

QUEENSLAND LAW SOCIETY

SUCCESSION AND ELDER LAW RESIDENTIAL, 2016

Surfers Paradise, 4 November 2016

EQUITY : A NSW EXPERIENCE

by

**Justice Geoff Lindsay
Probate and Protective List Judge
Equity Division
Supreme Court of NSW**

INTRODUCTION

- 1 The Law Society's kind invitation that I address its Residential Conference on Succession and Elder Law was accompanied by a request that I address two particular topics: (1) the advantages and disadvantages of having an Equity Division; and (2) a summary of current themes in family provision applications in the NSW jurisdiction.
- 2 I see, from the Conference Programme, that these two topics are to be presented under the banner of a broader question: How free is freedom?
- 3 Try though I might, I find it hard to fit the first of my assigned topics into the framework of that question. On the other hand, the question has a natural affinity with the second topic if the "freedom" spoken of is confined to "testamentary freedom". I proceed on that assumption.

THE ADVANTAGES AND DISADVANTAGES OF AN EQUITY DIVISION

The Problem Defined

- 4 The first assigned topic I take as alluding to the fact that the Supreme Court of New South Wales is unique amongst the Supreme Courts of the Australian States and Territories in operating through an organisational structure that specifically includes an "Equity Division".

- 5 Addressing the conference as a judge of the Supreme Court of NSW assigned to the Equity Division, and well content with the job, it is a difficult task to contemplate that there are *any* disadvantages in having an Equity Division.
- 6 Still, the Conference is entitled to something more than a personal declaration of contentment by a member of an institution implicitly held up for comparative review.
- 7 That said, an immediate and fulsome disclaimer is necessary. In speaking of my personal experience of, and in, a State Supreme Court that has long operated through an “Equity Division”, I speak for nobody but myself. Right or wrong, any opinions expressed are mine alone.
- 8 It needs to be said, also, that I venture no opinions about the structure, or administrative arrangements, of courts in Queensland. It is not my place, and I am not qualified, to express any such opinion.
- 9 As a former secretary, and still an active member, of the Francis Forbes Society for Australian Legal History), I content myself with an observation, not entirely free of envy, that I greatly admire the History Programme of the Supreme Court of Queensland! Otherwise, in this paper I confine myself to a description of how, in my experience, an Equity Division has operated in NSW – and that only as a precursor to expression of a personal, more abstract view about perceived “advantages” and “disadvantages” of an “Equity Division”. If comparisons are to be made with what happens in Queensland, that is a task I leave entirely to Queenslanders.
- 10 For reasons I endeavour to explain, the topic I have been asked to address seems to me, ultimately, to boil down to a consideration of the advantages, and disadvantages, of a system of judicial administration that specifically caters (in some degree or another) for specialisation in the judges, barristers and solicitors who participate in the process of decision-making assigned to judges. I am conscious, too, that, although specialisation might be catered for

by a Court's Divisional structure, other administrative arrangements for the conduct of business may be more flexible and more readily embraced – in particular, the concept of a specialist List of cases managed, if not decided, by a “List Judge”.

- 11 An examination of Anglo-Australian legal history confirms what management theory might independently conclude: That there is no universal, optimal model for administrative arrangements within a Supreme Court for the Court's performance of its constitutional functions. What is required, administratively, for an effective discharge of the obligation of the Court (and judges who constitute the Court) to administer justice can, and usually does, vary over time and space.
- 12 A court is required to remain in touch with the community it serves, optimally deploying available resources (including personnel) to maximum advantage. Even in a national system of law such as Australia has been intent upon establishing since the enactment of the *Australia Acts* of 1986 by the Australian and Imperial Parliaments, there is a sense in which all law (like all politics) is ultimately local.
- 13 The primary functional task of a court being the adjudication of particular disputes, each court must remain focused upon the administration of justice – the resolution of disputes – in individual cases. That does not relieve anybody of a need to understand the world in global terms (the “macro” world) but it does require constant attention by each court to the “micro” world inhabited by identified, or identifiable, people.
- 14 Taking NSW as a concrete illustration of how an Equity Division can operate, trusting that the example has resonance in Queensland, but anxious not to prescribe for Queensland any form of model of court administration merely because of its familiarity in NSW, I offer in this paper a general description of the structure (past and present) of courts and tribunals in NSW, with special reference to areas of interest to practitioners with a specialty in “succession

and elder law”. Before I do that, however, two preliminary points require notice.

