness and transferred to palliative care, social isolation, nurse/patient relationship

Facts: The respondent, born in 1959, was a registered nurse in Queensland since 27 March 1979. She was employed by BlueCare and, in around September 2002, was assigned to provide community care for JRP ("the deceased"), born in 1930.

The respondent provided care to the deceased every working Monday to Friday until 23 May 2004 when the deceased was admitted to the Ipswich General Hospital. About a week after, he was diagnosed with metastatic cancer and was transferred to palliative care. The deceased was an inpatient at Ipswich General Hospital until June 2004, and the respondent visited on several occasions.

The deceased was then moved to Ipswich Hospice Care and stayed there until December 2004. During this period, the respondent visited the deceased on at least 56 occasions. On 23 September 2004, the deceased signed a will appointing the respondent as sole executor and leaving his entire estate to the respondent, save for a bequest of $2,000 to his nephew Wayne Paidley.

The deceased was then moved to Karinya Village Nursing Home, and stayed there until 14 January 2005. On 4 January 2005, the respondent accepted the deceased's enduring power of attorney for both financial and personal/health matters.

From 14 January 2005 to 3 July 2005, the deceased resided at Glenwood Hostel, and was visited by the respondent on 4 to 5 occasions each week. During this time, the respondent was employed by BlueCare which owned and operated the Hostel, and was involved in formulating a care plan for the deceased. The deceased died at the Hostel on 3 July 2005.

From 23 May 2004 to 3 July 2005, the respondent regularly attended the deceased's principal place of residence in Rosewood to check the mail, feed the deceased's cat and ensure security of the house. The respondent did not renounce her entitlement to the deceased's estate under the will despite legal action by the deceased's next-of-kin and a request by her then employer, BlueCare, to do so.

The Queensland Nursing Council brought a charge against the applicant pursuant to the *Nursing Act 1992* (Qld) ("the Act") s 104(1) on the ground that she had behaved in a way that constitutes unsatisfactory professional conduct contrary to s 104A(1) of the Act.

The Council contended that she abused her position of influence and trust arising from a nurse/patient relationship, and listed out six charges/sub-particulars, namely: (1) she was over involved in the deceased's affairs after the relationship ended on 23 May 2004 to such an extent that there was a foreseeable risk of undue influence; (2) she had failed to take to take reasonable steps to ensure clarity of their relationship; (3) she had failed to adequately involve the deceased's family in discussing about the deceased's ongoing care requirements; (4) she had failed to take positive steps to further distance herself from the deceased when he was making decisions about his will; (5) she had had failed to relinquish the entitlements under the deceased's will; and (6) she sought to influence the deceased at various times from 23 May 2004 until his death to benefit herself under his will.

Legal Conclusion: The Tribunal held that the charge of "abuse of position of trust and confidence" had been made out though charges 3 and 6 had not been proved. The respondent's nursing registration was cancelled, and she was prohibited from reapplying for two years and from undertaking employment in a "community health nurse environment" or an "aged care facility".

On appeal to the District Court, the Tribunal's decision was overturned on the basis that the charge could be made out only if the respondent engaged in the alleged conduct with the intention of gaining some benefit for herself.

The Council then appealed to the Court of Appeal, where the Tribunal's original decision was upheld on the ground that proof of intent of gaining some benefit was not necessary to the finding that the respondent's conduct amounted to an abuse of position of trust and influence.

Link: *Fletcher v Queensland Nursing Council* [2009] QCA 364

Other cases referenced: *Fletcher v Queensland Nursing Council* [2009] QDC 129

Greer v Greer [2021] QCA 143

Year: 2021
Court/Tribunal: Queensland Court of Appeal
Judicial Officer/ Tribunal Member: Sofronoff P, Bond JA, and Wilson J
Legislation: N/A
Legal Issue: Whether the deceased's cognitive impairment impacted his testamentary capacity and to what extent.
Area of Law: Succession - testamentary capacity
Vulnerability Criteria: Declining cognitive and physical function

Facts: This case was an appeal against a decision of the Supreme Court finding the testator Kevin Greer (Mr Greer) did not have testamentary capacity when, in 2017, he made a will benefiting only three of his children (all natural children of his first marriage), at the expense of his child of his second marriage.

Mr Greer and his second wife had made corresponding wills in 2001. It had been Mr Greer's long-term intention to benefit his youngest son (the only child of his second marriage) upon his death. An earlier will and other arrangements sought to ensure this occur, including arrangements regarding co-ownership of property.

