

**THE NEW SOUTH WALES BAR ASSOCIATION  
THE LAW SOCIETY OF NEW SOUTH WALES**

**ESTATE ADMINISTRATION : A COURSE OF SEMINARS –  
The Protective, Probate and Family Provision Jurisdictions of the  
Supreme Court of New South Wales**

**SEMINAR NO. 1 : An introductory Overview  
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by

**Justice Geoff Lindsay,  
Probate and Protective List Judge,  
NSW Supreme Court**

**Justice Phil Hallen,  
Family Provision List Judge,  
NSW Supreme Court**

**A PROVINCE OF MODERN EQUITY : MANAGEMENT OF LIFE,  
DEATH AND ESTATE ADMINISTRATION**

By Lindsay J

**INTRODUCTION**

1. The course of seminars introduced by this paper is intended: (a) to provide an introduction to current principles, practice and procedure governing the protective, probate and family provision jurisdiction(s) of the Supreme Court of NSW; and (b) to encourage discussion of principles attending the administration of estates, before and after death.
2. The seminars are timely, for a variety of reasons:
  - a. the protective, probate and family provision jurisdictions are intrinsically important to the way law is administered, and society functions, in NSW.
  - b. over recent decades there have been fundamental changes to the way the law is administered, and further changes of that order are likely.
  - c. the subject matter of the protective, probate and family provision jurisdictions is not routinely studied at university level, and generations of lawyers have come of age without studying them.

- d. well-rounded lawyers need something more than passing familiarity with these areas of the law, whatever their preferred areas of practice or academic study.
  - e. in recent years there has been a large expansion in the numbers of people engaging the protective function of government (more through statutory tribunals operating under the supervision of the Court, than through proceedings in the Court) and the family provision jurisdiction of the Court, with the Court's probate jurisdiction (supplemented by its equity jurisdiction) mediating between them.
  - f. if the law, and its administration, are to meet today's challenges, and to adapt to meet those of tomorrow, community understanding and acceptance are required, as well as flexibility in both concept and process.
3. Mastery of the law requires an understanding of the different branches of the Court's jurisdiction; how and why they are different; and how, and by whom, they are administered.
  4. That understanding comes more readily if one is prepared to think of the law as serving the **administration of estates (management and transmission of property) on behalf of a person unable (by reason of death or incapacity) to manage his or her own affairs**, rather than as a vehicle for vindication of third party rights through adversarial litigation.
  5. The common law model of an adversarial trial (based, historically, on trial by jury) does not sit comfortably with the protective, probate and family provision models of litigation (like the equity jurisdiction, historically, more influenced by an inquisitorial, civil law tradition), their public interest character or the functional tasks inherently involved in recognition, and management, of property.
  6. In administration of the business of the Supreme Court of NSW, the several nominated branches of the Court's jurisdiction (respectively, the protective, probate and family provisions jurisdictions) are perceived to be specialist parts of its equity jurisdiction.
  7. That perception is soundly based insofar as judges assigned to the Court's Equity Division routinely administer the Court's Protective List, Probate List and Family Provision List.
  8. However, a full appreciation of the nature and range of the Court's substantive jurisdiction requires an understanding of:
    - a. the historical origins of each branch of the Court's jurisdiction;
    - b. the purposive character of each branch; and
    - c. their interconnectedness.

## HISTORICAL ORIGINS

9. At the outset, it must be recognised that the Court's **Protective List** is not coterminous with its **protective jurisdiction**. The latter embraces both branches of the jurisdiction historically exercised (on different delegations from the Crown) by the English Lord Chancellor:
  - a. jurisdiction over lunatics, idiots and persons of unsound mind ("the lunacy jurisdiction"); and
  - b. jurisdiction over infants, minors, children and young people (as they are variously called), generally known as "the *parens patriae* jurisdiction".
10. The expression *parens patriae* is sometimes used to describe both branches of the Lord Chancellor's ancient, protective jurisdiction; but, in the work of the Supreme Court of NSW, the expression is generally used exclusively in relation to the Court's jurisdiction over minors.
11. The work of the Court's Protective List is generally confined to cases relating to the administration of estates of persons (of whatever age) who are, functionally, unable to manage their own affairs.
12. The Court's jurisdiction over the property of infants unable to manage their affairs is capable of drawing support from both branches of the Court's protective jurisdiction, and it is increasingly exercised in cases in which a minor recovers a substantial award of compensation for personal injuries suffered at birth or in a motor vehicle accident: eg, *AC v OC (a minor)* [2014] NSWSC 53.
13. Cases relating to "the person" of minors, and others unable to manage themselves, may be dealt with in the Protective List but they are, more often, assigned to any of the judges in the Equity Division.
14. The history, and interconnectedness, of the twin branches of the Lord Chancellor's **protective jurisdiction** is classically explored in *E (Mrs) v Eve (aka Re Eve)* [1986] 2 SCR 388 at 407 *et seq*; 31 DLR (4th) 1 at 13 *et seq*, approved by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. This treatment draws heavily upon HS Theobald, *The Law Relating to Lunacy* (London, 1924), which continues to be a seminal work informing expositions of the protective jurisdiction in NSW: *W v H* [2014] NSWSC 1696 at [29]-[31].
15. The history of the Court's **probate jurisdiction** is traced in *Estate Kouvakis; Lucas v Konakis* [2014] NSWSC 786 at [102]-[202]. It is derived from the jurisdiction of the "ecclesiastical courts" of the Church of England, particularly those of the Diocese of London. Not until 1890

(30 or more years after England) did the Supreme Court of NSW exchange the name “probate jurisdiction” for the older expression “ecclesiastical jurisdiction”.

16. Probate jurisdiction was exercised by church courts in England because, in an evolutionary compromise between church and state, the church was recognised as having a special interest, and expertise, in matters of life and death.
17. This changed in the 19<sup>th</sup> century with secularisation of society and centralisation of court administration. The English *Judicature Acts* of 1873 and 1875 centralised administration of more jurisdictions than merely those of the Courts of Common Law and the Chancery Court. The probate jurisdiction, until the 1850s exercised by church courts, was caught up in English reforms.
18. On the changing nature of a “will” since the early 19<sup>th</sup> century, see *Estate of Scott; Re Application for Probate* [2014] NSWSC 465 at [68]-[81].
19. The history of the Court’s **family provision jurisdiction** (formerly known as “testator’s family maintenance” jurisdiction) can be traced:
  - a. via writings of Professor Rosalind Croucher (eg, “Contracts to Leave Property by Will and Family Provision after *Barnes v Barnes*” (2005) 27 (2) *Sydney Law Review* 263; “Law Reform as Personalities, Politics and Pragmatics – Family Provision Act 1982 (NSW): A case study” (2007) 11 *Legal History* 1; “Conflicting narratives in Succession Law – A review of recent cases” (2007) 14 *Australian Property Law Journal* 179); or
  - b. by comparing the provisions of the successive statutes governing the jurisdiction: the *Testator’s Family Maintenance and Guardianship of Infants Act*, 1916 NSW, the *Family Provision Act*, 1982 NSW and Chapter 3 of the *Succession Act* 2006 NSW.

