[2007] WASC 249

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	DOLAN -v- DOLAN [2007] WASC 249
CORAM	**:**	MURRAY J
HEARD	**:**	16 OCTOBER 2007
DELIVERED	**:**	29 OCTOBER 2007
FILE NO/S	**:**	CIV 1543 of 2007
BETWEEN	**:**	SUZANNE JAYNE DOLAN Plaintiff AND STEVEN JOHN DOLAN First Defendant CHRISTOPHER DOLAN Second Defendant

Catchwords:

Wills - Probate - Will form filled out by deceased but unexecuted - Document purporting to embody testamentary intentions of deceased - Whether intended to constitute will of deceased - Interpretation of *Wills Act 1970* (WA), s 34 - Onus and burden of proof - Costs rules discussed

Legislation:

Wills Act 1970 (WA), s 34

Result:

Order pronouncing validity of will

Parties to have their costs taxed and paid out of estate

Category: A

Representation:

Counsel:

Plaintiff	:	Dr J J Hockley
First Defendant	:	Mr P S Bates
Second Defendant	:	Mr P S Bates

Solicitors:

Plaintiff	:	Lewis Blyth & Hooper
First Defendant	:	PSB Legal
Second Defendant	:	PSB Legal

Case(s) referred to in judgment(s):

Briginshaw v Briginshaw (1938) 60 CLR 336
Hatsatouris v Hatsatouris [2001] NSWCA 408
In the Matter of the Will of Lobato (1991) 6 WAR 1
In the Matter of the Will of Trinidad (dec); Ex p. The Public Trustee (Unreported, WASC, Library No 980504, 28 August 1998)
Oreski v Ikac [2007] WASC 195
Oreski v Ikac [2007] WASC 195 (S)
Re Application of Brown; Estate of Springfield (1991) 23 NSWLR 535
Re Estate of Perryman (dec) [2003] WASC 191
The Estate of Hines v Hines [1999] WASC 111

1 **MURRAY J**:

The family

2 In November 1998, the plaintiff, then Mrs Welsh, commenced a de facto relationship with the deceased, John Dolan. To that relationship he brought two children from a previous marriage, the defendants Steven and Christopher. Steven had been born on 26 May 1987, and so he would then have been 11 years old. Christopher had been born on 3 March 1993, and so he would then have been a little boy of 5 years of age.

3 Mrs Welsh also brought two children to the relationship. They were her daughter, Stevie Welsh, and her son, Luke Welsh. Stevie had been born on 21 March 1986, and so she would then have been 12. Luke was born on 2 August 1988, and so he would then have been 10.

4 The relationship lasted until Mr Dolan died on 30 December 2006. He was killed by Luke, who fatally wounded him by stabbing him. I will return to the background and circumstances of that event, but on 2 October 2007, Luke appeared before McKechnie J in this Court, charged on indictment with the wilful murder of his stepfather. He pleaded guilty to manslaughter and that plea was accepted by the prosecution. On 8 October he was sentenced, before taking into consideration time spent in custody on remand, to 3 years and 4 months imprisonment which converted to a term of 2 years and 6 months. The term was undoubtedly lenient having regard, the judge said, to various circumstances which I shall mention in due course. The sentence was rendered more lenient by an order that it be suspended for a period of 2 years.

5 I have said that the relationship between Mrs Welsh and Mr Dolan lasted, effectively, for a period of 8 years, until his death. Four years after it commenced, on 29 November 2002, the two were married. Immediately after that a house in Seville Grove was purchased. It was bought in the name of Mr Dolan. It was clearly intended to be the matrimonial home and Mr and Mrs Dolan lived there for the 4 years until his death. Various of their combined offspring lived with them from time to time. As at 30 December 2006 neither of the defendants, the deceased's children, was at home, but her children, Stevie and, of course, Luke, were. By that time, the oldest, Stevie, was 20, the first defendant Steven was 19, Luke was 18, and the youngest, the second defendant Christopher, was 13.

6 Shortly after Mr Dolan's death, on 12 January 2007, Mrs Dolan consulted solicitors about her position in respect of the deceased's estate.