Generalists v Specialists

- 15 First, it must be acknowledged that there is a natural tension (not limited to those engaged in the provision of legal services) between people who favour “generalist” service providers and those who favour “specialists”.
- 16 The case for generalists can be presented, at least in part, by reference to the career of Sir Harry Gibbs, as recently eulogised by his former Associate, David Jackson AM QC, in a Selden Society lecture delivered in Brisbane on 17 March 2016:

“The structure of the courts [in Queensland] at the time of [Gibbs’] appointment [as a judge of the Supreme Court of Queensland] was then quite different:

- (a) there was no Court of Appeal in Queensland – it would come many years later – and the judges sat on the Full Court/Court of Criminal Appeal in fairly strict rotation.
- (b) the Family Court and Federal Court had not been established. The Supreme Courts were invested with and exercised almost all federal jurisdiction.
- (c) in a day the work of the Chamber Judge – the judge appointed to deal with short, or urgent, matters – might extend to dealing with three or four undefended divorces, making people bankrupt or discharging them from bankruptcy, winding-up or reconstructing companies, disposing of disputes as to custody of or access to children, construing wills or contracts, dealing with applications for injunctions, resolving interlocutory disputes in pending litigation, and perhaps finishing off the day with an application for bail.

What was noticeable was Sir Harry’s facility in each area. Whether presiding over a criminal trial, or in the Court of Criminal Appeal or the Full Court, or on circuit, or hearing civil litigation, or as the chamber judge, his ability to master the law and the facts rapidly was obvious; so too with procedural issues and with rulings on evidence. His fairness was manifest, and his broad experience stood him in good stead for his subsequent appointment to the High Court.”

- 17 As wonderful as it might be to have all courts presided over by judges, and served by barristers and solicitors, of the standard set by Sir Harry Gibbs, life's realities require that we cater for something less exacting in the ordinary course of business.
- 18 The case for specialist judges and practitioners focuses, in large measure, not only on the desirability of utilising professional expertise in areas that require specialised knowledge, but also on the desirability of fostering such expertise and developing, and maintaining, a sense of community between practitioners required to address common problems that require, or benefit from, special knowledge.

Anglo-Australian Legal History

- 19 The second preliminary point requires notice of the historical origins of the concept of an "Equity Division" in the Supreme Court of NSW: Our present understanding of what constitutes an "Equity case" has changed, and may in the future change, over time.
- 20 Australian lawyers generally require no reminder that the origins of the concept of an "Equity Division" lie in the jurisdiction historically exercised by the Lord Chancellor, in the Court of Chancery, in England before enactment by the UK Parliament of the *Judicature Acts* of 1873 and 1875.
- 21 However, it may come as a surprise to many modern Australian lawyers, or at least those who have not studied (or who have forgotten their studies of) legal history, that two large slabs of what we presently think of as "equity jurisdiction" were once thought of by Englishman and Australian Colonials alike as standing outside equity jurisdiction.
- 22 What we presently think of as the "protective jurisdiction" of the Supreme Court, and as a subset of "equity jurisdiction", was once (until the 1950s) called the "lunacy jurisdiction". That jurisdiction was once exercised by the Lord Chancellor, in England, as part of his "common law jurisdiction". We are

apt to forget that the Chancellor had a common law side, as well as an equity side, to his jurisdiction.

- 23 What we presently think of as the “probate jurisdiction”, again as a subset of “equity jurisdiction”, was once (until the 1890s) called the “ecclesiastical jurisdiction”. Until 1858 it was, in England, exercised by church courts and known by that name: ecclesiastical jurisdiction.
- 24 There is a tendency in Australia, even now (30 years after the commencement of the *Australia Acts*, 1986), to frame our thinking about judicial administration as turning upon adoption, or otherwise, of a “*Judicature Act* system” of court administration based upon the 19th century English model.
- 25 That tendency has manifested itself sometimes in a tacit acceptance that problems identified by Charles Dickens and others in the administration of a fractured court system in England – reformed over a period of 60 years before the commencement of the *Judicature Acts* in 1875 – are, in all respects, part of local, Australian experience. Some of the acrimony that has, in the past, centred upon the concept of “fusion fallacy” identified by Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (1st edition, 1975; 5th edition, 2015), chapter 2, has its genesis in an assumption (displaced by the *Australia Acts*) that Australian and English law, practice and procedure must, in all respects, conform to the same model.
- 26 Although the concept of “Equity” as a separate field of study has long been subject to periodic challenge (especially, it seems, by those attracted by a Roman Law mindset that favours “unity” of law and equity in legal analysis) it has thus far seen off each challenge and continued, in Australia, to demonstrate its vibrancy.
- 27 If it remains the function of an exercise of equity jurisdiction “to supplement the law, not to destroy it but to fulfil it”, as FW Maitland instructs us in the second of his Lectures published as *Equity: A Course of Lectures* (Revised,

1936 edition), an essential feature of the jurisdiction is that its content can vary over time and across boundaries in the context of different national systems of law.

