

UNSW CONTINUING LEGAL EDUCATION PROGRAMME

CPD SEMINAR

WILLS AND ESTATES LAW UPDATE

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WILLS AND ESTATES : A SURVEY OF THE FIELD

by

Justice Geoff Lindsay

**Probate and Protective List Judge
Equity Division, Supreme Court of NSW**

I. INTRODUCTION

- 1 Something of the breadth of the estate administration jurisdiction of the Supreme Court of NSW (focused, in this seminar, on “wills and estates”) is manifest in a program that canvases:
 - (a) the law of testamentary promises;
 - (b) estate planning and superannuation;
 - (c) practice and procedure in grants of probate; and
 - (d) grants of probate and administration.

- 2 Within a limited compass, this paper serves as a supplement to the more detailed papers presented on those topics.

II. THE FIELD OF OPERATION OF ESTATE ADMINISTRATION LAW

- 3 This area of the law is dynamic, necessarily grounded in enduring concepts but required to adapt to changes in Australian society, including:
- (a) evolution of the concept of “family”, moving away from a formal legal structure of marriage towards informal arrangements;
 - (b) privatisation of the management of the estates of persons incapable of managing their own affairs; and
 - (c) computerisation of Australian society, including the use of electronic devices as a routine means of communication, information storage and public administration.
- 4 Australians have embraced the concept of a “managed society”, in which (with or without misgivings) they expect their personal affairs to be managed from cradle to grave or, at least, in the legal penumbra that often precedes and follows death.
- 5 As has been commented upon elsewhere, there is a need to recognise synergies in practice areas (commonly involving the administration of estates) now formally recognised as the Protective, Probate and Family Provision jurisdictions of the Supreme Court, the first two of which are known historically by labels such as “the *parens patriae* jurisdiction” and “the ecclesiastical jurisdiction”: GC Lindsay, “A Province of Modern Equity: Management of Life, Death and Estate Administration” (2016) 43 *Australian Bar Review* 9.
- 6 The merging of these specialist jurisdictions must be recognised as overlaid with general equitable principles governing trusts, fiduciary obligations generally, obligations to account and principles of estoppel.

- 7 Legal practitioners must be alive to the reality that, from a legal perspective, death is generally a process (not merely a physical event) as people cope with physical incapacity, prepare for death and contest the property implications of incapacity and death.
- 8 A legal practitioner must recognise the possibility that the legal process of death may begin when, in anticipation of mental incapacity as a precursor to death, a person executes an enduring power of attorney (governed by the *Powers of Attorney Act 2005 NSW*), an enduring guardianship appointment (governed by the *Guardianship Act 1987 NSW*) and a will (governed by the *Succession Act 2006 NSW* and the *Probate and Administration Act 1898 NSW*).
- 9 That process may end only when, for all practical purposes, the time has expired when an application for a family provision order (governed by Chapter 3 of the *Succession Act 2006*) is likely to be entertained.
- 10 In institutional terms, this process potentially involves a broad range of flashpoints requiring familiarity, not only with the jurisdiction and practice of the Supreme Court, but familiarity also, at least, with the jurisdiction in practice of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT).
- 11 The Tribunal deals with a large range of cases, upon an exercise of jurisdiction protective in nature, affecting the person and estates of persons who are, or may be, incapable of managing their own affairs. That jurisdiction extends to a review of enduring powers of attorney and appointments of enduring guardians.

III. “ELDER ABUSE” CASES

- 12 At both State and Federal levels, Australian governments of all persuasions have become aware of phenomena generally described as “elder abuse” which, despite that descriptive label, might involve a vulnerable person of any age.