She was advised to search for any documents concerning insurance or other property and to see if there was a will. About a fortnight later she located a shoe box which the deceased had been in the habit of using for document storage. In it she found a package of documents concerned with a proposal for life insurance described in evidence as 'insurance line documents' and also a will form which Mrs Dolan then recalled had been received originally in February 2006 with the insurance line documents. The will form had been filled out by the deceased, but it was not executed.

The nature of the application

7 The present action brought by Mrs Dolan seeks to have the Court pronounce for the validity of the will form as the will of the deceased, so that probate of the will may be obtained.

8 The action depends upon the *Wills Act 1970* (WA), s 34, which is in the following terms:

> A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court is satisfied that the deceased intended the document to constitute his will.

9 The document describes itself as the last will and testament of the deceased. He gives the Seville Grove address. It is a printed form which concludes with numbered instructions as to information which may be written in to the form. Asterisks indicate clauses which may be deleted by being ruled through. As I say, there are handwritten entries in some of the clauses. I accept that they have been made by Mr Dolan. He has also ruled out some of the provisions.

10 The document appoints Mrs Dolan and Steven as joint executors. In the event that they may be unwilling to act, Stevie is appointed. Despite Christopher's age, the clause which provides for the appointment of a guardian is struck out. There are some specific gifts purporting to be by the deceased; of his masonic mounting to Steven, his gold watches to Christopher, and his beer kits to Luke.

11 The residuary estate is given entirely to Mrs Dolan, with a gift over, if she should not survive the deceased for at least 30 days, to 'my children', without making it clear whether by that expression he meant to include his stepchildren or whether he meant to confine that term to his natural children. The document is not dated or executed. It concludes with an attestation clause which, if it was complied with, would allow the

document to satisfy the requirements of s 8 of the *Wills Act* to secure its formal validity.

12 I am told that the principal asset of the estate is the home in Seville Grove. It is probably worth between $200,000 and $300,000 but it has not been formally valued. In addition, it seems that the deceased did take out the insurance line life insurance policy which matured upon his death. I was told that there was no nominated beneficiary. The proceeds, some $200,000, would therefore fall into the deceased's estate. There are no doubt items of personal property, but little else. The death certificate shows the deceased to have been a welder by trade. He was 46 when he died.

13 If I do not pronounce for the validity of the will in solemn form, the estate will fall to be distributed under the laws governing intestacy and the Table which forms part of s 14(1) of the *Administration Act 1903* (WA). Under cl 2(b) Mrs Dolan would be entitled to receive the sum of $50,000 plus interest at the rate of 5 per cent per annum, 'the household chattels' and one-third of the residue. Mr Dolan's two sons, Steven and Christopher, would each be entitled to a third of the residue. It should be said that there is no evidence to suggest that Mr Dolan knew anything of that.

14 In relation to s 34 of the *Wills Act*, there is no doubt that the will form purports to embody the testamentary intentions of the deceased. The question before me, therefore, is whether I am satisfied that Mr Dolan intended the document to constitute his will. It used to be necessary that the court be satisfied of that beyond reasonable doubt. Originally, s 34 and related sections in Part X of the *Wills Act* dealing with informal wills required the court to make the appropriate finding only if it was 'satisfied that there can be no reasonable doubt that the deceased intended the document to constituted his will'. The phrase 'that there can be no reasonable doubt' was deleted from all the sections in which it appeared by s 4 of the *Wills Amendment Act* 1997.

The onus and standard of proof

15 In my view, the onus to satisfy the court that the deceased intended the document to constitute his will lies upon the plaintiff, the proponent of the document as a will. In the case ***In the Matter of the Will of Trinidad (dec); Ex p. The Public Trustee*** (Unreported, WASC, Library No 980504, 28 August 1998) Templeman J held that the requirement that the court be satisfied implied proof on the civil standard, the balance of probabilities.