- 28 In recent decades, the 19th century English paradigm of thinking about court administration, and the law administered by particular, antiquated courts, has been displaced not only by the *Australia Acts* but also by the adoption, in England and throughout Australia, of “case management” philosophy. At the heart of that philosophy (driven in large part by economic imperatives) is the professed “overriding purpose” of focussing attention on managing proceedings in a manner calculated “to facilitate the just, quick and cheap resolution of the real issues in the proceedings”.
- 29 Turf wars between common lawyers and equity lawyers (always oversimplistic in division of lawyers into only two camps) have, at least to some extent, dissolved with: (a) elevation of the concept of “case management” of court business as a prime consideration, accompanied procedurally with the practical abolition of civil jury trials; and (b) the conferral on judges of statutory discretions that tend to require all judges to be familiar with techniques of statutory construction, and administrative law, in the resolution of disputes that once would have been characterised as a “common law” or “equity” problem.
- 30 Without any need for surrender on the part of those who favour, or criticise, a system of jurisprudence that treats Equity as a separate branch of legal thought (contrasting Equitable “principles” with Common Law “rules”), we are all today called upon to approach the structures, and administrative arrangements, of courts through the prism of management practice and economic imperatives.
- 31 Taking NSW as the starting point for an analysis of Australian law, not only for New South Welshmen based in Sydney but also for those (based in Moreton Bay) who became Queenslanders in 1859, it is the historical fact that:

- (a) by the *New South Wales Act, 1823 (Imp)*, the *Third Charter of Justice* promulgated pursuant to that Act in 1823, the *Australian Courts Act, 1828 (Imp)*, and ancillary legislation of the Imperial Parliament, the Supreme Court of New South Wales was established as a single administrative unit, invested with general jurisdiction identified by reference to jurisdiction exercised in England by the Courts of Common Law (Kings Bench, Common Pleas and Exchequer), the Lord Chancellor and others; and
- (b) subsequent developments in NSW (and Queensland, as it became) were local adaptations of English institutions and practice driven by local conditions, albeit informed by deeply ingrained respect for English institutions, English modes of procedure and English practice.

32 A narrative that criticises the Supreme Court of NSW for “delay” of nearly a century in its adoption of an English *Judicature Act* system represents Australian legal history held captive to an assumption that Australian systems of court administration were bound to follow English developments in lock-step irrespective of local conditions. The fragmentation of courts in England was not NSW. NSW was free to choose a system of court administration that worked for it, and it did so. That there were periodic calls for change is determinative of not much. Few systems are ever free of criticism, the present day not excepted.

33 There is no single explanation for NSW’s resistance in moving towards a *Judicature Act* system, on the English model, in line with other Australian jurisdictions. It may have been a reflection of the long struggle for trial by jury in a penal colony, and the local profession’s attachment to that mode of trial when introduced. Effective steps towards the adoption of a *Judicature Act* system on the English model were taken in NSW only in the 1960s, contemporaneously with restrictions on the availability of civil jury trials at common law.

34 In ages past, as well as the present, each court must choose the system of administration which it considers best enables it to discharge its constitutional function in the administration of justice in the community it serves. Uniformity of administrative systems across territorial boundaries serves as an aspiration; but it is rarely an imperative that prevails over a need to serve a local community in particular cases. The essence of the justice system that Australia did inherit from the English (much to our benefit) is a focus on the perspective of individual litigants, attaching importance to the facts of each particular case, in the administration of justice.

“Divisions” in administration of the Supreme Court of NSW

35 Several institutional expedients have been adopted in NSW, since the establishment of the Supreme Court of New South Wales in 1824, to cater for perceived needs for specialisation:

- (a) The most prominent of these in contemporary thinking, in a *Judicature Act* system fully embraced by NSW in 1972 with commencement of the *Supreme Court Act 1970 NSW*, is the organisation of the Court’s business into “Divisions” – currently, the Court of Appeal, the Common Law Division and the Equity Division.
- (b) Another, still in play, is the establishment by statute of a separate court, or courts, presided over by judges of the Supreme Court. The most prominent, contemporary example of this is the Court of Criminal Appeal, commonly constituted by judges drawn from the Court of Appeal or the Common Law Division of the Supreme Court. In earlier days, though, “Circuit Courts”, “the Judge in Equity” and “the Judge in Probate” were distinct creatures of statute. Common Law and Equity procedures were, in those times, governed by Acts of Parliament specific to each jurisdiction.