- 13 The classes of wrongdoing loosely described as “elder abuse” may involve exploitation of a vulnerable person sufficient to attract an exercise of equitable jurisdiction in aid, or vindication, of that person’s rights.
- 14 Anecdotal evidence – consistent with cases brought before the Supreme Court – suggests that vulnerable people are in many cases exploited by those closest to them (including family and friends) or, at least, by the holder of a power of attorney who, after the death of the principal, may be sued for an accounting based upon allegations of breach of fiduciary obligations.
- 15 Where exploitation, or a risk of exploitation, is discovered in time, systematic protective orders might be made by the Supreme Court or NCAT for:
- (a) the appointment of a manager of the vulnerable person’s *estate* (attracting the operation of the *NSW Trustee and Guardian Act* NSW 2009 NSW and the administrative oversight of the NSW Trustee exercising powers under that Act); or
 - (b) in protection of *the person* of the person, the appointment of a guardian by NCAT (pursuant to the *Guardianship Act* 1987) or a committee of the person (by the Supreme Court in exercise of its inherent jurisdiction).
- 16 These cases routinely involve decision-making directed towards risk management.
- 17 Where exploitation has run its course (eg., culminating in the death of a vulnerable person), an exercise of equitable jurisdiction – not uncommonly grounded upon an application for a fiduciary to account – may be required to effect a remedy, if any effective remedy is available at all. In my own experience, these cases can be marked by great complexity and attendant costs: eg. *Smith v Smith* [2017] NSWSC 408; *Reilly v Reilly* [2017] NSWSC 1419.

18 Whether there is scope for an allegation of undue influence in equity to be pleaded as ancillary to probate litigation (as contemplated in *Bridgewater v Leahy* (1998) 198 CLR 457 and 474-475 and discussed in *Boyce v Bunce* [2015] NSWSC 1924 at [32] *et seq*) remains to be seen.

IV. THE NATURE OF A GRANT OF PROBATE OR ADMINISTRATION

19 A grant of probate bears the character of both an order of the Court and an instrument of title to property: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233].

20 These twin characters affect the practice of the Court in that, although a change of executor to whom a grant of probate has been made traditionally involves revocation of the grant and the making of a fresh grant of administration (with the will annexed) in favour of the executor's replacement, a judge may sometimes simply order that the original executor be removed from office: *Riccardi v Riccardi* [2013] NSWSC 1655.

21 On the whole, because of the significance attributed to a grant as an instrument of title, I incline to the view that the better practice, generally, is the traditional one of revocation and re-grant, coupled with an order for the revoked grant to be delivered up to the Court's Registry and (if need be) an injunction restraining the executor "removed" from office from acting, or holding himself or herself out as entitled to act, as legal personal representative of the deceased's estate.

22 If (as might be anticipated) routine applications for probate are in due course computerised, one might reasonably expect a practical outcome of a successful application to continue to be the issuance of a formal instrument of grant, with original wills and other testamentary instruments to be delivered up to, and retained by, the Court.

V. GRANTS OF PROBATE IN SOLEMN FORM

23 Having earlier struggled to conceptualise decision-making criteria based on the distinction between grants of probate in solemn form and grants in common form, I reviewed the history and practical effect of the two classes of grant in *Estate Kouvakas* [2014] NSWSC 786.

24 In that judgment, at paragraph [249], a grant of probate expressly issued by the Court “in solemn form” was described as 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.

25 At the heart of this formulation of the distinction between grants in solemn and common form is recognition that probate proceedings involve “interest” litigation and, before a grant in solemn form is made, the Court needs to be satisfied that all persons who have or may have an interest in the particular estate have been given reasonable notice of the proceedings leading to the grant.

- 26 A grant in solemn form is binding on the parties to the probate suit in which it was granted, or anyone who has been cited to see the proceedings (or, in the language of the current *Probate Rules*, given formal notice of the proceedings), and also on anyone of full capacity who has an interest in the suit, and knows of the proceedings, but chooses not to intervene: *Osborne v Smith* (1960) 105 CLR 153 at 157-158.