16 I respectfully agree, but I note that in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336, the High Court held that the standard of proof expressed as the civil standard of proof on the balance of probabilities may require a greater degree of satisfaction, depending upon the seriousness or the importance of the issue. The Court was there construing the requirement in the *Marriage Act 1928* (Vic), s 80, that the court was required to be satisfied of the facts entitling the petitioner to the dissolution of a marriage. The wording is not dissimilar to s 34 of the *Wills Act*. For the general proposition, to which I have referred, it is sufficient to cite a passage from the judgment of Dixon J at 361 - 362, where his Honour said:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references.

17 The finding which is pressed upon me by the plaintiff in terms of s 34 of the *Wills Act* is undoubtedly a serious one. If the will form as filled out by the deceased is accepted as his will, the result will be that the whole of his estate will go to his widow to the exclusion of all others. On the other hand, under the *Administration Act*, as has been seen, the defendants, the children of the deceased, would take a share of the estate. In my view, the question of fact involved and the seriousness of the consequences of the finding to be made in terms of s 34 dictate that I should apply the civil standard of proof to achieve a considerable degree of satisfaction that the deceased intended the document to constitute his will.

The nature of the relevant intention

18 It is necessary then to understand what it is that the deceased must intend when the section speaks of an intention that the document should constitute his will, given that, in its terms, the document purports to embody testamentary intentions, ie, the disposition of property on death. One starts from the point that Part X of the *Wills Act* contains a set of remedial provisions designed to permit effect to be given to testamentary instruments by way of the making of a will, the alteration of a will, the revocation of a will and the revival of a will where the necessary formality otherwise provided for in the Act is missing. The legislation appears to be an example of similar legislation introduced in all of the Australian jurisdictions following recommendations made by the NSW Law Reform Commission in its report No 47, 'Wills - Execution and Revocation', published in 1986. Earlier remedial legislation had been enacted in SA. Part X was introduced into the *Wills Act* of WA in 1987.

19 An early New South Wales case concerned to interpret the provision which was the equivalent in that State of s 34 was the decision of Powell J, then Probate Judge of the Supreme Court of NSW, in ***Re Application of Brown; Estate of Springfield*** (1991) 23 NSWLR 535. Mr Brown was a friend of the deceased. While he was in hospital, terminally ill, shortly before his death, Mr Brown persuaded the deceased, using a commercially produced will form, to give him instructions as to what were the dispositions the deceased wished to make by will. Mr Brown noted the instructions. This was the document propounded as the will of the deceased. It was not seen by the deceased. He in no way authenticated or adopted its contents. It was, in truth, a note of his instructions for a will. Powell J held that the document did not come under the section.

20 At 539 - 540 his Honour set out a number of general propositions to be applied when dealing with cases under the section, which his Honour recognised to be remedial and not directed solely to wills which were imperfectly executed so that the formal requirements of the Act were not complied with. However, as his Honour put it, the greater the departure from the formal requirements of the Act the more difficult it would be for the court to be satisfied that the deceased intended the document to be his will. That approach has been taken in this State, eg, ***In the Matter of the Will of Lobato*** (1991) 6 WAR 1, 9.

21 Useful guidance as to the intention required to be established is provided by the decision of Powell JA, with whom Priestley and Stein JJA

agreed, in the unreported case of ***Hatsatouris v Hatsatouris*** [2001] NSWCA 408 at [56], where his Honour said that the question was:

> … did the evidence satisfy the court that, either at the time of the subject document being brought into being, or at some later time, the relevant deceased, by some act or words, demonstrated that it was her or is, *then* intention that the subject document should, *without more on her or his part*, operate as her or his will? (emphasis in original)

22 A similar approach to the section has been followed in this Court. In ***The Estate of Hines v Hines*** [1999] WASC 111, Owen J, at [22] - [26], reviewed a number of the decided authorities before cautioning that the intention of the deceased was, of course, a matter of fact and it therefore followed that each case would depend very much on its own factual circumstances. At [22] his Honour accepted that a s 34 application was to be assessed by reference to a particular document, taking the view, however:

> … I think it is necessary to recognise that the inquiry is not directed at whether the deceased's intention was that a document constitute a will as such. It is directed at whether the deceased intended the document to have effect as a testamentary instrument.

In other words, the document will be held to constitute the will of the deceased if the court is satisfied that the deceased intended its terms without more - without any alteration or reservation - to be the manner in which the property of the deceased dealt with in the document was to be disposed of upon his or her death.