However, in 2017, with his health in decline, Mr Greer was hospitalised on several occasions (including after two falls) and then put into respite care by his youngest son. Mr Greer complained about this to Karyn (one of his children from his first marriage) and told her that he wanted to change his will, as he thought that his youngest son had put him in a nursing home permanently, and that he had given all his money to that son, who did not build the granny flat he had agreed to provide. The second will appointed another child of the first marriage as his executor and left the estate to the three natural children of his first marriage in equal shares.

The court at first instance found that the time the second will was drafted and executed, Mr Greer had both physical and mental diseases which adversely affected

his cognitive functioning, which included heart disease, postural hypotension, chronic lung disease, chronic pancreatic insufficiency, chronic euvolemic hyponatremia, osteoporosis, malnutrition, unintentional weight loss, and urinary and faecal incontinence, as well as depression and anxiety. The issue was whether Mr Greer had testamentary capacity at the time he executed his second will, and the respondent (plaintiff in the proceeding) sought a grant of probate on the first will. The primary judge concluded, relying on the evidence of several medical practitioners who had treated the testator, the report of a Professor Byrne, and evidence of other instances in which Mr Greer demonstrated significant memory loss and compromised executive function, that Mr Greer did not have testamentary capacity. Thus, the primary judge concluded that the second will should not be admitted to probate.

The appeal alleged that the primary judge erred in the application of the test of testamentary capacity, leaping from a finding of cognitive impairment to a finding of a lack of capacity. The appellant court found the trial judge did correctly refer to, and apply, the test derived from *Banks v Goodfellow* and *Frizzo v Frizzo*, and that the assessment of the evidence against the test was correct.

Legal Conclusion: The appeal was dismissed. The Court held that the primary judge correctly appreciated the test of testamentary capacity, and that her Honour did properly consider all relevant evidence.

Other cases referenced: *Banks v goodfellow* (1870) LR 5 QB 549; *Frizzo v Frizzo* [2011] QCA 308

Link: *Greer v Greer* [2021] QCA 143

McIvor v Westpac Banking Corporation [2012] QSC 404

Year: 2012
Court/Tribunal: Queensland Supreme Court
Member: Applegarth J
Legislation: N/A
Legal Issue: Whether there was an equitable barrier to the enforcement of guarantees executed by Mrs McIvor in favour of Westpac Bank at her son's request.
Area of Law: Equity – undue influence, unconscionable conduct
Vulnerability Criteria: Reliant upon her son in financial matters.

Facts: Mrs McIvor was an elderly parent of Mark McIvor and had little formal education.

Mark was a former lawyer turned money lender as well as a director and shareholder in MM Holdings and Equititrust. Mrs McIvor granted various guarantees and a mortgage over her property on the Gold Coast to Westpac Bank at Mark's request. MM Holdings and Equititrust defaulted in their obligations to Westpac. In 2012, the bank's solicitors issued a letter of demand to Mrs McIvor pursuant to the 2003 guarantee. Mrs McIvor sought an injunction against Westpac, restraining it from enforcing the guarantees and mortgage; delivery up and cancellation of the guarantees; and an order that the bank procure a release of the mortgage.

Mrs McIvor alleged that, by 2002, Westpac had notice that she reposed trust and confidence in Mark regarding commercial matters and she was subject to his influence in such matters. Mrs McIvor claimed that it would therefore be unconscionable for Westpac to enforce the guarantees and mortgage.

Legal Conclusion: The court investigated a series of issues throughout the trial, beginning with whether there was undue influence. The court found that Mark did use his position of domination (influence) to obtain an unfair advantage for himself by requesting that Mrs McIvor give guarantees and mortgages to support his

companies. However, the court then went on to consider other circumstances arising after the documents were signed (including obtaining legal advice).

The court proceeded to investigate whether Mrs McIvor understood the purport and effect of the transactions. Since it was explained to her by her solicitors, Mrs McIvor was found to have possessed an adequate comprehension of the legal obligations and effects of the guarantees and mortgages. Additionally, the solicitors who advised Mrs McIvor were independent from the borrower and the bank, and therefore, the legal advice received by Mrs McIvor was found to be independent.