## THE PROVINCE OF THE COURT’S JURISDICTIONAL BRANCHES

20. The province of the Court’s **protective** jurisdiction is that of the living, focusing on care for those who are in need of protection because of a functional incapacity to manage themselves or their affairs.
21. The province of the **probate** jurisdiction is that of the dead, focusing on the winding up of their affairs, including disposal of their mortal remains and, more often, transmission of their estates: in accordance with testamentary intentions, where expressed, and otherwise in accordance with law (currently chapter 4 of the *Succession Act* 2006 NSW) governing intestate estates.

22. The province of the **family provision** jurisdiction is that of those who survive, focusing upon the claims of community on a deceased estate.
23. There is a strong **administrative** flavour to each of these branches of the Court's jurisdiction, with a strong public interest element, generally associated with the absence of representation before the court (because of incapacity or death) of the individual whose affairs are under consideration, and a concern about identification of those who have a material interest in management of those affairs.
24. The Court's general **equity** jurisdiction (grounded, historically, in the jurisdiction exercised by the English Lord Chancellor) informs and supplements each branch of the Court's jurisdiction under review.
25. However, it is itself distinct from them, focusing on the provision of remedies in individual cases involving unconscionable conduct, the provision of flexible remedies (including, historically, accounting remedies) to supplement those otherwise available and the maintenance of standards.

#### **A COMMON ASSUMPTION : THE IDEAL OF AN AUTONOMOUS INDIVIDUAL LIVING IN COMMUNITY**

26. **A Central Idea.** Conceptually, each branch of the Court's jurisdiction under consideration has at its centre the ideal of **an autonomous individual, living (and dying) in community**. Questions of capacity and incapacity are judged against the standard of such an individual. So too are the derivative claims of those who claim a material interest in an estate.
27. Identification of the law's assumption of an "individual living (and dying) in community" aids an exploration of basic ideas that inform each of the protective, probate and family provision jurisdictions of the Court.
28. At different stages of a person's life different importance is, or may be, attached to the relative entitlements of "the individual" and "the community".
29. **Illustrations of the Central Idea.** An exercise of **protective** jurisdiction is generally governed by "the welfare principle", according to which paramountcy is given, in all decision-making, to the welfare and interests of the person in need of protection: *Re Eve* [1986] 2 SCR 388 at 425-427 and 434; 31 DLR (4th) 1 at 28-29 and 34; *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238B-C and 241A-B and F-G; *M v M* [2013] NSWSC 1495 at [50]; *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [146]-[147]; *CJ v AKJ* [2015] NSWSC 498 at [27].
30. The protective jurisdiction is commonly said to be both parental and protective. It exists for the benefit of the person in need of protection,

but it takes a large and liberal view of what that benefit is, and it will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do: HS Theobald, *The Law Relating to Lunacy* (London, 1924), pages 362-363, 380 and 462; *Protective Commissioner v D* (2004) 60 NSWLR 513 at [55] and [150].

31. Whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what is in the interests, and for the benefit, of the person in need of protection: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48]. In an exceptional case, where the welfare and interests of the person in need of protection warrants and requires it, personal liberties may be restricted: *Marion's Case* (1992) 175 CLR 218 at 258-259; *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217 at [22]-[34]; [ 2009] NSWSC 625; and [2010] NSWSC 1525.
32. Adoption of the perspective of the person in need of protection is not inconsistent with recognition, in an appropriate case, of the claims of members of his or her family and others with a claim on his or her bounty. The Court's inherent, protective jurisdiction extends to authorisation of a voluntary allowance or donation out of a protected estate, not limited to allowances for the maintenance or benefit of a protected person's family, although family may be the natural objects of beneficence: HS Theobald, *The Law Relating to Lunacy* (London, 1924), chapter 65 (pages 463-467); *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545.
33. Critical to an exercise of such jurisdiction is the centrality of the welfare and interests of the protected person, as demonstrated in the seminal judgment of Lord Eldon in *Ex parte Whitbread in the matter of Hinde, a Lunatic* (1816) 2 Mer 99 at 101-103; 35 ER at 879, fully extracted in *W v H* [2014] NSWSC 1696 at [40]. With emphasis added, Eldon there said, *inter alia*:

**" ... the Court, in making [an] allowance, has nothing to consider but the situation of [the protected person himself or herself], always looking to the probability of his [or her] recovery and never regarding the interest of the next of kin.** With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the [protected person himself or herself] would do, if he [or she] were in a capacity to act, will make some provision out of the estate for those persons.... **The Court does nothing wantonly or unnecessarily to alter [the protected person's] property, and on the contrary takes care, for his [or her] sake, that, if he [or she] recovers, he [or she] shall find his [or her] estate as nearly as possible in the same condition as he [or she] left it, applying the property in the meantime in such manner as the Court thinks it would**

have been wise and prudent in [the protected person] to apply it, in case he [or she] had been capable.”

34. The **probate** jurisdiction offers a classic example of the paradigm of the “individual living (and dying) in community” in the test for testamentary capacity for which *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 is the leading authority.
35. In underscoring the interconnectedness between the protective, probate and family provision jurisdictions, an extended extract from that judgment (with emphasis added) is warranted:

“...The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, **though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.** The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. **Hence arises a reasonable and well warranted expectation on the part of a man’s kindred surviving him, that on his death his effects will become theirs, instead of being given to strangers.** To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. **It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations.** On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner’s death would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favour of the testamentary power. Among those, who, as a man’s nearest relatives, would be entitled to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others; some from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that **ought** not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations. **As was truly said by Chancellor Kent, in *Van Aalst v Hunter* 5 Johnson N.Y.Ch. Rep. at 159: ‘It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command [the attentions due to his infirmity.]’ For**

**these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property**, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that **ought** to be attended to, yet, the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately **adjusted to the requirements of each particular case**, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

[565]... **it is obvious... that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect;** and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his **sense of right**, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or **the moral sense**, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgement are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence - in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand....”

36. The genius of this passage is that it is timeless in its understanding of the human condition. It is instructive even in modern times. Taking death as a pivotal point, it glances backwards to the province of the protective jurisdiction, noting the power of property as an influence on behaviour. Looking forward, it engages the province of modern family provision jurisdiction in references to what testamentary provision “ought” to be made for those within the community of a testator.