23 That, I think, was also the view of Barker J in ***Re Estate of Perryman*** (dec) [2003] WASC 191. His Honour discussed the history of the legislation and reviewed a number of the authorities at [11] - [28], before following the judgment of the NSW Court of Appeal in ***Hatsatouris***. Very recently, in ***Oreski v Ikac*** [2007] WASC 195, a case which bears no factual similarity to this, Barker J, at [105], reaffirmed the principles to be applied in considering a case under s 34. I respectfully agree.

24 However, relative to this case I should add one further observation arising from the nature of the intention required to be found as it was expressed by the NSW Court of Appeal in ***Hatsatouris***. There the Court observed that it would be necessary for a court to be satisfied that the deceased possessed the relevant intention, 'either at the time of the subject document being brought into being, or at some later time'. In my view,

the relevant time is the date of the death of the deceased because it is then that the deceased must intend the testamentary disposition to take effect.

25 It would not matter, in my view, if for example, when the document was created the deceased had reservations about whether it should take effect upon his death, if he later came to a settled view that the disposition should take effect and the court is satisfied that remained the deceased's intention as at the date of death. On the other hand, it would not be sufficient, in my opinion, if, at the time when the document was created or at some later time during the life of the deceased, it was his intention that the disposition should take effect upon his death, but before he died he changed his mind, so that at the date of death that was no longer the deceased's intention.

26 In my opinion, that view is supported by the way in which, properly understood, the section is worded. It is necessary that the court be satisfied that 'the deceased intended the document to constitute his will'. By that is meant that the deceased intended the document to take effect as a testamentary disposition, a disposition of property upon his death. It must follow that the relevant time for the intention to be established is at the date of death. It will be seen that this is a point which may factually be of some importance in this case.

Am I satisfied about the deceased's intention?

27 I turn then to a more detailed examination of the circumstances of this case. By consent, the evidence before the Court was comprised of an affidavit sworn by Mrs Dolan on 14 August 2007, with annexures, an affidavit of a Mr Justin Hobbs, sworn on 9 May 2007, with annexures, an affidavit sworn by Ms Welsh on 9 May 2007 and, again by consent, the transcript of the criminal proceedings in respect of the plea by and sentencing of Luke Welsh by McKechnie J. None of the witnesses were required to be cross-examined.

28 I have mentioned that Mrs Welsh, as the plaintiff then was, and Mr Dolan formed a de facto relationship in about November 1998 and that they were married on 29 November 2002. I have mentioned that it was shortly after that, in December 2002, that the house in Seville Grove was purchased and became the family residence.

29 Mrs Dolan says that during the period of the de facto relationship and their married life together she had many conversations with Mr Dolan as to his testamentary wishes. At all times he said that if he should die before she did, then all of his estate would go to her, and if she died

before he did then the estate should be divided equally between all of the children, his sons Steven and Christopher, her daughter Stevie and her son Luke. It will be recalled that that is effectively the way the deceased filled in the will form, leaving everything to his wife if she should survive him for at least 30 days, and in the event that she did not do so, everything was left to 'my children'.

30 Justin Hobbs is now a young man aged 19. About 4 years ago he met Mr and Mrs Dolan through his friendship with Luke Welsh, and about 3 years ago he commenced to board in the Seville Grove house. He still does so. He says that on at least five occasions before Mr Dolan's death he was involved in discussions between the family members about what was to happen to Mr Dolan's estate after his death. He consistently said that his wife was to get everything.

31 It may be that in one of those discussions a document was written which was adduced in evidence as an annexure to Mr Hobbs' affidavit. As I understand the evidence, the document is a single sheet. On one side there are three lotto coupons. They are for Saturday 12 April 2003. The date stamps show that they were purchased on Saturday 5 April 2003.

32 Mr Hobbs says that he found this document on 11 April 2007 after Mr Dolan's death. It was tucked in between the pages of a cook book which he was looking at in the house at Seville Grove. On the reverse side of the sheet opposite the lotto forms there are two printed sections. Apart from one sentence, the rest of the written material is in the hand of the deceased. One portion, entirely in the deceased's hand, is a recipe for beer batter. Perhaps that is why the sheet of paper was retained and placed in the cook book some time after 12 April 2003.

