

Requests for information about validity of will

Have you been asked to provide a statement as to the circumstances surrounding the preparation and execution of a will and to also provide copies of the will file? Did the request refer to *Larke v Nugus*?

Larke v Nugus is an English case concerning resistance to a grant of probate of a will on the grounds that it was procured by undue influence and the testator lacked knowledge or approval of the will. The case was decided in 1979 but somewhat surprisingly was not reported until 2000. Larke (the executor of the estate) was successful in resisting the challenge but the Court nevertheless allowed the unsuccessful plaintiff to have her costs paid out of the estate. This was because Larke, who was not only the executor but also the solicitor for the estate had refused to provide Nugus with a copy of the will or details of the circumstances in which it was prepared and signed, despite there being legitimate suspicions about aspects of the will. Larke was a material witness of fact whose evidence could have proved crucial in avoiding a trial.

LPLC has seen several recent instances where Australian lawyers have sent letters to solicitors who prepared wills citing *Larke v Nugus* as authority for an expansive proposition that any lawyer who prepared a will is obliged to hand over their will file and provide evidence about their instructions and actions whenever a dispute is raised about the circumstances in which the will was signed.

A recent decision of McMillan J in *Hughes (as executors of the will of Gardiner) (dec'd) v Gardiner (No 3) [2018] VSC 414* in July 2018 has debunked such an expansive proposition. In *Hughes v Gardiner* certain relatives of the deceased sought revocation of the grant of probate on the grounds the testator lacked capacity at the time of making the last will. The issue for determination in the case was whether the relatives were able to establish a prima facie case to order revocation of that will. In seeking to do this the relatives had sought production of the solicitor's will files pertaining to the last will and to earlier wills (referred to as a 'chain of wills') and they relied on *Larke v Nugus* in support of their right to access this information.

McMillan J held that the relatives had not established a prima facie case of undue influence or lack of knowledge and approval. The facts of the case were also distinguishable from *Larke v Nugus* (a challenge based on alleged lack of capacity) and in any event *Larke* did not stand as authority for a broad-sweeping proposition requiring executors or solicitors to provide evidence or produce will files in all cases. At paragraph 109 of the judgement McMillan J said:

"This Court has not found any reported decisions where Larke v Nugus has been applied in Australia. Further, upon a proper consideration of the decision, it does not stand for the proposition that the applicants have a

right to issue a Larke v Nugus letter to the plaintiffs requesting information concerning the making of the 'chain of wills' and the relevant will files, or that such an application creates a corresponding obligation on the plaintiffs to respond to such an application."

At paragraph 120 Her Honour also commented on the importance of client confidentiality noting that this continues after the client's death.

It follows that practitioners should be careful about the propositions for which they cite *Larke v Nugus*, and if you do receive a *Larke v Nugus* request from another practitioner or person, we recommend that you:

- give objective consideration to the facts and allegations presented
- think about the issue of privilege and confidentiality
- draft a statement for your file (but don't send it without instructions)
- if you or your firm drew the disputed will and are also acting as solicitor to the estate in defending the will:
 - consider your position as a potential material witness and whether you or your firm have a conflict and should cease acting for the estate
 - advise the legal personal representative about legal professional privilege and the Civil Procedure Act obligations to minimise the scope and expense of litigation and discuss the pros and cons of releasing any information or material in response to the request, including a statement.
- do not provide copies of any files, documents or your statement without the informed consent of the deceased's personal representative.