37. At the boundary between the protective and probate jurisdictions: (a) *Perpetual Trustee Company Limited v Fairlie-Cunninghame* (1993) 32 NSWLR 377 recognises that the currency of a protected estate management order is not, of itself, a bar to a will being made by the protected person; and (b) if, at the time a will is proposed to be made by a protected person, he or she lacks testamentary capacity, the Court can authorise the making of a “statutory will” under the *Succession Act* 2006 NSW, sections 18-26.
38. The normative standards that govern an exercise of **family provision** jurisdiction are centred upon sections 59(1)(c) and 59(2) of the *Succession Act*. In sharp focus, they provide as follows:
- “59(1) The Court may... make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:
- a. the person in whose favour the order is to be made is an eligible person [within the meaning of section 57(1)], and...
  - c. at the time when the Court is considering the application, **adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made** has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.
- 59(2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks **ought** to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.”
39. On one view, the family provision jurisdiction does not fit the paradigm of “individual in community” as snugly as it once did. That is because modern statements of principle tend to emphasise the “community” element at the expense, implicitly, of the “individual” element. However, whatever tensions exist between those two elements, they are inevitably bound together.
40. Older authority set a standard for decision-making in family provision cases by reference to the concept of a “just and wise testator”, (to use an expression attributed, first, to *In Re Allen* [1922] NZLR 218 at 220-221 and often associated with *Bosch v Perpetual Trustee Co* [1938] AC 463 at 479 and *The Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20.

41. In more recent days, the standard has shifted towards decision-making by reference to “community values” about what is right and appropriate (*Andrew v Andrew* (2012) 81 NSWLR 656) without express, unequivocal abandonment of the older touchstone of justice and wisdom.
42. That has been possible only by making judges the arbiters of “community values”, implicitly recognising that judges are required, by the nature of their office, to ground their decisions on both justice and wisdom.
43. So understood, the Court’s embrace of “community values” might best be seen as a qualification on, not an attempt to displace the foundational concept of, a just and wise testator.
44. As *Andrew v Andrew* illustrates, one of the most difficult cases in which to reconcile the perspectives of a “just and wise testator” and “community values” is a case in which an estranged son or daughter applies for family provision relief from the estate of a deceased parent. Problems with which the Court must wrestle in such a case are as old as society itself. In their own temporal affairs most people probably more readily identify with the older son than they do with the younger one in the parable of the prodigal son, notwithstanding that the perspective that “ought” to prevail may be that of the parent: *Luke* chapter 15 verses 11-32.
45. **Practical Consequences of the Central Idea.** Coherence, consistency in administration of the law across the protective, probate and family provision jurisdictions requires that the Court’s foundational assumption of an “individual living (and dying) in community” be recognised as a means by which the Court endeavours to make a principled decision based on standards more objective than an individual judge’s subjective judgement.
46. The need to identify both the “individual” at the centre of all judicial decision-making and his or her “community” also explains, across jurisdictional divides, the importance of giving notice of proceedings to those who have, or may have, a material interest in the conduct or outcome of the proceedings. Before death, although the perspective of an individual may be paramount, the Court often depends upon the individual’s community to provide information about the individual’s circumstances, and care. After death, the Court’s perspective shifts, in due administration of a deceased estate, towards those members of the deceased’s community entitled to inherit it.
47. Where a Court speaks of “moral” claims, entitlements or obligations (as the community at large often does) in connection with an exercise of protective, probate or family jurisdiction, the word “moral” is generally used by the Court in a relational sense, and rarely as a reflection on the

“worth” of an individual in the eyes of a judgmental society. The focus of attention is upon relationships between an “individual” and his or her “community”. Inevitably, Courts are required to make allowances for imperfections inherent in the human condition, and life as experienced, in all its diversity. In the Equity tradition, each case must depend on its own particular facts, in all the circumstances, not immutable, universal rules about human capacity or correct behaviour: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at [46]-[48].

## **AN HISTORICAL LEGACY : ACTION-BASED RATHER THAN ABSTRACT, EXPOSITIONS OF LAW**

48. **The Concept of an Action-Based Exposition of Law.** Our understanding of the “protective” and “probate” jurisdictions of the Court has been heavily influenced by administrative arrangements, rules and practices inherited from the English legal system. That inheritance, particularly in the realm of the probate jurisdiction, has been essentially “action based” (articulated in terms of orders made in routine types of court action), not explained by reference to abstract principles. The family provision jurisdiction was unknown at the time the Court was established in 1824 and English law was formally received in NSW in 1828.
49. An action-based exposition of law may be no less “scientific” than an abstract textbook treatment of guiding principles. It is not without drawbacks, however. For example:
  - a. an exposition of law in terms of court orders (remedies) can become outdated, even obscure, when court procedures or cultural imperatives of legal practice change.
  - b. a consequence of this may be that established practices of court administration are unwittingly elevated into jurisdictional constraints, or something similar, not readily understood by the community they serve.
  - c. *via* these means, the law becomes inaccessible to all but a class of specialist practitioners.
50. This may be seen most clearly in probate cases.
51. **Illustrative Examples.** Two examples may suffice.
52. First, in the description of different types of limited, or conditional, “special” grants of administration by reference to what **were** descriptive Latin tags but are **now** comprehensible only to specialists.

53. For an elaboration of standard form special grants, see Mason & Handler, *Succession Law and Practice* (NSW) (Lexis Nexis, Butterworths), paragraph [1181.4] and RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in NSW* (LBC, 1996), paragraphs [40.74]-[40.86]. Those texts refer to the following types of grant (with emphasis added for those most common in practice):
- a. **administration *cum testamento annexo* (with the will annexed).**
  - b. **administration *ad colligenda bona defuncti* (granted for the protection of an estate's assets pending delay in making a general grant).**
  - c. **administration *ad litem* (granted to provide a person to represent an estate in litigation).**
  - d. **administration *pendente lite* (granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending).**
  - e. administration *de bonis non administratis* (where an executor or administrator dies without having fully administered an estate and a replacement is necessary).
  - f. administration *durante absentia* (during the absence from the jurisdiction of an executor or other person entitled to a grant).
  - g. administration *durante dementia* (during the incapacity of an executor or administrator).
  - h. administration *durante minore aetate* (during the minority of an executor or other person entitled to a grant).
54. Use of descriptive labels of this character can be convenient because it provides illustrations of commonly occurring cases for the appointment of a special administrator.
55. Use of such a label in a court order may also inform the purpose of, and implicitly the power conferred by, a special grant of administration. However, in each case, the best guide to the purpose of a special grant of administration, and the powers of the administrator, is found in the text of the order appointing the administrator. This area of the law is no different in this respect from other areas of the law where, for example, a receiver and manager is appointed to deal with property.
56. Secondly, distinctions between a grant of probate (or, more generally, a grant of administration) "in common form" or "in solemn form" have become obscured by ancient practice, in English ecclesiastical courts, going back, at least, to the seminal textbooks of Henry Swinburne, A

*Brief Treatise of Testaments and Last Wills* (1st ed, 1590; 7th edition, 1803), Part 6 Section 14, either directly or through John Godolphin, *The Orphan's Legacy, a Testamentary Abridgment, in Three Parts. I Of Last Wills and Testaments. II Of executors and administrators. III Of Legacies and Devises* (1<sup>st</sup> ed, 1673; 4<sup>th</sup> ed, 1701), Part 1 Chapter 20 section 4: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [153]-[154].