33 The other portion of the handwriting is as follows:

> 'Will House
>
> 100% Sue till she dies then house divided 4 ways between the kids 25 each. Stevie, Steven, Luke, and Chris. My ex wife Alana gets fukall (Alana Murdoch)
>
> Dolan
>
> The super the same way. If I di B4 im 65. Car goes to Luke W. The red one who is a les
>
> Sprickled Sue John Stevie Luke
>
> MCG Ibrox QSAR Pool'

34 There is no evidence to establish the date of that writing. Mrs Dolan says that she recalls her husband writing out the recipe for beer batter, but it is clear that she has no clear idea when that was in relation to the purchase of the lotto tickets. She says that she has no recollection of seeing her husband write the material under the heading 'Will'. There is evidence that the words 'Car goes to Luke W', are in the hand of Luke Welsh. But there is no evidence before the court from him. All that can be said, therefore, is that the material written by Mr Dolan must have been written at some time between April 2003 and his death in December 2006.

35 But I think it is likely that it was written in about April 2003. I say that because it seems that the document was kept to preserve the recipe for beer batter, and so that part of the handwriting, at least, may have been made before the paper was discarded as a result of the lotto investment being unsuccessful. There is evidence of the numbers drawn in the particular lotto game being written on the side of the paper bearing the lotto forms, and of these numbers being struck out of the various games.

36 Strictly speaking, of course, the testamentary disposition envisaged in that early document, which is not propounded as a will is different from what I take to be the later document, the will form. In that document, if Mrs Dolan was to survive her husband, as she has done, she was to receive all of the deceased's estate absolutely. The 'Will' document, on a strict reading, implies an intention that she should have a life interest in the estate, or at least the house. The house appears to be treated as the substantial asset of the estate, as indeed it was until, in early 2006, Mr Dolan took out the life insurance policy with the insurance line company to which I have referred. Otherwise, however, the residual gift over is certainly to all four of the children.

37 As to the material at the end of the writing, counsel agreed that I might be told that none of the three witnesses, who were present in court, knew the meaning of the words "the red one who is a les". The word 'sprickled' should be 'sprinkled', and the names which then follow refer to Mrs Dolan (Sue), the deceased (John) and Mrs Dolan's children, Stevie and Luke Welsh. Apparently, this material refers not only to Mr Dolan's wish that his remains be cremated and the ashes scattered, but that was what other members of the family wished to happen upon their deaths, the words associated with their names apparently being shorthand references to places of particular significance to each of them where their ashes might be scattered. For example, 'Ibrox' is said to be part of the name of the home ground of the Rangers football club in Glasgow, Scotland.

38 On balance it seems to me that I should accept that this writing dates from about April 2003 and it is an example of a view expressed by Mr Dolan as to the testamentary disposition of his property which, without reading it with any degree of sophistication so as to inject into it a view about the appropriateness of leaving his wife a life interest in the house, is broadly consistent with the testamentary disposition expressed more clearly in the will form, again in the handwriting of the deceased.

39 Otherwise, the witnesses refer, generally without reference to specific occasions, to Mr Dolan consistently expressing his testamentary wishes in terms consistent with the will form. They imply that his view did not change at any time during his life after the association with the plaintiff was formed.

40 Mrs Dolan and Mr Hobbs do, however, refer to one specific occasion in November 2006, shortly before Mr Dolan was killed. Mrs Dolan's niece died. There was a general discussion about wills and estates, during which Mrs Dolan said she should make a will. Mr Dolan again said that so far as he was concerned his wife would get everything. The implication was that that remained his intention shortly before his death and that he had arranged for that to occur, including making a provision that, if his wife died before he did, his estate would be divided between the four children. Of course, as has been seen, when, on 23 January 2007, Mrs Dolan found the will form filled in by the deceased, it had not been duly executed.