- (c) A variation of the same idea is found in the establishment by statute of separate, specialist courts presided over by judges whose standing is equivalent to that of a Supreme Court judge. The current day example is the Land and Environment Court of NSW.
- (d) A further variation of this is a statutory court, or tribunal, presided over by a Chief Judge or President who holds an appointment as a Supreme Court judge. Of these two variants, the District Court of NSW falls into the first category (with a Chief Judge drawn from the Common Law Division of the Supreme Court). The Civil and Administrative Tribunal of NSW (NCAT) falls into the second category, with a President whose appointment to that office was accompanied by an appointment as a Supreme Court judge.

36 I do not suggest, by my identification of these models, that they necessarily cover the field of available institutional structures for the administration of justice. Quite the contrary. The point I seek to make is that, in practice, various possibilities have been embraced from time to time.

37 The range of possibilities becomes even broader if one notices the jurisdiction conferred upon arbitrators, mediators and referees under the rubric of “alternative dispute resolution procedures”, a description not entirely apt in light of their regular deployment in many civil cases.

38 Separate, specific notice needs to be taken of the establishment within the Supreme Court (and other courts and tribunals) of specialist “Lists” of cases that are managed by a judge, other judicial officers and administrative staff who are routinely assigned to manage, and often to determine, particular classes of proceedings.

39 This is, perhaps, the most flexible means of embracing specialisation in the conduct of litigation in the Supreme Court. The authority to establish a “List”

may be found in a statute, rules of court or merely administrative practice. Lists tend to evolve, from a perceived need to manage particular classes of proceedings, without formalities attendant upon establishment of a Divisional structure within a court administration.

40 Lists are no stranger to Queensland Courts.

41 In the Supreme Court of New South Wales the Equity Division currently maintains the following Lists (identified in alphabetical order):

- the Admiralty List
- the Adoptions List
- the Corporations List
- the Commercial List
- the Expedition List
- the Family Provision List
- the Probate List
- the Protective List
- the Real Property List
- the Revenue List
- the Technology and Construction List

42 Some of these lists are routinely run together. The Commercial and Technology and Construction Lists are one example. The Probate and Protective Lists are another.

43 Although urgent matters are sometimes listed (or otherwise brought by parties) before a “Duty Judge”, and references to the “List” of the Duty Judge are commonplace, the Duty List is not a grouping of like cases maintained as

a specialised List. All judges of the Equity Division are liable to sit as the Division's Duty Judge from time to time. The identity of the Duty Judge changes, usually on a fortnightly rotation, to meet the exigencies of the Court's business.

- 44 Much the same can be said of the Equity Division's "Applications List". Judges are rostered, from time to time, to hear short applications, or non-urgent interlocutory business, requiring the attention of a judge, and given that attention, in the Applications List, generally sitting on a Friday.
- 45 The Applications List is a product of a decision, in practical terms, to do away with the office of "Master in Equity", the equivalent of an "Associate Judge" in modern parlance. Judges now have to do work once commonly done by a Master. A decision by a judge on questions of "liability" cannot now, as was once the case, routinely be accompanied by a referral of incidental questions (including the quantification of compensation) to a Master. That is one consequence of recent institutional change. Another is the periodic service of judges as the Applications List Judge.
- 46 The work of the Equity Division is supervised by the Chief Judge in Equity (currently Justice Paddy Bergin), in consultation with the Chief Justice (Chief Justice Bathurst). In broad terms, the Chief Judge has her counterparts in the Common Law Division (Hoeben CJ at CL) and in the Court of Appeal (Justice Beazley, President of the Court of Appeal).
- 47 The fact that a judge assigned to the Equity Division serves as a List Judge or is routinely allocated work of a particular character, does not mean that his or her work is confined to that area of law. By way of illustration, I note that, although I am currently the Court's Probate List Judge (charged with dealing with probate litigation on a regular basis), probate cases are routinely allocated to judges across the Equity Division. Although Justice Philip Hallen is the Court's Family Provision List Judge (and bears the primary burden of deciding family provision cases), he is assisted by all judges of the Division from time to time in his conduct of "running lists" within his List.

