**UNIVERSITY OF NEW SOUTH WALES**

**LAW FACULTY**

**UNSW EDGE**

# WILLS & ESTATES LAW INTENSIVE PROGRAMME

**12 March 2020**

# A PROGRESS REPORT : CASE MANAGEMENT IN THE PROBATE LIST

**by**


## Justice Geoff Lindsay,

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


## INTRODUCTION

1 As foreshadowed in a paper entitled "Probate Law and Practice : An Appetite for Change" published on 13 November 2019 (now available on the website of the Supreme Court of NSW), a more rigorous form of "case management" is this year being implemented in conduct of the Court's Probate List.

2 This paper provides a progress report on changes to probate practice designed to meet challenges of a new era. The Court is obliged to adapt its procedures to an environment in which there are increasingly complex cases, insatiable demands on the court system and constraints on available resources.

3 A small but common example of how the modern world works is found in the assumption of many practitioners and parties that they can, by the device of an email to a judicial officer, obtain advice, seek a remedy without a formal application, or obtain an early listing for a directions hearing at which

unspecified business is sought to be conducted. There is little appreciation of the amount of time involved, within the court system, in locating the file (or files) relating to the subject matter of an email, ascertaining the nature and scope of any problem that requires attention, working out whether any (and, if so, which) other parties need to be consulted, and formulating a response. To a person who sends such an email, a small request is but a small request. Recipients of multiple email requests can be overwhelmed by their volume or, at least, deflected from other business no less important to affected parties.

4 At a mundane level, these are the sorts of problems that must be solved in administration of the Court's probate business. Under current arrangements for management of the Probate List, "consent orders" will not ordinarily be made in chambers in advance of a scheduled listing of proceedings. This is important, not only to relieve workload pressure on the Probate List Judge and staff, but to ensure that parties present themselves to the Judge in circumstances in which progress of proceedings can be audited and actively managed.

5 Experience suggests that even a well-motivated request that orders be made in chambers in advance of a directions hearing may have the effect of denying the Court an opportunity to identify questions in dispute; to invite consideration of steps that might be taken to resolve disputes or to overcome formal constraints on estate administration; or to monitor progress in case preparation.

**THE PROBATE LIST GUIDELINES**

6 At the beginning of this year the Court published, in the Probate section of its website, a practice guide entitled "Probate List Guidelines", with appendices which provide a form of "Disclosure Statement" (Appendix A) and a "Standard Form of Orders" (Appendix B).

7 Those documents provide a template adaptable by the Court without undue formality. They can be, and already have been, updated in the light of

experience. They are a central point of focus in case management of the Probate List.

**CONDUCT OF BUSINESS ON A PROBATE (AND PROTECTIVE) LIST DAY**

8 In keeping with the Guidelines, contentious probate proceedings are now case managed by the Probate List Judge rather than by the "Probate Registrar", a Senior Deputy Registrar working under the supervision of the Prothonotary. List days are generally held every Monday.

9 In management of proceedings listed on a List day, an endeavour is made to get through cases quickly, and to facilitate appearances by giving each case a "not before" time marking. If there is a science governing how this is best done, it remains elusive. A part of the problem is that the List Judge and staff might not have an opportunity to review each file before the time at which the list must be published.

10 Where possible, Protective List cases intermingled with the Probate List are listed at 12.30pm or at the end of the list so that, if they go over time, they can be dealt with during the lunch break or after court hours.

11 The availability of the Probate and Protective List Judge on some Fridays broadens the range of opportunities for cases to be resolved by the Judge, either on a List day or soon thereafter, without the need for proceedings to be referred to another judicial officer for the appointment of a specified date for a hearing. Cases are to be listed on a Friday only by, or with the consent of, the List Judge. Fridays are not available for routine business able to be dealt with on a Monday.

12 The new case management regime carries with it a need, on the part of the Probate List Judge, to be familiar with every file in the Probate List or, at least, to have a convenient system for the monitoring of each file.

13 In the management of contentious probate proceedings it is now of critical importance that each time proceedings come before the Probate List Judge progress is made in the due administration of the estate in question.

14 Successive adjournments cannot be had without consequences, either in costs orders (without recourse to the estate) or in the summary disposal of proceedings.

15 Anybody who appears in the Probate List must come armed with draft Short Minutes of Orders which provide for orderly progress in the administration of an estate. The Court cannot be counted upon to play a passive role in case preparation, simply deferring to parties. It maintains an active interest in case management.

**THE UNIQUE CHARACTER OF PROBATE PROCEEDINGS**

16 Case management of probate proceedings offers unique challenges.

17 Idiosyncratic features of probate proceedings were catalogued in *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [60]. These stem largely from three things. First, the purposive character of the probate jurisdiction. Secondly, by definition, the absence (by death or incapacity) of the person whose estate is central to an exercise of jurisdiction. Thirdly, the fact that, in the absence of that central personality, the Court must be vigilant (to consult all affected interests) in the way it permits an estate to be administered.