41 Mrs Dolan was in fact the only person to see the document when her husband made the entries on the form. She was present when that happened. The will form had come with the insurance line documents which Mr Dolan must have filled in. It seems that later he submitted the proposal for insurance and the policy issued. He did not discuss with Mrs Dolan what he should write on the will form, but when he had finished he showed her the document and asked her if that seemed to correctly record his intentions. She said, 'That all seems pretty good to me'.

42 Immediately afterwards, Mr and Mrs Dolan discussed what should be done about execution of the document. Mrs Dolan said that she thought that it needed to be signed before a justice of the peace. He said, when he next had the opportunity he would sign the document before a justice of the peace or some other authorised witness.

43 For the defendants, it is argued that on that ground alone s 34 may not be satisfied. It is submitted that the Court may not find that the deceased intended the document in its form at that time and as it ultimately remained to constitute the will of the deceased. However, as I have indicated, in my view the fact that the document was unexecuted but was intended to be executed, on the assumption that the planned manner of execution would satisfy the requirements for formal validity of the will, does not negate an intention that the document, so far as it made a testamentary disposition, was, in the terms in which it was drawn, intended by the deceased to constitute his will.

44 The second matter raised for the defendants is, in my view, of more substance. Relying by consent upon the facts recorded in the sentencing transcript of 2 October and 8 October 2007, when Luke Welsh was dealt with by McKechnie J for the manslaughter of his stepfather, it is submitted, and I find, that although no hint of this emerges from the affidavit evidence before the Court, in truth this was a gravely dysfunctional family throughout the years of the relationship, whether de facto or married, between the plaintiff and the deceased. Relationships between the members of the family seem to have been poisoned by alcohol-fuelled violence.

45 It is clear that the deceased was the instigator of much of the violence against Mrs Dolan, Stevie and Luke. Twice previously Luke had intervened to prevent the continuation of a violent attack by his stepfather upon his mother and upon his sister.

46 The deceased was apparently prone to strangling his victims. On one occasion, when Mr Dolan was strangling Stevie, Welsh struck him with a baseball bat. On another occasion, when Dolan was strangling his wife, Welsh hit him with something described as a 'trolley pole'. On both occasions Mr Dolan required treatment of some kind at a hospital.

47 Finally, before the night of the killing, the most recent episode of violence happened in about August 2006. Luke Welsh had been out. He came home and tried to go past his mother and stepfather to go to bed. Something Welsh did apparently provoked the deceased who attacked him, causing what Welsh described as a 'full-on fist fight'. The police were called and removed Welsh from the house, but it seems that no charges were laid and when Welsh appeared before McKechnie J he had no previous convictions.

48 The circumstances of the commission of the offence of manslaughter seem to have been typical of such incidents. There was drinking going on among family members and others. People became intoxicated. An argument developed between Welsh and his stepfather. It became heated. The younger man went to his bedroom and brought back to where the deceased was, a fishing knife which he presented to the deceased, but pointed towards his own chest, inviting his stepfather to stab him. The deceased did not do that, but a violent struggle did develop, during the course of which the deceased took hold of his stepson by the throat and commenced to strangle him. That caused Welsh to stab the deceased with the knife in the left side of his torso, below his ribs. Although Mr Dolan was rushed to a nearby hospital, he had suffered serious internal injuries and he soon died.

49 I note that those findings, taken from the information supplied to the court in the sentencing proceedings, are consistent with the findings made by McKechnie J.

50 For the defendants it is put that I should hesitate long, in those circumstances, before concluding that I am satisfied that the testamentary intention expressed in the will form filled out in February 2006 was still the intention of the deceased as at the date of his death. As I have said, the will form proposed a specific gift of the deceased's beer kits to Luke Welsh. In view of the serious violence between the two men, including that Welsh used weapons against his stepfather on three occasions at least, hospitalising him twice and finally killing him, it is submitted that it is hardly likely that the deceased would wish to make a testamentary disposition in favour of his stepson, or any of his immediate family, including his wife. It was pointed out that the gift over of the residue was apparently, as the will form was drawn up, intended also to give Luke a quarter share of the estate.