- 48 An essential feature of a *Judicature Act* system, especially as adapted by case management philosophy, is the idea that there should be mobility in the resources available in the administration of justice. That same thinking finds reflection, across State and Territorial boundaries, in the *Jurisdiction of Courts (Cross Vesting)* legislation found throughout Australia.
- 49 There is no particular sanctity in the distinction between a “Division” and a “List” as a primary unit of organisation within the Supreme Court. In 1972, when the *Supreme Court Act 1970* commenced operation, it provided for the first instance work of the Court to be conducted through several Divisions: the Common Law Division, the Equity Division, the Admiralty Division, the Divorce Division, the Protective Division and the Probate Division. In 1999 the Court consolidated all its Divisions into two: the Common Law Division and the Equity Division by amendments to the *Supreme Court Act*. The Equity Division was assigned the work of the abolished Admiralty, Commercial, Family Law, Probate and Protective Divisions as particular Divisions were then known. We now operate with fewer “Divisions” and more “Lists”. Essentially, the same work continues to be done by much the same type of judges wearing slightly different titles.
- 50 In NSW, since about the 1950s at least, there has been a close affinity between the Supreme Court’s “Equity” and “Commercial” judges. In England, in 1895, a “Commercial Causes List” was established as part of the Queen’s Bench Division of the High Court of Justice (the equivalent of the Common Law Division of the NSW Supreme Court). New South Wales followed this model with the enactment of the *Commercial Causes Act 1903 NSW*, repealed and replaced by the *Supreme Court Act 1970*. At that time the Commercial List was retained in the Court’s Common Law Division. It became the Commercial Division in 1987 but, in 1999, it was absorbed within the Equity Division.
- 51 The point to be noticed, here, is that structures for the administration of the Supreme Court’s business are not immutable. They can be, and are, adapted to meet the exigencies of each age.

- 52 So, too, is the character of the work entrusted from time to time to statutory tribunals. Retaining the supervisory jurisdiction of the Supreme Court, and providing by statute for appeals to the Court, the NSW Parliament has, from time to time, created statutory tribunals that perform a great deal of work that was formerly performed by the Court itself.
- 53 The topical example of this, for Conference attendees, is found in the work undertaken by the Guardianship Division of NCAT, the NSW version of QCAT.
- 54 The Guardianship Division is one of four divisions of in, governed by the *Civil and Administrative Tribunal* 2013 NSW, particularly schedule 6 of the Act.
- 55 The Divisions of the Tribunal comprise: the Administrative and Equal Opportunity Division, the Consumer and Commercial Division, the Occupational Division and the Guardianship Division.
- 56 The functions of NCAT allocated to the Guardianship Division are defined by reference to the *Children and Young Persons (Care and Protection) Act* 1998 NSW, the *Guardianship Act* 1987 NSW, the *NSW Trustee and Guardian Act* 2009 NSW and the *Powers of Attorney Act* 2003 NSW. Expressed in more general terms, the work of the Division covers much of the work which might otherwise have been expected to be performed by the Supreme Court's Equity Judges generally, if not the Protective List Judge in particular. That work includes: (a) the appointment and supervision of a guardian, the equivalent of a committee of the person upon an exercise of the Court's inherent protective jurisdiction; (b) the appointment and supervision of a financial manager, the equivalent of a committee of the estate upon an exercise of inherent, protective jurisdiction; (c) the review of private appointments of enduring guardians and enduring powers of attorney; and (d) the grant and supervision of medical consents on behalf of persons incapable of self-management.

- 57 Regulated rights of appeal from a decision of the Guardianship Division lie either to an Appeal Panel of NCAT or to the Supreme Court, the inherent (protective) and supervisory (administrative law) jurisdiction of which is preserved.
- 58 The heavy workload of the Guardianship Division demonstrates the communal need for it, and the improbability that the same amount of work could be performed by a judge, or more than a few judges, of the Supreme Court. Even allowing for the informality that can attend an exercise of the Court's protective jurisdiction, NCAT enjoys efficiency dividends arising from characterisation of its decision-making as "administrative", an ability to proceed with greater informality of procedure than would be acceptable in the Court, and decision-making in which responsibility for decisions is shared between a lawyer, a medically qualified person and a lay member.
- 59 Within the Equity Division, all judges routinely decide Probate List cases and, less frequently, Protective List cases. The Probate and Protective List Judge has no monopoly on cases of this character.
- 60 The same is true of all the Division's Lists. A List Judge has a particular responsibility for management of cases in his or her List – and an accompanying incentive to study problems, of both law and practice, that routinely arise in such cases – but no judge has a monopoly on the determination of particular classes of case. All judges within the Supreme Court, let alone the Equity Division, can be called upon to exercise the jurisdiction of the Court ordinarily exercised, for administrative convenience, in a specialist list of cases. The work of the Court assigned to the Equity Division, again for administrative convenience, is shared by all the judges of the Division in a mutually supportive, collegiate environment.
- 61 The nature of cases in the Probate List is well understood as centred upon succession to property upon death, by a will or upon intestacy. Claims for family provision relief under chapter 3 of the *Succession Act 2006* NSW, although closely related to probate cases, are generally case managed by the

Family Provision List Judge and heard by him with the rostered assistance of other judges of the Division.

