LEGACY LAW

Protecting the assets in your family tree

When a Carer cares more for themselves – another cautionary tale

Carers are wonderful people who do important work, often for little or no reward. Occasionally, we sadly see cases where older or vulnerable people have been taken advantage of.

A recent case related to the wife of Australia's most important living artist, John Olsen, Katharine Howard-Olsen. She died of a terminal illness at the age of 75, survived by John and her daughter from a previous marriage.

The writer saw John Olsen give a presentation at the Art Gallery of NSW a short time after his wife died and he was clearly still very sad. It was about to get worse.

We are extremely careful with the confidentiality of our clients' information and do our very best to keep them out of Court, where dirty linen is aired in public (unlike the Family Court). We were not involved in this case and most of the commentary below is lifted directly from the important judgment handed down last week by the NSW Court of Appeal on 21 August 2020 and published on the internet in full

We are passionate about the law in this area. Some would say we are nerds and we would not disagree. The law can be complicated but we submit that the Courts are trying to be as clear as possible so that people understand what is unlawful behaviour in families and what is not. These are truly cautionary tales.

We think this decision should be compulsory reading for those who care for elderly people so we set out below a large chunk of it, verbatim except for some case citations (sometimes even we cannot resist legal jargon). Enjoy.

Shortly before her death, John's wife gave approximately $2.2 million to her daughter. That money was withdrawn from a term deposit account that was solely in Katharine's name. Some of the funds in the term deposit were inherited from the estate of the Katharine's mother. However, the majority of the funds were from other sources and may have been assets of a partnership between Katharine and John.

John commenced proceedings as an executor of the estate and in his personal capacity against his stepdaughter, the recipient of the gift. He alleged that she had obtained the money by reason of undue influence or unconscionability and was liable to repay that amount to the estate. The primary judge found in favour of John and ordered the daughter to repay the money to the estate with interest. His Honour principally based that conclusion upon a finding that the daughter initiated or contrived her mother's change of mind to her own benefit or took advantage of her mother's vulnerability in unconscionable circumstances. His Honour indicated that the factual findings would also support a finding of undue influence. Round 1 to John.

As you would expect there was a lot of emotion between the parties. After the decision, the winner sought to shorten the time within which the loser could appeal. While the Court found this to be a novel application of some legal interest, the application was rejected and John was ordered to pay the costs of the step-daughter. No doubt this increased the stakes and may have emboldened the step-daughter to bring an appeal, which she did. Round 2 to the daughter.

The daughter submitted that the primary judge erred in his conclusions concerning unconscionable conduct and undue influence, in addition to rejecting defences of conventional estoppel and change of position.

Overwhelmed law students (some of whom the writer has seen, sometimes in mirrors) often only read the casenote so if you are in a rush, here it is:

The Court of Appeal held (Meagher and Payne JJA and Emmett AJA) in dismissing the appeal held:

1. The primary judge's findings underlying the conclusion that the deceased's decision to make a gift of $2.2 million was the result of unconscionable conduct were supported by the contemporaneous documents, oral evidence and probabilities.

2. The primary judge did not err in concluding that the transaction by way of gift was not fair, just and reasonable.

3. As the primary judge's finding of unconscionability was upheld, it was not necessary separately to consider the appeal from the finding of undue influence.

4. In those circumstances the claimed defences of estoppel and change of position did not arise.

Round 3 to John. If you have got this far, you might as well read an extract from the judgment:

1. **MEAGHER and PAYNE JJA**: We have had the benefit of reading in draft the judgment of Emmett AJA. We agree with his Honour that the appeal should be dismissed. The primary judge did not err in concluding that the gift of $2,203,328 made by the deceased to the appellant on 11 October 2016 should be set aside as resulting from the appellant's unconscionable conduct. The argument on appeal focused on that finding, the appellant accepting that the result of her challenge to it was likely to dictate the same result with respect to her challenge to the primary judge's additional finding that the gift was procured through undue influence. Whilst we agree with Emmett AJA's reasons for dismissing the appeal, we add the following reasons by way of further explanation in support of that outcome. The potential procedural issue about the capacity in which the various parties appeared in the litigation raised by Emmett AJA at [53] was not an issue raised by the parties, and in the absence of any complaint about the manner in which the primary judge addressed that issue it is unnecessary to consider it any further.