57. A grant of probate, in whatever form, is essentially an order of the Court that confirms, or confers, title to estate property.
58. Distinctions between a grant in common or solemn form can, in practice, be illusory because one needs to examine the underlying facts.
59. Nevertheless, a grant expressly issued by the Court “in solemn form” is a judicial statement that, on the Court’s then assessment:
  - a. all persons interested in the making of a grant (and, particularly, those with an interest adverse to the making of a grant) have been allowed a fair opportunity to be heard, with a consequence that principles about the desirability of finality in the conduct of litigation should weigh heavily on any application for revocation of the grant;
  - b. on evidence then formally noticed, the Court is satisfied that the particular grant represents, consistently with the law’s requirement that testamentary intentions be expressed formally, an expression of the deceased’s last testamentary intentions, if any; and
  - c. an order for a grant in solemn form appropriately serves the due administration of justice.
60. No grant can be revoked as of right; but the principles governing them are essentially the same. The reason why a grant in solemn form is generally, and should be, more difficult in practice to set aside than a grant in common form is that:
  - a. the Court can reasonably be taken to have investigated questions about parties, evidence and the due administration of justice *before* making the grant; and
  - b. an applicant for a revocation order can reasonably be taken to have, at least, a forensic onus to displace findings expressly or impliedly made by the Court as a foundation for the grant.
61. Nevertheless, elevation of perceived distinctions between the two forms of grant into something akin to an immutable rule of law rather

than a practice guideline diverts attention away from the substantive importance of effecting a due administration of deceased estates.

62. **An Historical Analogy.** An imperfect analogy that may help to explain what is happening or, at least, what may need to happen in a contemporary exposition of the law governing protective, probate and family provision cases can be found in development of the modern law of contract (in the 19<sup>th</sup> century) as:
- a. underlying forms of action (assumpsit, covenant, debt, detinue and account) ceased to be pleaded as such because of procedural changes that culminated in widespread adoption of a *Judicature Act* system of court administration (Lindsay, “Understanding contract law through Australian legal history: Whatever happened to assumpsit in NSW?” (2012) 86 ALJ 589); and
  - b. textbooks increasingly took the form of academic treatises rather than alphabetically arranged digests of case law earlier favoured as practice books: AWB Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature” (1981) 48 *University of Chicago Law Review* 632, reprinted as chapter 12 in Simpson’s *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, London, 1987).
63. Although the continuing utility of the old law should not be overlooked, “the law of contract” is now universally understood in terms of abstract principles turning upon concepts of “agreement” and the “intention” of contracting parties, not on procedural forms of remedy available to enforce rights and obligations of parties to a contract. Our common understanding of the law of contract is not dependent upon the old forms of action.
64. An analogy between contract law and the law governing estate administration is not a perfect one for several reasons, including the following:
- a. each of the protective, probate and family provision jurisdictions is tethered to court proceedings in a way that the free-standing concept of a contract is not;
  - b. albeit that legislation generally conforms to a jurisprudential model defined by the **purpose** served by the protective and probate jurisdictions, and considerations of **functionality**, in critical respects (epitomised by statutory wills and applications for family provision relief), the law governing estate administration depends on legislation, rather than merely general principles of law, for its existence;

- c. the law of contract is predicated upon an assumption that contracts are generally made by parties with capacity to act in their own interests; and
  - d. each of the protective, probate and family provision jurisdictions is predicated upon the existence, or possible existence, of a person who (through death or incapacity) is unable to protect his or her own interests.
65. The suggested analogy is intended, principally, to draw to attention an historical process of change in the way important legal questions may be understood by lawyers and the community they serve.
66. Any attempt to analyse how the protective, probate and family provision jurisdictions operate in practice, or to analyse principles that govern or explain the law in operation, is likely to cut across jurisdictional divides that were once sufficient to justify analysis of the law in terms of action-based concepts.

## WINDS OF CHANGE : LAW AND SOCIETY

67. **A Fundamental Paradigm Shift.** Much has changed since the foundations of Australian law were laid in the 19<sup>th</sup> century.
68. In the eyes of modern law death is now, more than formerly, less an *event* and more a *process* that may commence before, and extend beyond, *physical death*. Incapacity for self-management is no longer, if it ever was, a rarity. Problems associated with management of the person, and property, of those unable to manage themselves or their affairs are now commonly confronted in everyday life. Individuals, living in community, are increasingly called upon to take steps in anticipation of incapacity and death.
69. The historical boundaries between the Court's protective, probate and family provision jurisdictions have been, and are increasingly likely to be, blurred in this environment .
70. **Examples.** Take three concrete examples. The first two involve a change effected by legislation. The third involves an adaptation of existing law to meet current social challenges.
71. First, at the epicentre of this change, symbolising the breakdown in historical divisions, is the modern concept of a **“statutory will”** governed by the *Succession Act 2006 NSW*, sections 18-26. It does not fit neatly within any of the three specialist jurisdictional categories under consideration. The Court is empowered, by statute, to “make” a “will” for an individual lacking testamentary capacity: *Re Fenwick; Application of JR Fenwick; Re “Charles”* (2009) 76 NSWLR 22 at [154]-[188]; *Re Will of Jane* [2011] NSWSC 624 at [52]-[100]; *Estate of Scott; Re Application for Probate* [2014] NSWSC 465; *Secretary, Department*

*of Family and Community Services v K* [2014] NSWSC 1065; *GAU v GAV* [2014] QCA 308.

72. The notional “will-maker” is, by definition, a person in need of protection. His or her “statutory will” is likely, if not bound, to alter disposition of his or her deceased estate, being admitted to probate as if a will regularly made. Whether to authorise the making of a statutory will in the lifetime of an incapacitated person, or to leave interested parties to a family provision application after the person’s death, is one of the questions entrusted to judicial discretion.
73. The making of a statutory will provides no guarantee that a family provision application will not be made after the death of the notional will-maker but, in practice, it may have a distinct tendency in that direction, especially if the “will” made is the subject of acquiescence on the part of the will-maker’s family and social circle.
74. Secondly, conceptually not so dramatic but, in practice, probably of more profound significance is our community’s embrace of the concept of “**an enduring power of attorney**” (currently governed by the *Powers of Attorney Act 2003 NSW*) and “**an enduring guardian**”, governed by Part 2 (sections 5-60) of the *Guardianship Act 1987 NSW*. Subject to the oversight of the Court and the Guardianship Division of the Civil and Administrative Tribunal of NSW (NCAT), appointees to the positions of Enduring Attorney or Enduring Guardian exercise, with comparative informality, powers that once would have required an exercise of the Court’s “Lunacy jurisdiction”, since 1958 more delicately known as part of the Court’s “Protective jurisdiction”: eg, *Szozda v Szozda* [2010] NSWSC 804; *Scott v Scott* [2012] NSWSC 1541; 7 ASTLR 299.
75. Without the benefit of an empirical study, one can but speculate about the extent to which, notwithstanding judicial or administrative oversight, families engage in, or plan for, the succession of property between generations in the context of management (*via* an enduring power of attorney) of the affairs of a family member incapable of managing his or her own affairs.
76. With expansion of community resort to protective jurisdiction mechanisms in caring for family members suffering from disabilities, and devolution of protected estate management regimes away from purely government operations, enduring powers of attorney (especially) are likely, increasingly, to become a focal point of legal proceedings, both during and after the lifetime of protected persons.
77. If (as may reasonably be expected) the trend towards widespread use of enduring powers of attorney continues, it may have a systemic effect on the administration of deceased estates and the way **probate** and **family provision** cases are prepared.