51 There is certainly much to be said for these arguments and I have considered the evidence carefully and asked myself whether I may be of the clear and firm persuasion required before I may be satisfied that, as at the date of Mr Dolan's death, he still intended what was expressed in the will form to be the testamentary disposition he wished to have in place so as to constitute the document his will.

52 The facts are most unusual, but in the end I have reached the degree of satisfaction required by s 34. The violence perpetrated particularly by the deceased man, apparently indiscriminately against family members, but particularly against his wife, was a long-standing feature of the life of

this appallingly dysfunctional family. It was fuelled by alcohol and I do not think there is evidence that the violence was an expression of antipathy by the deceased for his wife and her children. Rather was it the case that the deceased was an habitual heavy drinker, inclined to become heavily intoxicated, and when intoxicated he was a dangerously violent man.

53 While he possessed that character and while those events continued, from time to time, there was also, from time to time, discussion within the family throughout the period of the relationship about the deceased's testamentary intentions. As to that he always said the same thing. If she survived him his property was to go to his wife. If she did not it was to be divided equally among the four children.

54 Properly interpreted, I think the lotto document, dating from April 2003, is a record of just such a discussion and I agree that there is a consistency between that document and the content of the will form which, in my view, was intended to give effect and did give effect to the deceased's settled testamentary intention, a testamentary intention which he continued to express until the very month before he was killed.

55 I do not think the deceased was holding in abeyance the act of executing the will in the manner he thought was necessary. I think rather that he simply never got around to doing anything about the execution of the will after the form was made out. Whether he thought the document was effective without such execution I do not know, but I am satisfied that when he made the document and as at the date of his death, he intended it to constitute his will in the sense that he intended the document to express, in its terms and without more, the manner in which his estate was to be disposed of after his death.

56 I will therefore pronounce for the force and validity of the will form as the will of the deceased and I will make such consequential orders as are required to facilitate a grant of probate.

Costs

57 The plaintiff seeks an order that her costs be paid out of the estate. The approach of the court to the exercise of its discretion in relation to costs in such an action as this was recently very helpfully discussed by Barker J in ***Oreski v Ikac*** [2007] WASC 195 (S). His Honour reviewed many of the decided authorities and held that although the ordinary rule expressed in the *Rules of the Supreme Court 1971* (WA), O 66 r 1, that costs will follow the event and be awarded in favour of the successful

party against the unsuccessful party, there were exceptions in relation to probate matters, where the estate itself potentially provides a ready source from which an order for the payment of costs may be defrayed.

58 It remains the case that the successful party will ordinarily be entitled to his or her costs. They may be taxed and will be paid by the unsuccessful party or out of the estate, in the discretionary judgment of the trial judge. That raises the question whether the unsuccessful party should be protected from an award of costs and what should be done in relation to the costs of that party.

59 In my view, it amounts to this. Where the unsuccessful party has been in some way at fault in its conduct of the litigation or has acted without reasonable cause to propound or challenge the will, then that party will not only ordinarily be required to bear his or her own costs, but may also be required to meet the costs of the successful opponent. Where, on the other hand, the losing party has acted reasonably and, although unsuccessful, with cause, that party may not only be protected from having to meet the costs of the successful party with the result that the successful party's costs may be ordered to be taxed and paid out of the estate, but the unsuccessful party may similarly be awarded his or her costs to be taxed and paid out of the estate.

60 The reason for taking that approach is that it is important that there be a capacity to test or establish testamentary dispositions. No party should be dissuaded from doing so for fear of a costs burden to be met if unsuccessful, where there is apparently reasonable cause for the involvement of that party in litigation. On the other hand, the ordinary brake upon a party too readily engaging in fruitless litigation, that that party, if unsuccessful, will have to bear all the costs, will continue to apply. The purpose in a proper case of awarding costs to be paid out of the estate is thereby to provide for the costs of the unsuccessful party, but not directly at the expense of the successful party.

61 In this case, reference to the reasons for judgment which I have expressed will demonstrate that not only should the plaintiff have her costs to be taxed, but also a similar award should be made to the defendants, who properly raised appropriate considerations in respect of the application of s 34. All parties should therefore have their costs to be taxed and, in my view, those costs should be paid out of the estate.