- 62 The nature of Protective List proceedings focuses squarely upon persons who are unable, by reason of incapacity, to manage their own affairs (their property or person). Although the Court's protective jurisdiction (sometimes described as *parens patriae* jurisdiction) includes jurisdiction over minors, cases relating to minors are not routinely dealt with in the Protective List. They are shared between all judges of the Equity Division or, according to the nature of the case, assigned to the Adoptions List. Appeals from the Guardianship Division of NCAT are generally case managed by the Protective List Judge, on referral by the Registrar who case manages the List at that level of the Court's hierarchy.
- 63 The Probate and Protective List Judge generally deals with routine business that requires a judge and can be dealt with in the absence of the parties, in chambers, or by way of a short hearing.

Overview

- 64 So, when one asks "What are the advantages and disadvantages of an Equity Division?" one has to place the question in its particular institutional setting.
- 65 One also needs to bear in mind the possibility (in practice, the probability) that, whatever the internal administrative structure of a court, its personnel can, and will, from time to time, move across administrative boundaries. In NSW, this translates to divisional judges occasionally sitting as acting judges of appeal; judges of appeal, less frequently, sitting at first instance in the Common Law or Equity Divisions; Equity judges sometimes sitting in proceedings assigned to the Common Law Division; and Common Law Judges sometimes sitting in proceedings are assigned to the Equity Division. The internal, administrative structure of the Court establishes a pattern for the ordinary conduct of business. It does not prevent variations from the norm.

- 66 From the perspective of a judge assigned to the Equity Division, and from the particular perspective of the Equity Division's Probate and Protective List Judge, five "advantages" of the Court's current administrative arrangements come to mind.
- 67 First, a constant flow of cases bearing familiar features enables a judge to identify patterns and problems not visible to a casual observer of isolated cases.
- 68 Secondly, identification within the legal community as a "List Judge" for a specialist list maintained within the Equity Division carries with it, for the Court and for practitioners alike, regular opportunities for engagement with the community that inure for the benefit of us all (an illustration of which is the attendance of the NSW Probate and Protective List Judge at the Queensland Law Society's Succession and Elder Law Conference).
- 69 Thirdly, administration of the Court's business through a combination of Divisions and Lists provides opportunities for all practitioners (judges, barristers, solicitors and academics) to develop specialised knowledge and skills adapted to institutional structures.
- 70 Fourthly, for those judges (and other lawyers) who have an aptitude for, and an interest in, specialised work, a refinement of the institutional structure through which decisions are made increases opportunities for job satisfaction.
- 71 Fifthly, and not least of the advantages of an Equity Division, the maintenance of such a Division provides institutional support for the exposition and development of a jurisprudential tradition centred upon the prevention of unconscionable conduct, and the maintenance of standards of probity and propriety, even in the assertion of legal rights. It is a tradition worthy of recognition, preservation and promotion.
- 72 If there are any "disadvantages" attaching to an institutional structure that includes an Equity Division, they are likely to be associated, in a particular

setting, with: (a) a lack of an administrative *need* for such a structure in management of a court's business; (b) a local culture in which judges, practitioners and other stakeholders *prefer* to work in a generalist work setting than one characterised by specialisation; (c) unnecessary *rigidity* in management of work allocations resulting, perhaps, from judges remaining in a particular jurisdiction for too long, without the refreshment of attending to other types of cases from time to time; or (d) possibly, but not necessarily, an antipathy to Equity as a specialised field of practice.

- 73 My personal experience of, and in, the Supreme Court of NSW compels me to acknowledge these “disadvantages” only as academic possibilities, not as a lived reality.

HOW FREE IS FREEDOM? : CURRENT THEMES IN NSW FAMILY PROVISION CASES

- 74 The concept of “testamentary freedom”, at its zenith in the 19th century, is now generally regarded in NSW as necessarily qualified by discretionary powers conferred upon the Supreme Court of NSW (currently, by chapter 3 of the *Succession Act 2006* NSW) to make an order that provision be made for the maintenance, education or advancement in life of an eligible person, such as the Court thinks “ought” to be made, in circumstances in which such a person has been left without “adequate provision for [his or her] proper maintenance, education or advancement in life.”
- 75 In the century since *Testator's Family Maintenance* legislation was first enacted in NSW there has been a large shift, first towards acceptance and then expansion, in how the family provision jurisdiction of the Supreme Court is perceived. An exploration of that topic can be found in a paper (entitled “The TFM Act: Early days leading to a 99 year centenary”) I presented as part of a panel discussion organised by the Elder Law and Succession Committee of the Law Society of NSW on 14 October 2015. It has been posted on the Supreme Court's website.