78. At present, the investigations necessary, routinely, to be undertaken: (a) in the preparation of a will; (b) in the preparation of an application for a grant of probate or some other form of administration; or (c) upon consideration, as a prospective plaintiff or defendant, of an application for family provision relief, include inquiries about whether, in the three years preceding his or her death, the deceased entered into a property transaction that could ground a designation of property as “notional estate” for the purpose of identifying property out of which an order for provision can be made: *Succession Act 2006 NSW*, section 80.
79. In any case in which a death has been preceded by incapacity, but particularly in a case in which an enduring power of attorney has been exercised or in which a protected estate manager has been appointed, a prudent lawyer may be compelled to make inquiries going back to the time of commencement of the deceased’s incapacity.
80. Inquiries of this nature, however formal or informal, will need to focus upon whether each person standing in a fiduciary relationship with the incapacitated person has duly accounted for his, her or its administration of the person’s estate and whether, by reason of a breach of fiduciary obligations, a duly appointed legal personal representative of the deceased might have an entitlement to recover property, or equitable compensation, on behalf of the deceased estate.
81. In practice, the need to make inquiries of this character may be less intense in relation to the activities of a protected estate manager because of the probability that, in administration of the protected estate, the activities of the manager will have come under the routine scrutiny of the NSW Trustee (*via the NSW Trustee in Guardian Act 2009 NSW*), the Guardianship Division of NCAT or the Court during the period of management. Greater informality attaches to the deployment of powers under an enduring power of attorney.
82. Either way, practical questions about how the law is administered may need to be confronted. Privacy provisions which, very properly, attend protected estate management may, in troublesome cases, confront an investigator, with a potential material interest in an estate but no privity in information confidential to the protected person, with substantial impediments in unravelling what has happened or is happening in management of an estate. On the whole, there is no formal mechanism for routine scrutiny of the accounts or transactions of an incapacitated person’s enduring attorney. Whether any (and, if so, what) new safeguards are required, in supervision of estates of **people in need of protection**, may require constant review in order to maintain order in the administration of **deceased** estates.
83. Thirdly, as recent judgments have demonstrated, **family settlements** of property in anticipation of death can be effected *via* family provision legislation (*Succession Act 2006*, section 95) and, if necessary, the Court’s protective and probate jurisdictions (*L v L* [2014] NSWSC

1686, *W v H* [2014] NSWSC 1696, *JPT v DST* [2014] NSWSC 1735 and *Re RB, a protected estate family settlement* [2015] NSWSC 70).

84. A classic case occurs when two or more generations of a family have amassed wealth in the name of a patriarch or matriarch who, at an advanced age, becomes incapable of managing his or her affairs (including those of the extended family), leaving “children” and “grandchildren” (themselves of mature age) without access to property which has been previously freely available for ordinary living, and with uncertain prospects because the head of the family is, or may be, unable, for an indefinite time on the road to death, to make management decisions for the family.
85. With cooperation between family members, this problem can be addressed by invoking the Court’s protective jurisdiction (recognised by the Court of Appeal in *Protective Commissioner v D* (2004) 60 NSWLR 513 but, critically, guided by the seminal judgment of Lord Eldon in *Ex parte Whitbread in the matter of Hinde, a lunatic* (1816) 2 Mer 99; 35 ER 878), to make allowances for family members out of a protected estate, coordinating an exercise of that jurisdiction with the probate jurisdiction and the jurisdiction (under section 95 of the *Succession Act*) to approve a release of family provisions rights, as occurred in and following *W v H* [2014] NSWSC 1696.
86. **Future Directions.** Australian society has changed, is changing and will inevitably continue to change its attitude to the management and transmission of wealth. More people are living longer, often with a disability bearing upon their capacity for self-management. More people have more wealth to manage and to pass on. We have now, more than in years past, substantial (public and private) infrastructure to assist in management of the person and property of individuals living, in a welfare state, with expectations of a good life and a managed death. Legal concepts of “family” have evolved, and continue to evolve, with consequential shifts in the balance between “individual” and “community” rights, obligations and expectations.
87. The law has changed, is changing and will inevitably change to accommodate social change.
88. People are now encouraged by government to plan for the risks of disability by granting an enduring power of attorney, appointing an enduring guardian or (as contemplated by *Hunter and New England Area Health Service v A by his tutor T* (2009) 74 NSWLR 88) preparing an advance care directive in anticipation of death, during incapacity, and for the guidance and protection of carers.
89. If orderly, and generally acceptable, succession arrangements have not been made during the lifetime of the property owner, applications for family provision relief (under chapter 3 of *Succession Act*) are now commonplace.

90. Although “freedom of testamentary disposition”, much vaunted before the commencement of the 20<sup>th</sup> century, is now highly qualified by the availability of family provision relief, compensating developments have seen relaxation of formalities which, in the 19<sup>th</sup> century and preceding generations, impeded an effective expression of testamentary intention. The formalities of making a will (presently centred upon section 6 of the *Succession Act*) are qualified by the jurisdiction of the Court to admit “an informal will” to probate (under section 8 of the Act) or to have a will rectified by an order made under section 27 of the Act.
91. So expansive has our “managerial” society become that one does not even need a body to invoke a jurisdiction that straddles both protective and probate models of estate administration. The jurisdiction of the Court now extends to making a management order (under section 54 of the *NSW Trustee and Guardian Act 2009 NSW*) to be made in respect of a “missing person”: *Gell v Gell* (2005) 63 NSWLR 547. This allows property of a missing person, often suspected of being dead but unable (*via* the *Probate and Administration Act 1898 NSW*, section 40A) to be presumed dead, to be applied (*via* section 59 of the *NSW Trustee and Guardian Act*) in the maintenance of family and dependents in advance of probate proceedings.

