Article Information

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Production of will files in Estate Litigation: check your (legal professional) privilege

GROVE -v- SIMON DIRK KENWORTHY-GROEN as executor of the estate of WILLIAM GROVE [2021] WASC 70

When deceased estates are litigated, there is often a preliminary dispute about whether the will drafter's file (often including notes of the deceased's instructions and copies of any previous wills) should be disclosed to prospective claimants.

Some legal practitioners take the view that such documents should be volunteered to assist parties in determining whether or not a claim actually exists. Other practitioners remain concerned about the deceased client's confidentiality and the legal professional privilege which still attaches to will files after death, and take the view that such requests can be a fishing exercise and should not be released without a court order or subpoena. This debate was canvassed by the Supreme Court of NSW in *Re Estates Brooker-Pain and Soulos*.[1]

The conflict between these two views is again canvassed in a recent decision of Master Sanderson of the Supreme Court of Western Australia in *Grove v Simon Dirk Kenworthy-Groen*[2] (**Grove**).

The facts in Grove

The Deceased, William Grove, passed away in October 2015. His health had been declining over several years following a gastric cancer diagnosis, and worsened particularly in the final 6 months of his life. In those final months, the Deceased executed a number of wills, the last of which was made on 11 September 2015 and appointed his son Simon as executor. Probate was granted to Simon in February 2016.

The Deceased had two other sons, John (the Plaintiff) and Andrew (the Defendant). John, Andrew and the Deceased had operated the Indian Ocean Hotel in partnership. John sought certain documents from Simon and his lawyers to determine whether or not a claim of undue influence may exist (which would invalidate the last will). Simon refused, and John issued proceedings seeking pre-action discovery.

The two categories of documents John sought (which were apparently in the possession of Simon's solicitors), comprised:

- First, two earlier wills of the Deceased known to exist; and
- Secondly, other records of testamentary intention as may appear on the will drafter's file.

The decision and key considerations

At the outset, Master Sanderson commented that the documents in the second category would almost certainly be subject to legal professional privilege, though the position was less clear with respect to the earlier wills.

However, the Court noted that the existence of a claim for privilege is not a reason not to refuse an order for pre-action discovery, because any order would only be for *discovery*, not *production* of the actual documents. That is to say, Simon would be required only to file a list of the documents in his control as executor which fell within those categories, not produce copies of the documents if privileged.

Having made this clear, the main issue to be then argued was whether or not John could establish that he "may" have a

cause of action which would justify pre action discovery.

Of the various matters identified by John which were said to establish a possible claim against Andrew, the one on which the Court appeared to ultimately rely was affidavit evidence from John that Andrew would '*frequently scream at [his] father*' and that they had a difficult relationship That lead the Court to find that "*there existed between [the Deceased] and Andrew a volatile and occasionally hostile relationship*".

While that may not seem a strong basis, the Court took the view that it is desirable for potential claimants to have the opportunity to seek access to will files so they can determine whether or not a prime facie action may exist. The earlier wills to ascertain any benefits to John (or not) '*…would [give] a clear idea of whether an action was worth taking…*'.[3] while the other documents, if not privileged, would enable John to determine the '*utility in bringing an application to revoke the grant*'.[4]

This conclusion remains difficult to reconcile with the Court's earlier acknowledgement that the documents would likely be privileged and protected from production in any event. In the absence of legislative amendment, this conflict is likely to be an ongoing aspect of estate litigation.

Grove is also a reminder of the importance of legal professional privilege with respect to wills and testamentary documents generally. This privilege will (usually) not apply to notes of testamentary intention or similar documents which appear on the file of a non-legal advisor such as the accountant or financial planner of a deceased will maker.

[1] [2019] NSWSC 671

[2] [2021] WASC 70, 3(2).

[3] Ibid, 6.

[4] Ibid, 14.