- 76 The Supreme Court of Queensland exercises powers under the *Succession Act* 1981 Qld, Part 4, that are broadly similar to those of the NSW Supreme Court - although those powers are not identical with the powers conferred on the Supreme Court of NSW and, at least insofar as they do not include provisions for the designation of property as “notational estate”, they are not as extensive as the powers found in the NSW legislation.
- 77 In the Supreme Court of NSW, claims for family provision relief are case managed by the Family Provision List Judge (Hallen J) in accordance with the Family Provision Practice Note. (No SC Eq 7).
- 78 The “evaluative” nature of determinations required upon disposition of a family provision claim (*Andrew v Andrew* (2012) 81 NSWLR 656 at [14]), and current themes in dealing with family provision applications, are often best examined by a review of recent judgments.
- 79 Of particular assistance for practitioners (and for fellow judges of Hallen J) is his Honour’s practice of regularly including in his judgments a full summary of the principles governing particular types of applications for relief.
- 80 Samples of such judgments, defined by reference to the categories of “eligible person” prescribed by section 57(1) of the *Succession Act* 2006, are as follows:
- (a) a spouse: *Epov v Epov* [2014] NSWSC 1086.
 - (b) a de facto spouse: *Sadiq v NSW Trustee and Guardian* [2015] NSWSC 716.
 - (c) a child: *Kohari v NSW Trustee and Guardian* [2016] NSWSC 1372.
 - (d) a former spouse: *Geoghegan v Szelid* [2011] NSWSC 1440.

- (e) a dependent person living in the same household as the deceased: *Page v Page* [2016] NSWSC 1218 (and [2016] NSWSC 1323).

- 81 His Honour's summaries provide a handy, reliable research tool, not only because they bring to bear his widely recognised expertise in succession law, but also because they assimilate recent judgments of the Court of Appeal and other judges. They serve as a one-stop shop for legal research in many cases.
- 82 Under Hallen J's close supervision, most claims for family provision relief settle, often after a mediation, before the allocation of a date for final hearing. The flipside of this is that those cases that *are* the subject of a final hearing are often difficult cases, not uncommonly bitterly contested proceedings relating to small estates.
- 83 Currently, a majority of family provision claimants appear to be adult children of the deceased. That may explain the prevalence of cases involving estranged relationships between a claimant and the deceased: see, for example, *Andrew v Andrew* (2012) 81 NSWLR 656; *Burke v Burke* [2015] NSWSC 195; and *Underwood v Gaudron* [2015] NSWCA 269, affirming [2014] NSWSC 1055.
- 84 Cases of estrangement are tailor-made for differences of opinion about whether, notwithstanding (or because of) experiences of alienation within a family, provision should be made out of a deceased estate for the maintenance, education or advancement in life of an adult child. Care needs to be taken, in each case, to remain open to a critical assessment of the particular facts of the particular case without "glossing" the statute with presumptions or predispositions. Estrangement may be a relevant fact, or even a decisive one; but, in most cases, it is likely to be only one fact to be weighed in the balance upon a consideration of all the circumstances of a case.

- 85 After claims by adult children, the next most frequent claimants appear to be spouses and *de facto* spouses (that is, widows and widowers, *de jure* and *de facto*) of the deceased. A comparatively few cases involve claims by grandchildren and former spouses.
- 86 Whether the rapid growth of family provision litigation that has been experienced by the Court over recent years will become exponential as increasing numbers of people from “blended families” meet their day (to use a euphemism borrowed from ancient Rome) is a question for reflection upon any contemplation of the classes of “eligible person” for which section 57 of the *Succession Act* provides.
- 87 The perennial problem of “costs” manifests itself in family provision proceedings in several guises: How to contain the costs of proceedings within reasonable limits; How to deal with costs, in a profoundly discretionary jurisdiction, in the light of offers of settlement; and What is the appropriate order for costs upon dismissal of a claim in circumstances in which the unsuccessful claim was not brought unreasonably. There is no simple solution to any of these problems, recurrent though they are.
- 88 Overly complacent, over-ambitious and ultimately unsuccessful plaintiffs are occasionally shocked (without reasonable cause) when, to their horror, they realise that the basic rule remains that “costs follow the event”. A complacent assumption by a plaintiff that all costs are likely to be borne by the estate of the deceased, whatever the outcome of proceedings, is a dangerous assumption to make, no less dangerous because commonly made.
- 89 At a more abstract level, there are some perennial debates in the family provision jurisdiction that occupy territory other than a constant concern about how to contain costs and how to avoid delay in the conduct of proceedings (and, consequentially, in the administration of deceased estates) :
- (a) One which surfaces every so often is how to formulate principles that guide decision-making without imposing a judicial gloss on

the broad language of the governing legislation. That is a topic addressed by the Court of Appeal in *Andrew v Andrew* (2012) 81 NSWLR 565. Judges balk at use of expressions such as “moral duty” and “need”, in the context of legislation that speaks more generally about “adequate provision”, “proper” maintenance, etc. and about whether provision “ought” to be made out of an estate. However, the language of “moral duty” and “need” is resilient, in the presentation of cases, because it is difficult to articulate a case, or competing contentions, about what “ought” to be done without resort to that type of language.