## **INSTITUTIONAL CHANGE**

92. Many of these developments have been underwritten, in practice, by modernisation of public infrastructure to facilitate management of the State’s historic obligation to care for those unable to care for themselves: *M v M* [2013] NSWSC 1495 at [10]-[48]. The Court’s protective jurisdiction (largely found in the *NSW Trustee and Guardian Act*, though not to the exclusion of the Court’s “inherent” jurisdiction) is supplemented and, in terms of the volume of work undertaken, overtaken by that of statutory tribunals.
93. Most of the work formerly undertaken by the Court in the appointment of committees of the estate and committees of the person, and in the making of ancillary orders affecting both person and property, is now performed by the Guardianship Division of NCAT (formerly the Guardianship Tribunal) under the *Guardianship Act*.
94. The Court retains an important supervisory jurisdiction (a recent exposition of which can be found in *P v NSW Trustee and Guardian* [2015] NSWSC 579) but, for most people in most cases, the first and only port of call is NCAT. The Court exercises its jurisdiction (both its inherent and its statutory jurisdiction) in aid of the work of statutory tribunals exercising protective jurisdiction broadly comparable to that of the Court. The Court generally reserves its original jurisdiction for exceptional cases or those in which proceedings in a statutory tribunal have miscarried.

95. An essential connecting link between NCAT and the Court in the administration of the Court's protective jurisdiction is the NSW Trustee and Guardian, increasingly keen to focus its attention on monitoring private managers of protected estates, rather than in management of estates (*M v M* [2013] NSWSC 1495 at [46]-[48]) in light, *inter alia*, of:
- a. the judgment of the Court of Appeal in *Holt v Protective Commissioner* (1993) 31 NSWLR 227; and
  - b. more recently, as documented in *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245, the growing incidence of protected estate management utilising commercial managers other than traditional "statutory trustee companies".

### THE GUIDING LIGHT : PURPOSIVE CHARACTER OF THE LAW

96. In a world in which legislation proliferates there is no substitute, in a particular case, for a specific consultation of the particular legislation engaged by the particular facts of the case.
97. Equally, however, a constructive engagement with the law and those responsible for its administration (be they judges, members of statutory tribunals, public servants, professional lawyers or those engaged in social welfare work) cannot be had without a working understanding of how, and why, the legal system works as it does. One needs knowledge of the institutional framework and applicable legislation, but the dynamic of the law cannot be understood separately from the purposes it serves.
98. Each branch of jurisdiction presently under consideration is essentially **purposive** in character. Its operation is fundamentally informed by the purpose it serves.
99. The **protective** jurisdiction of the Court is, almost single mindedly, focused upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or left undone is or is not for the interests, and benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers: *CJ v AKJ* [2015] NSWSC 498 at [27]-[30]; *Guardianship Act* 1987 NSW, section 4; *NSW Trustee and Guardian Act* 2009 NSW, section 39.
100. The **probate** jurisdiction looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a testator's testamentary intentions, and to see that beneficiaries get is due to them: *In the Goods of William Loveday*

[1900] 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakis* [2014] NSWSC 786 at [211]. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight*; *Wight v Robinson* [2013] NSWSC 1229 at [10]-[22]; *Riccardi v Riccardi* [2013] NSWSC 1655 at [9].

101. The **family provision** jurisdiction, equally, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants for relief out of a deceased estate, or notional estate, in whose favour an order for provision “ought” to be made.
102. A focus on the purposive nature of each branch of the Court’s jurisdiction assists in avoiding some of the pitfalls commonly encountered in administration of the Court’s business. This point can be reinforced with examples.
103. In the **protective** jurisdiction, members of the family or social circle of a person in need of protection not uncommonly tend to identify their own self interest with that of the person in need of protection. Disputes about allegedly improper use of an enduring power of attorney attract that comment. An order for the appointment of a financial manager (by NCAT) or for the appointment of a protected estate manager (by the Court) is capable, summarily, of bringing competing adversarial claims into a different focus, because such orders have the effect (under section 71 of the *NSW Trustee and Guardian Act*) of suspending the operation of an enduring power of attorney. If there is a dispute about who should be appointed to manage a protected estate, the Court can appoint a “receiver” (usually the NSW Trustee) pending an orderly determination of the dispute: *JMK v RDC and PTO v WDO* [2013] NSWSC 1362. It can, for the better, change the dynamic of a dispute.
104. The Court can, in an appropriate case, rise above the parties’ dispute by acting on its own motion. Confirmation of that can be found in section 41(2) of the *NSW Trustee and Guardian Act 2009 NSW*, which expressly provides that the Court can make a management order under section 41(1) on its own motion or on the application of any person having a sufficient interest in the matter.
105. The **probate** jurisdiction offers two examples. First, there is a tendency, because of conscientious endeavours on the part of the Court to respect expressed intentions of will makers, for persons named as an executor in a will to assume that **they** have an inalienable **right** to administration of a deceased estate. They do not. A focus on the central purpose of estate administration may require that claims of an “entitlement” to administer an estate be subordinated, summarily or, at least, without lengthy litigation, to a need for efficient administration: *Estate Wight*; *Wight v Robinson* [2013] NSWSC 1229; *Re Estate of*

*Constantino Sini, deceased* (2013) 10 ASTLR 418; [2013] NSWSC 1459; *Riccardi v Riccardi* [2013] NSWSC 1655.

106. Secondly, the established pattern of presumptions (summarised by Powell J in *Re Eger; Heilprin v Eger* (1985) BC 8500997 at 72-74 and by Santow J in *Ridge v Rowden; Estate of Dowling* (1996) BC 9601342 at 39-46) routinely applied in testamentary capacity cases cannot be applied, as it sometimes is, as if it is a series of immutable rules, independent of the purpose served by the probate jurisdiction. That the presumptions operate in service of a search for testamentary intention, not as a formalistic substitute for it, is all the more important to remember in an era in which, with the advent of “informal wills”, assumptions about human behaviours underlying traditional presumptions may need review: *Calverley v Green* (1984) 155 CLR 242 at 264.
107. In the **family provision** jurisdiction, the centrifugal tendencies of multiple beneficiaries interested in the outcome of an application for relief are, at least to some extent, kept in check by: (i) the Court’s insistence that, *prima facie*, the carriage of proceedings on behalf of an estate is entrusted to a deceased’s legal personal representative (executor or administrator) without the joinder of beneficiaries; and (ii) the imposition on such representatives of positive duties, supplementing their ordinary fiduciary duties, in managing the proceedings as an incident of their administration of the estate.
108. Other examples of the potentially profound effect on the administration of the law of a focus upon its purposive character can be found in a paper by Lindsay J, upon which this paper draws, entitled “Administration of Estates – Deconstruction and Synthesis in Changing Times : Purposeful Management of Property, People and Relationships”. It is posted on the Court’s website.