Unconscionable conduct (principles)

2. Where a party seeks to set aside a transaction on the basis of unconscionable conduct, it must be established (1) that one party to the transaction is placed at a "special disadvantage" vis-à-vis the other in the sense that the disabling condition or circumstance is one which seriously affects the ability of that party to make a judgment as to his or her own best interests; and (2) that the other party understood the plaintiff to be at a special disadvantage and its effect with respect to his or her not being in a position to look after his or her interests. Where those circumstances make it prima facie unfair or "unconscientious" that the "stronger party" procure or accept the weaker party's assent to the impugned transaction, the onus is cast on the stronger party to show that it was fair, just and reasonable: *Commercial Bank of Australia v Amadio.*

3. Both parties are agreed that the deceased had testamentary capacity to make the will of 15 October 2016 and the codicil of 2 November 2016. It did not follow that the deceased could not be under a special disadvantage in the relevant sense. Such a disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation, and may coexist with a "full understanding" of the transaction: as to the latter, see *Bridgewater v Leahy*. As Mason J explained in *Amadio* at 461, in cases of unconscionability "the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position".

4. The innocent party must have been under a disadvantage that was "special" in the sense that it involved an inability "to make a judgment as to his or her own best interests": *Thorne v Kennedy*; or "to make worthwhile decisions in his [or her] own interests": *Kakavas v Crown Melbourne Ltd*. But the question of whether the deceased was under such a disadvantage is not to be considered separately from the other relevant circumstances, and particularly her relationship with the appellant: *Kakavas* at [122]-[124].

Findings as to special disadvantage

5. Emmett AJA summarises the primary judge's findings as to the deceased's being in a position of disadvantage and vulnerability by reason of her sickness and infirmity, and the appellant's knowledge of that being the position. The primary judge's findings as to special disadvantage and as to the appellant's knowledge of that being the position are not challenged in the appeal.

6. From June 2016, the deceased moved into her mother and John Olsen's home at Hidden Lake, where she became the full time carer for her mother when she was not in hospital. In July 2016, the respondent took over the role which the deceased had previously carried out in relation to that household's finances. She was added, on 21 July 2016, as a signatory to the A Casa Botanica cheque account because the deceased had trouble signing cheques. After periods in hospital between 12 July and 15 August 2016, the deceased returned to live at Hidden Lake.

7. The deceased was terminally ill and struggling to get her affairs in order, with little time in which to do so. Indeed, on 6 or 7 October 2016, four or five days before the impugned gift was made, the deceased was informed, in the appellant's presence, that her condition was terminal. She was "extremely anxious and exhausted", and dependent on the appellant for assistance in running her household and dealing with her medical affairs. As Fullagar J observed in *Blomley v Ryan* , "sickness, age, infirmity of body or mind... [and] lack of assistance or explanation where assistance or explanation is necessary" are all paradigmatic examples of special disadvantage. In some degree all were present here."

In conclusion, we are pleased that the Court of Appeal agreed with the original decision. It gives our elderly clients some protection which is, unfortunately, needed. Documents, evidence and the probable conclusions to be drawn from them were key again in this case. You know what you need to do people. If not, please make an appointment with us to discuss.

It is a family tragedy that these cases arise and are plastered all over the national papers, as it was in the Sydney Morning Herald last weekend. We can only assume that it is bigger news in the local papers and cafes in the Southern Highlands. What a legacy.

The costs of the appeal of all the parties will, subject to assessment which also takes time and money, be payable by the step-daughter. In many cases such as this, the loser can be bankrupted although we are not privy to the circumstances here. We would expect that she may not expect to get anything from John Olsen's Will or even a Christmas card!

An example of short-term thinking although maybe he was always going to give his wealth to charity. Another great idea we say! That said, we hope John Olsen continues to paint and enjoy life for a long time to come.