VI. SERVICE OF NOTICE OF PROCEEDINGS

- 27 Where Notice of Proceedings is required to be served, it should ordinarily be served personally. Proceedings can miscarry where a Notice of Proceedings is simply posted and service is not acknowledged.
- 28 The Court is presently giving consideration to promulgation of a prescribed form of “Affidavit Confirming Service of Notice of Proceedings” designed to ensure that proper notice of proceedings is given.

VII. INTERLOCUTORY ADMINISTRATION ORDERS

- 29 Upon an exercise of probate jurisdiction an interim grant of administration (routinely described as a “special grant”) can be, and is not uncommonly, made to deal with the necessities of estate administration in cases not suitable for the making of an ordinary form of grant.
- 30 The standard types of “special grant” (discussed in Mason and Handler, *Succession Law and Practice (NSW)* (Lexis Nexis, Butterworths) paragraph [118.4] and R S Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in NSW* (LBC, 1996), paragraphs [40.74]-[40.86]) are commonly classified as follows:
- (a) Administration *pendente lite* (granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending).

- (b) Administration *ad litem* (granted to provide a person to represent an estate in litigation).
- (c) Administration *ad colligenda bona defuncti* (granted for the protection of an estate's assets pending delay in making a general grant).

- 31 Where a special grant can be made by consent, or without undue complication, parties are generally well advised to apply to the Probate Registrar, rather than to a judge, for the grant to be made. This is likely to be the most timely and cost effective method of proceeding. If need be, the Probate Registrar can refer an application to a judge.
- 32 “Special grants” take the form of a Court order, generally expressed to be for a limited period of time (typically six months) or until further order, in which the particular powers conferred upon an administrator are specified. No separate instrument of grant is issued by the Court.
- 33 Because the Court's order is, in law and practicality, the special administrator's authorisation to represent and bind an estate, and title to property in an estate, care needs to be taken to consult the terms of the particular order made for the administrator's appointment. Care needs to be taken, also, not to rely merely upon the descriptive Latin tags used in common conversation. In each case, the terms of the appointment should be consulted before acting upon an appointment.
- 34 Because a grant of probate in common form is regarded as “inherently revocable”, it is sometimes more productive to make a common form grant (rather than to appoint a special administrator), expressly characterising the grant as a grant “in common form” and reserving rights to apply for an order for revocation.

- 35 So much for an exercise of *probate* jurisdiction. Upon an exercise of *equitable* jurisdiction (or the general jurisdiction for which section 67 of the *Supreme Court Act* 1970 NSW provides) an alternative form of procedure might be to appoint a receiver and manager to estate property as a protective measure.
- 36 In any event, whatever the precise form of orders made in a particular case, the Court exercises its jurisdiction looking to the due and proper administration of the 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 what is due to them: *In the goods of William Loveday* [1900] 154 at 156; *Bates v Messner* (1967) 67 SCR (NSW) 187 at 189 and 191-192.

VIII. INFORMAL WILLS

- 37 Informal wills (admitted to probate under section 8 of the *Succession Act*) continue to be an increasingly important part of the Court's exercise of probate jurisdiction. They have ceased to be exceptional. Registrars routinely grant applications for a grant in respect of an informal will.
- 38 By its very nature, an informal will (that is, a testamentary document not executed in accordance with section 6 of the *Succession Act*) does not, without fundamental reservations, attract any traditional "presumption" of capacity or knowledge and approval arising from "due execution".
- 39 However, the concept of a "presumption" in this area is essentially empirical rather than prescriptive. It is an aid to the investigation of questions of fact, and to the determination of disputed questions of fact, in a world of imperfect knowledge; it might better be understood as an inference commonly drawn from established facts.
- 40 So understood, the practical wisdom encapsulated in probate "presumptions" may be able to be applied, by analogy, in and informal will case: eg. *Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107.