## **RELATIONSHIPS BETWEEN COURT ORDERS AND TITLE TO PROPERTY**

109. Much of the mystery concerning the areas of law, and administration of the law, under consideration in this series of tutorials can be stripped away by exposure of relationships between orders of the Court and the title of property affected by court order.
110. Mystery attending orders of the court is, at least to some extent, a function of our exposition of the law in terms of (court) “actions”, rather than “principles” explaining the rationale (“what” and “ why”) of steps taken in administration of an estate on behalf of a person who (by reason of death or incapacity) is unable to manage his or her own affairs.
111. **Formal Orders Engaging Jurisdiction.** In each branch of the jurisdiction of the Court under current scrutiny (relating, respectively, to

protective, probate and family provision cases) the nature of cases determined by the Court generally requires that, at some stage of proceedings, a distinctive form of order, or orders, be made marking engagement, or disengagement, with the jurisdiction being exercised. This serves, *inter alia*, to mark a boundary between an exercise of a specialist jurisdiction and the Court's other, more general heads of jurisdiction.

112. Upon an exercise of **protective** jurisdiction in relation to the estate of a person thought to be incapable of managing his or her affairs, the customary forms of order (reflected in the terms of the *NSW Trustee and Guardian Act 2009 NSW*) are a declaration that the person is incapable of managing his or her affairs, coupled with orders appointing a private manager to his or her estate or committing management of the estate to the NSW Trustee (section 41) and, at the other end of the management process, an order for revocation of management orders (section 86) . What the Court describes as “a management order” is known, in the conduct of the business of the Guardianship Division of NCAT, as a “financial management order”: *P v Trustee and Guardian* [2015] NSWSC 579 at [42]-[51].
113. Upon an exercise of **probate** jurisdiction, the Court's customary orders of a similar character are a grant of probate (intended to give effect to a will), a general grant of administration (of an intestate estate) or, moulded to the particular needs of an estate, a special grant of administration expressed to be for a limited purpose or conditional in some way.
114. Upon an exercise of **family provision** jurisdiction, the Court generally builds upon steps earlier taken in the probate jurisdiction to ensure that an estate is represented by an executor (to whom probate of a will has been granted) or an administrator (in favour of whom some other form of grant of administration has been made). However, absent such a grant, the Court may: (a) make a grant of administration for the specific purpose of permitting a family provision application to be made (*Succession Act 2006*, section 91); (b) make an order, usually under rule 7.10 of the *Uniform Civil Procedure Rules 2005 NSW*, for a particular party to represent the estate for the purpose of the proceedings (*Stedman v O'Hearn* [2006] NSWSC 112); or (c) make a deliberate decision (according to criteria canvassed in *Wheat v Wisbey* [2013] NSWSC 537 at [29]-[60]) about whether the facts of the particular case do not warrant the appointment of a representative of the estate.
115. The need for determinations of this character, across the different branches of the Court's jurisdiction, reflects their close connection with the concept of “property” and the importance attached by the Court to ensuring that all persons who have, or may have, a material interest in property affected by proceedings in the Court are joined in, or otherwise bound by orders made in, the proceedings.

116. **The Special Character of an Order for a Grant of Probate.** Upon an exercise of probate jurisdiction, a grant of probate or administration, in whatever form it takes, is a judicial act in the character of an order of the Court: *Romascu v Manolache* [2011] NSWSC 1362 at [174]. As a matter of practice, an order that a will be admitted to probate or that letters of administration be issued in a particular estate is generally accompanied by an order that proceedings be referred to the registrar to “complete” the grant by ensuring that, so far as not dispensed with by an order of a judge, the Probate Rules have been complied with. Save in relation to special grants of administration in the character of an order for the appointment of an estate manager on an interlocutory basis, as a matter of practice the judge’s order is but a preliminary to the issue of a formal instrument generally recognised as a “grant of probate” or “letters of administration” issued by the Court’s registry.
117. Although the Court’s practices need to be flexible enough to adapt to the needs of each case, importance attaches to these formalities in most cases because the Court’s formal instrument may serve as a document of title to estate property: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229; *Riccardi v Riccardi* [2013] NSWSC 1655; *Estate Kouvakas* [2014] NSW SC 786 at [228]-[233]. Technically, the title of an executor is said, ultimately, to be derived from a will (confirmed by the Court’s grant of probate) whereas the title of an administrator is said to be derived from the Court’s grant of administration: *Gertsch v Roberts; the Estate of Gertsch* (1993) 35 NSWLR 631 at 635B.
118. **The Special Character of Protected Estate Management Orders.** The different character of a protected estate management order here manifests itself. A protected person retains title to his or her property notwithstanding that it is under estate management: *GDR v EKR* [2012] NSWSC 1543 at [36]; *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 at [174]-[175]; *JPT v DST* [2014] NSWSC 1735 at [54]. Property under management remains the property of the protected person, although (by operation of section 71 of the *NSW Trustee and Guardian Act 2009 NSW*, if not otherwise, as discussed in *David by her tutor The Protective Commissioner v David* (1993) 30 NSWLR 417) any entitlement on the part of the protected person to deal with his or her property during the pendency of management orders is, generally, suspended (without prejudice to the person’s right, if possessed of testamentary capacity, to make a will).
119. **The Special Character of Family Provision Orders.** In formal terms, an exercise of family provision jurisdiction operates in a way that is incidental to the probate jurisdiction because, as provided for by section 72 of the *Succession Act 2006*, a family provision order generally takes effect as if provision was made in a will, or in a codicil to the will, of the deceased person in respect of whom a grant of provision is made.



## PARTIES – AN “ESTOPPEL” ANALOGY

120. A function of (a) the absence, by reason of death or incapacity, of the person whose estate is the subject of proceedings before the Court; and (b) the need of the Court, in the interests of an orderly administration of estates, to ensure that all persons affected by orders of the Court are, so far as may be practicable, bound by those orders, is that a different approach to the question of “parties” is generally taken to proceedings in the protective, probate and family provision jurisdictions than is generally taken than in the paradigm case of a common law action.
121. In a broad sense, it is not wholly inaccurate to attribute the Court’s flexible attitude to the question of “parties” to traditions of the Court’s general equity jurisdiction, classically described by Megarry J in *John v Rees* [1970] Ch 345 at 369H-374E (especially at 369H -370H, 371G-372A and 373H-374C) by reference to Lord Macnaughten’s judgment in *Duke of Bedford v Ellis* [1901] AC1 at 8-11 and, ultimately, the judgments of Lord Eldon in *Adair v New River Co.* (1805) 11 Ves 429; 3 ER 1153 and, more especially, *Cockburn v Thompson* (1809) 16 Ves Jun 321; 33 ER 1005, approved by the High Court in *Carnie v Esanda Finance Corporation Limited* (1995) 182 CLR 398 at 417. Chancery practice required the presence of all parties interested in a matter in suit, in order that a final end might be made to the controversy, but this was a rule of convenience, able to be departed from in the interests of justice: *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at [33].
122. Although this equity tradition continues to inform the specialist jurisdictions presently under consideration, they have their own dynamic associated with the purposive character and functionality of the law governing them.
123. Going back to the practice of English ecclesiastical courts grounded in in *Newell and King v Weeks* (1814) 2 Phil. Ecc. 224 at 233-234; 161 ER 1126 at 1129-1130 (through the medium of *Wytcherley v Andrews* (1871) LR 2 P&D 327), the approach to parties in probate proceedings is classically defined by *Osborne v Smith* (1960) 105 CLR 153 at 158-159, per Kitto J, in the following terms (with emphasis added):
- “... There is a well established principle of probate practice, which grew up in the ecclesiastical courts, that any person having an **interest** may have himself made a party by intervening [in a probate suit], and that **if he, knowing what was passing, does not intervene**, but is ‘content to stand by and let his battle be fought by somebody else in the same interest’, he is bound by the result, and is not to be allowed to re-open the case [notwithstanding that he was not a party to the suit]”.