Mrs McIvor's solicitors also advised her of the potential risks of the guarantees and mortgages. As a result of her adequate comprehension of her legal obligations, it was deemed that Mrs McIvor was prepared to accept the risks as she believed Mark knew what he was doing. Even though Mrs McIvor's choice was affected by the trust and confidence she placed in Mark, her comprehension of the independent legal advice she received meant that her will was not overborne by Mark's influence. Because of this, the court found that there was no actual undue influence.

Furthermore, Westpac did not know that Mrs McIvor was in a vulnerable position. Although there was a possibility that Mark, being a solicitor and a businessman, was in a position to exercise undue influence over Mrs McIvor, the court found that Westpac acted prudently in requiring independent legal advice before it would provide the guarantees and mortgages to Mrs McIvor. Additionally, the court found that Westpac was entitled to assume that the solicitor would act honestly and give proper advice to Mrs McIvor.

Finally, the court investigated whether it was unconscionable for the bank to enforce guarantees and mortgages. Despite the transaction being voluntary, and the bank being aware that Mrs McIvor would receive no benefit, Westpac was entitled to rely upon each certificate and to believe on reasonable grounds that Mrs McIvor had received advice from a solicitor who was competent, independent and disinterested. Thus, Mrs McIvor had failed to establish the factual basis relied upon by her to allege

that it is unconscionable for the bank to enforce the guarantees and mortgage on the second ground considered by *Garcia*.

Any suspicion by Westpac of a possible exercise of undue influence was displaced by the solicitor's certificates. Westpac was entitled to rely upon the solicitor's certificates in conjunction with acknowledgements signed by Mrs McIvor. Westpac satisfied itself that Mrs McIvor received advice about the purport and effect of the transaction from a solicitor who Westpac believed on reasonable grounds to be competent, independent and disinterested.

As a result, Mrs McIvor's claims were dismissed.

Link: *McIvor v Westpac Banking Corporation* [2012] QSC 404

Public Trustee of Queensland v Martin [2012] QSC 279

Year: 2012

Court/Tribunal: Supreme Court of Queensland

Member: North J

Legislation:

Legal Issue: Whether the deceased (Mr Grubb, who died 2004 at age 87) had testamentary capacity at the time instructions were given for the preparation of the will and when it was executed in 2003.

Area of Law: Succession - testamentary capacity

Vulnerability Criteria: Numerous health issues including dementia requiring high level of care, hearing impairment

Facts: George Grubb (the deceased) died on the 4 January 2004. There were 2 wills written by the deceased in 1992 and 2003. The plaintiff, who was also the executor and trustee under the will dated 31 July 2003 seeks to propound the 1992 will. There was no doubt the 1992 will was properly made. However, by 2003 Mr Grubb was significantly impacted by dementia and other conditions. There was evidence that he was unable to recognise people he previously knew. The 2003 will named as beneficiaries the same four siblings as the 1992 will, plus an additional seven other beneficiaries made up of extended family members and some friends.

Dr Grant provided an expert medical opinion that 'Mr Grubb would have had difficulties with the more complicated or subtle aspects of making his will.' The assessments done in 2001 and 2003 were very similar, which suggests that his condition was one of a continuing dementia, not one in which one would expect clear, lucid intervals to occur. Additionally, he never became completely lucid from 1998 with a consistent base level of dementia.

Lay evidence from family members and staff of the Charters Towers courthouse where the will was signed did not substantially challenge Mr Grant's expert view.

Legal Conclusion: The court found that on 17 July 2003 when the instructions for his Will were given and on 31 July 2003 when the Will was executed, the court found that Mr Grubb lacked testamentary capacity and would have been susceptible to outside suggestion and influence due to his advanced dementia.

The Court pronounced against the force and validity of the will dated 2003 and granted to the plaintiff that the estate of the deceased be administered in accordance with the 1992 will.

Link: *Public Trustee of Queensland v Martin* [2012] QSC 279

R v Newman [2007] QCA 198

Year: 2007
Court/Tribunal: Queensland Court of Appeal
Judicial Officer/ Tribunal Member: Williams and Jerrard JJA, White J
Legislation: N/A
Legal Issue: Whether the sentence given to a young offender for raping, causing grievous bodily harm and robbing an elderly woman was manifestly excessive.
Area of Law: Criminal - sexual offences
Vulnerability Criteria: Defenceless, frail

Facts: The applicant was sentenced to 13 years imprisonment for the rape of a 60-year-old woman. At the time of the offence, he had just turned 17 years old. The applicant sought leave to appeal this sentence on the ground that it was manifestly excessive, particularly because of his age.