IX. STATUTORY WILLS

- 41 The leading NSW case on statutory wills (governed by sections 18-26 of the *Succession Act*) remains *Re Fenwick; application of JR Fenwick, re "Charles"* (2009) 76 NSWLR 22.
- 42 However, it must now be read in light of the judgment of the Queensland Court of Appeal in *GAU v GAV* [2016] Qd R1; [2014] QCA 308.
- 43 A summary of the principles enunciated in the Court of Appeal's judgment, adapted to a NSW setting, can be found in *Re K's Statutory Will* [2017] NSWSC 1711 at [20]-[21].
- 44 Essentially, upon an exercise of the jurisdiction to authorise a will to be made on behalf of a person lacking testamentary capacity, the Court must be mindful of an obligation, generally, to act only in the interests, and for the benefit, of the incapacitated person. The jurisdiction is essentially protective in character.
- 45 This is a counsel of caution against attempts to use the statutory will procedure to impose on an incapacitated person a complex form of will which, for example, through deployment of testamentary trusts, is designed to serve the interests of prospective beneficiaries rather than to be for the benefit, and to serve the interests of the incapacitated person.

X. INDIGENOUS INTESTATE ESTATES

- 46 There have now been two judgments published by the Supreme Court dealing with an application for a distribution order (under Part 4.4 of the *Succession Act*) in relation to an indigenous intestate estate.
- 47 Those judgments deal with very different factual scenarios; but, in each case, a distribution order was made by the Court.

- 48 In the first judgment (*Re Estate Wilson, deceased* (2017) 93 NSWLR 119) I dealt with competing claims to an intestate estate made respectively by the intestate's Aboriginal birth half-sisters and his adoptive half-sisters.
- 49 In the second judgment (*The Estate of Mark Edward Tighe* [2018] NSWSC 163) Kunc J dealt with a claim by a "kinship brother" in circumstances in which, had a distribution order not been made, the intestate's estate would have passed to the State, *bona vacantia*.
- 50 Our understanding of these types of case will evolve as the Court, parties and practitioners are exposed to different factual settings as they endeavour to engage the jurisdiction constructively.

XI. FAMILY PROVISION APPLICATIONS

- 51 A convenient starting point in analysis of any claim for family provision relief is generally to find a judgment of the Family Provision List Judge (Hallen J) which sets out in chapter and verse standard, and recent, authorities.
- 52 Because of his Honour's close management of cases in the Family Provision List, and because such cases are routinely referred to mediation, the cases that present themselves for a final hearing are generally difficult cases, for one reason or another not susceptible to compromise.
- 53 Following the recent judgment of the WA Court of Appeal in *Lemon v Mead* [2017] WASCA 215 (application for special leave to appeal pending), there has been a focus upon the proper approach to dealing with a family provision claim against a large estate.
- 54 In such a case, an ultimate constraint on the amount of relief available to a claimant might be the respect due to a deceased person's testamentary intentions: *Estate Hemmes*; *Cameron v Mead* [2018] NSWSC 85 at [67]; *Estate Grundy*; *La Valette v Chambers-Grundy* [2018] NSWSC 104 at [114]. *Cf, Sgro v Thompson* [2017] NSWCA 326 at [76]-[88], [92]-[93], and [95].

55 In a recent, unusual case a claimant for family provision relief was ordered to provide security for the costs of the executors of the estate against which he made his claim: *Re Estate Condon; Battenberg v Phillips* [2017] NSWSC 1813.

XII. ACCOUNTS

56 The Court is presently giving consideration to promulgation of a prescribed form of Notice of Motion for an order for the passing of accounts or for commission. The object of such a form would be to provide guidance to executors and beneficiaries, and to practitioners, engaged in the process of estate accounts being taken.

XIII. CONCLUSION

57 Given the broad range of cases that can be encountered in the “wills and estates” area of practice, any invocation of the jurisdiction of the Court should bear in mind the purposive nature of the Court’s jurisdiction (the due administration of a particular estate) as a means of guarding against undue deflection of the Court in adversarial litigation.

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