124. This approach explains the practice of serving notice of probate proceedings on non-parties (or, in the old language, “citing” them to “see” the proceedings) and lends itself to steps being taken to “build an estoppel” against interests adverse to the relief sought by a party to the proceedings.
125. Tempting though it may be, to locate the Court’s practice in principles of estoppel governing non-probate cases, those cases offer no more than an analogy. Probate practice is a distinct contribution of the jurisdiction’s ecclesiastical court heritage: *Estate Kouvakis* [2014] NSWSC 786 at [131]-[144] and [275]-[283].
126. Something similar can be seen:
  - a. in the general necessity in **family provision** cases to give formal notice of a family provision application to all other “eligible persons” before any interests of such persons can be disregarded by the Court (*Succession Act* 2006, section 61) or, in the absence of any known eligible person, in the service of notice of proceedings on a potential contradictor, even if only the State as the “party” entitled to an estate on a *bona vacantia* basis (*Re Estate of Ian McDonald; Application of Aiveh Ahmad* [2015] NSWSC 595).
  - b. in the **protective** jurisdiction, before approval of a “family settlement” involving provision of allowances out of a protected person’s estate ( *W v H* [2014] NSWSC 1696 at [72](a)) or before a statutory will can be made (*Succession Act* 2006 NSW, section 19(1)(g)-(k)).

#### **THE PUBLIC INTEREST CHARACTER OF THE COURT’S SUPERVISION OF ESTATE ADMINISTRATION**

127. Each of the protective, probate and family provision jurisdictions of the Court is characterised by a strong, distinctive public interest element because of the importance (to affected individuals, the orderly management of property within the community and the due administration of justice in a free, democratic society) of due management of the affairs of persons who, by reason of death or incapacity, are not able to manage their own affairs.
128. A common feature of each jurisdiction is that:
  - a. notwithstanding that parties may agree or consent to orders being made, the Court generally must be independently satisfied that the orders should be made, before making them. For example:

- (i) Protective Jurisdiction: *M v M* [2013] NSWSC 1495 at [50](a) and (k); *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 at [151]-[153];
  - (ii) Probate Jurisdiction: *Estate Kouvakis* [2014] NSWSC 786 at [271]-[272], [292] and [309]-[311].
- b. the Court might decline to make an order if not satisfied of the utility of the order. For example:
- (i) Protective Jurisdiction: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106;
  - (ii) Probate Jurisdiction: *Tobin v Ezekiel* [2012] NSWCA 285 at [5]-[8]; *Estate Kouvakis* [2014] NSWSC 786 at [292]-[293] and [309]-[311].

## FIDUCIARIES AND FIDUCIARY OBLIGATIONS

129. Protected estate managers, guardians, executors, administrators and trustees are all, classically, fiduciaries. They are all affected by general equitable principles that insist that: first, a fiduciary is not entitled to profit from his, her or its office as a fiduciary; and, secondly, a fiduciary is not allowed to put himself, herself or itself in a position where personal interest and duties of the office conflict.
130. A consequence of this is that, unless a special arrangement to the contrary is made or legislation otherwise provides, the office of a fiduciary is a gratuitous one: *Macedonian Orthodox Community Church St Petka Incorporated v Bishop Petar* (2008) 237 CLR 66 at 93 [69]; *Anson v Anson* [2004] NSWSC 766 12 BPR 22, 303 at [75]-[76].
131. The Court may approve remuneration for a protected estate manager (*Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245; *Re Managed Estates Remuneration Orders* [2014] NSWSC 383) or for the executor or trustee of a deceased estate (*Probate and Administration Act*, sections 86-87; *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32, 763).
132. If it does so, it is likely to insist that the rate, and quantum, of remuneration allowed be no more than what is "fair and reasonable" and that it be conditioned upon satisfaction that the fiduciary has duly performed the functions of his, her or its office.
133. That said, the standard of accounting required of a fiduciary may depend upon the nature and purpose of the particular office: *Countess*

of *Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at [37]-[40] and [46]-[49].

## **COSTS**

134. Although the Court's plenary jurisdiction to award costs (embodied in section 98 of the *Civil Procedure Act 2005 NSW*) is, in ordinary adversarial proceedings, generally exercised by reference to a rule (found in rules 42.1 and 42.2 of the *Uniform Civil Procedure Rules 2005 NSW*) that costs (assessed on the "ordinary basis") follow the event, each of the specialist jurisdictions under consideration in these tutorials routinely departs from this approach in practice:
- a. in the protective jurisdiction: *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640; *CAC v Secretary, Department of Family and Community Services (No 2)* [2015] NSWSC 344.
  - b. in the probate jurisdiction: *Re Eger* (Powell J) BC 8500997 at 78; *Estate Moran*; *Teasel v Hooke (No 2)* [2015] NSWSC 88.
  - c. in the family provision jurisdiction.

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GCL

## **EDITORIAL NOTES**

- (1) This paper is a revised version of a paper presented, in the Common Room of the New South Wales Bar Association, on 26 May 2015.
- (2) The Seminar Series in aid of which the paper has been prepared has been organised by the New South Wales Bar Association and the Law Society of New South Wales, jointly, in conjunction with the Supreme Court of New South Wales.
- (3) The Series comprises the following seminars:
  - (a) "Introduction to Estate Administration" by Lindsay and Hallen JJ (26 May 2015).
  - (b) "Family Provision Applications" by Hallen J and Peter O'Loughlin (9 June 2015).
  - (c) "Testamentary Dispositions" by Michael Willmott SC and Craig Birtles (16 June 2015).

- (d) "Grants in Administration" by Michael Meek SC and Senior Deputy Registrar Paul Studdert (30 June 2015).
- (e) "Administration of Intestate Estates" by Ruth Pollard, Peter Whitehead and Margaret Pringle (28 July 2015).
- (f) "Protective Jurisdiction" by Lindsay J and Martin Gorrick (4 August 2015).
- (g) "Accounts and Remuneration" by John Armfield, Richard Neal and John Poole (11 August 2015).
- (h) "Practice, Procedure and Precedents" by Lindsay and Hallen JJ (18 August 2015).