The night before the offence occurred, the applicant consumed ecstasy and a psychiatric report claimed he was 'coming down' from the effects of it the day of the offence. The victim was the neighbour of the applicant's grandmother, who he was visiting when he saw the victim enter her house. He followed the victim into her home, punched her multiple times, threw her on the ground and raped her. As a result of the attack, the victim sustained multiple physical injuries, became profoundly depressed and developed post-traumatic stress disorder.

The attack was characterised as a 'vicious, degrading and appalling depraved assault on a frail and elderly woman in her own home': at [13], committed by 'a young man nearly six foot tall and weighing 100 kilograms: at [12].

The applicant pleaded guilty to rape, grievous bodily harm, robbery with violence, burglary and deprivation of liberty and was sentenced to 13 years on the charge of rape, with the remaining charges subject to lesser sentences served concurrently.

Legal Conclusion: The application seeking leave to appeal was dismissed (2:1, Jerrard JA dissenting). White JA and Williams J considered that several factors considered by the sentencing judge warranted the 13-year sentence including:

- that the victim was an elderly lady who was frail and defenceless;
- that the applicant was indifferent to the victim's complaints when she told him that she was hurting, and was scared;
- the applicant's overall lack of remorse;
- that it was highly unlikely the attack was unplanned or spontaneous;
- the gratuitous violence and callousness;
- the fact that the applicant robbed the victim after the rape aggravated the incident further;
- the fact that the applicant was using illicit drugs for some time, which caused him to behave in a delinquent way.

Credit had been given for the early plea of guilty, and youth and maturity were taken into account. However, the applicant's young age and low-to-moderate risk of re-offending was considerably offset not only by the persistent, vicious assault to the victim but also the ongoing consequences she had to face due to her physical and psychiatric injuries.

In dissent, Jerrard JA emphasised the applicant's young age as a mitigating factor. His Honour examined analogous cases and determined that sentence of 13 years was 'too close to the upper range' and should be reduced to 11 years.

The majority, however, considered (due to the reasons described above) that the applicant's conduct was of an 'appalling and callous kind and deserved severe punishment'.

Link: *R v Newman* [2007] QCA 198

Other cases referenced: *Mallie* [2000] QCA 188; *Bolton* [2005] QCA 335; *Price* [2004] QCA 10; *Jerome* [1997] QCA 229.

Williamson v Director of Public Prosecutions [1999] QCA 356

Year: 1999; 2001 (Appeal)
Court/Tribunal: Queensland Court of Appeal
Member: McPherson JA, Thomas JA and Derrington J
Legislation: *Bail Act 1980* (Qld); *Criminal Code Act 1899* (Qld); *Penalties and Sentences Act 1992* (Qld)
Legal Issue: Whether the appellant had been correctly refused bail on charges of armed robbery with violence in company, entering a dwelling with intent, disabling to commit a crime, stealing, deprivation of liberty, serious assault (on a female over 60 years old) and unlawful use of a motor vehicle with a circumstance of aggravation.
Area of Law: Criminal - bail
Vulnerability Criteria: 63-year-old female was a victim of series offences including robbery and assault

Facts: The appellant's arrest in 1999 stemmed from a violent incident involving breaking and entering a dwelling, assault, theft, and related charges. The alleged victim, a 63-year-old widow, suffered threats, assault, and a substantial loss of property worth over $100,000, including sentimental items. One of the co-accused, Mr Boswell, pleaded guilty and implicated the appellant.

Legal Conclusion: Given that the appellant had been charged with an indictable offence involving the threatened use of an offensive weapon (a metal bar possessed by one of the perpetrators that had been used to gain access to the dwelling), he was required to show cause why he should be granted bail.

As for whether there was a risk of re-offending, the chamber judge denied bail on the basis there was an unacceptable chance that the appellant would commit a crime if released on bail.

An appeal against this decision was allowed. Considering the appellant's previous successful compliance with bail conditions, the lack of specific evidence for

suspecting that he might commit another offence before trial (as opposed to evidence of his general character), and the deterrents against re-offending, including the loss of a surety of $30,000 offered by the appellant's wife, it would not be justifiable to conclude that there is an unacceptable risk of the appellant committing an offence while on bail, especially given the substantial length of time before a trial was likely to occur.

Link: *Williamson v The Director of Public Prosecutions* [1999] QCA 356

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