- (b) A modern predisposition to require “evaluative” judgements to be made by reference to contemporary “community standards” (a topic also addressed by *Andrew v Andrew*) strikes some judges as entirely artificial, and analytically unhelpful, unless perhaps subordinated to the earlier standard of a “just and wise testator” established by *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. To say that judges are the arbiters of contemporary community standards offers, at best, an uncertain criterion for decision. If consulted, “the community” might well disclaim many of the judgements made by judges in the name of “community standards”.
- (c) Enactment of Chapter 3 of the *Succession Act* 2006, with a structure of statutory criteria (in sections 59(1)(c) and 59(2)) different from those found in the *Family Provision Act* 1982 NSW displaced by Chapter 3, has led to disagreements about whether the “two-stage” process of decision making spoken of in *Singer v Berghouse* (1994) 181 CLR 201 at 208-209 has continuing relevance. Again, *Andrew v Andrew* is at the centre of debate, although not, I apprehend, the last word on the subject. The debate turns on the fact that section 59(1)(c) requires the Court

to turn attention to whether “adequate provision” has been made out of an estate for a claimant, and section 59(2) requires the Court to turn its attention to whether an order for provision “ought” to be made, tests which some minds see as one and others as two. Some judges sidestep controversy by specifically addressing each of the criteria for which sections 57-60 provide.

- 90 Debates on these topics are perennial because, except in a rare case, case outcomes do not depend on which side of the debate is favoured.
- 91 These types of debate evidence the vibrancy of the family provision jurisdiction and the necessity for its application to a broad range of cases which, while capable of manifesting common characteristics, require nuanced attention to the particular facts of each case, a classic feature of equity jurisprudence.
- 92 And lest it be thought that the family provision jurisdiction is confined in its reach to proceedings instituted after death, attention should be drawn to the importance of those provisions of the *Succession Act* 2006 NSW that deal with:
- (a) a NSW speciality, the designation of property as “notional estate” by reference to property transactions that take effect within three years of the date of death of the person in respect of whom an application for family provision relief is made (*Succession Act*, Part 3.3, especially section 80(2));
 - (b) the jurisdiction of the Court (under the *Succession Act*, section 95) to approve a release of rights to apply for family provision relief, a jurisdiction not uncommonly invoked in the settlement of family disputes before or after the death of a propertied family member; and

- (c) the requirement (manifested in section 19(2)(i) of the *Succession Act*), on an application for a statutory will under sections 18-26 of the Act, to take into account “any evidence available to the applicant of the likelihood of an application being made under chapter 3 of [the *Succession Act*] in respect of the property of the person” lacking testamentary capacity in respect of whom an application for a statutory will is made: *Cf, Re Fenwick* (2009) 76 NSWLR 22.

93 A theme which has presented itself to me as Probate and Protective List Judge has been the interconnectedness of the Court’s protective, probate and family provision jurisdiction(s) generally. That interconnectedness has been reinforced by the frequency with which, before or after the death of a person incapable of managing his or her own affairs, the Court’s general equity jurisdiction has been invoked on a claim for recovery of property arising from misuse of an enduring power of attorney. This has led me to an observation, here repeated, that, from a legal perspective, death appears to have become a process (rather than merely a physical event) that commences with the execution of an instrument in the character of an enduring power of attorney, or for the appointment of an enduring guardian, and concludes with the closure of opportunities (if there can ever be closure of an opportunity) to make a claim for family provision relief.

94 In *W v H* [2014] NSWSC 1696 and *Re RB, a protected estate family settlement* [2015] NSWSC 70, I considered the jurisdiction of the Court, across jurisdictional boundaries, to approve a family settlement relating to the management and disposition of property of a protected person (in each case, a person of advanced years, irredeemable incapacity and the custodian of title to “family property”). This has not resulted in a deluge of applications for approval of family settlements (and neither should it do so), but it does, at least, focus attention on a need to consider all aspects of the Court’s jurisdiction in estate planning.

95 For those who seek further to explore these, and other Estate Administration, issues I commend the forthcoming, November issue of the *Australian Bar Review*. Under the guest editorship of two of my former tipstaves (Hugh Morrison and Mary-Ann de Mestre), now solicitors, the *Review* will publish as a thematic issue revised versions of seminar papers presented last year (by the NSW Bar Association and the Law Society of NSW) under the title, "Estate Administration: The Protective, Probate and Family Provision Jurisdictions of the Supreme Court of NSW".

GCL

28 October 2016