18 With this in mind, the Probate List Guidelines explicitly provide that the Probate List is administered on the basis that:

(a) the governing purpose of the law of succession is the due and proper administration of a particular estate, having regard to any duly expressed testamentary intention of the deceased and the respective interests of parties beneficially entitled to the estate: *In the Goods of Loveday* [1900] P154 at 156; *Bates v Messner*

(1967) 67 SR (NSW) 187 at 189 and 191-192. The task of the Court is to carry out a testator's duly expressed testamentary intentions, and to see that beneficiaries get what is due to them.

(b) probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993)35 NSWLR 631 at 634B-C; *Nobarani v Mariconte* [2018] HCA 36; (2018) 92 ALJR 806 at [49].

(c) in the interests of a proper and final determination of probate proceedings, and in the interests of settled rights to property upon succession, all persons who have, or may have, an interest in a contested estate should, so far as may be practicable, be given notice of the proceedings and an opportunity to intervene so as to be bound by the outcome of the proceedings; a person interested in the outcome of probate proceedings may be bound by the outcome even though not a party to the proceedings if on notice of the proceedings and possessed of a reasonable opportunity to intervene in them: *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

(d) all participants in probate proceedings have a duty (reinforced by the *Civil Procedure Act* 2005 NSW, section 56) to assist the Court in a timely disclosure of:

(i) all known testamentary instruments (including wills, codicils and "informal wills") of a deceased person, whether or not valid.

(ii) the circumstances in which a contested testamentary instrument was prepared and executed.

(iii) information about the deceased's medical condition and treatment so far as may be material to any dispute about the validity of a testamentary instrument of the deceased.

(e) no person interested in a deceased estate who participates in probate litigation has an unqualified entitlement to costs of that participation.

19 The probate jurisdiction extends far and wide. The range of problems thrown up for solution is limited only by human experience and ingenuity.

20 Illustrations of this can routinely be found in cases involving an alleged "informal will" (*Succession Act* 2006 NSW, section 8) or an application for a "statutory will" (*Succession Act* 2006, sections 18-26).

21 Many probate cases have about them a deceptive simplicity that encourages the uninitiated to approach the jurisdiction with misplaced complacency. The reality is that even an ostensibly simple case can quickly become complex. When that happens, even the most experienced judicial officer must run, not only to the standard texts and Caselaw, but to the accumulated experience of the Probate Registry. There is, and (for the efficient transaction of probate business) there must be, a close working relationship between the Probate List Judge and the Probate Registry.

22 Making full allowance for the breadth, depth and complexity of "probate proceedings", this paper focusses upon an application for a grant of probate or administration as the paradigm type of probate proceeding encountered in "case management".

23 The profound differences between probate proceedings and proceedings in which the Court is called upon to adjudicate civil disputes in an adversarial context are reflected in the concept of a "party" to proceedings.

24 In most civil proceedings (particularly upon an exercise of common law jurisdiction) the parties to proceedings are identified by the parties themselves or by the nature of relief claimed in the proceedings. A plaintiff generally sues a defendant for a remedy arising out of discrete dealings or a pre-existing relationship. The Court is usually called upon to manage a dispute culminating in dispositive orders binding (only) on named parties to the proceedings.

25 In probate proceedings, the Court is ordinarily charged with giving effect (so far as can be known) to the testamentary intentions (if any) of a person absent by death or (in the context of a statutory will application) incapacity and to do so by orders which, insofar as they affect title to property, bind "the world", not merely named parties. That task is not rendered less complex by the fact that, not uncommonly, death is preceded by a period of incapacity (by age or illness) during which others may have meddled with the estate under notice, raising potentially complex issues about the nature and identity of estate assets and what (if any) steps might be taken to recover them.

**THE PARADIGM CASE FOR MANAGEMENT : AN APPLICATION FOR A GRANT OF PROBATE OR ADMINISTRATION**

26 When its jurisdiction is invoked in probate proceedings, the Court must approach its task conscious of a need to allow for a reasonable investigation of the estate under scrutiny.

27 Upon an exercise of probate jurisdiction, the distinction between "contentious" and "uncontentious" proceedings (of practical importance though it is) can be misleading. The Court has an audit function which requires, within the limits of what is reasonably practical, that each application affecting an estate be critically reviewed. In the absence of a contradictor, requisitions that issue from the Probate Registry play an important role in service of the public interest. Not uncommonly, proceedings commenced as "uncontentious" are referred by the Probate Registry to Probate List Judge for case management because of an apprehension on the part of the Registry that the proceedings

are truly “contentious” in nature and steps need to be taken to identify a contradictor or, at least, to determine conditions upon which relief might be granted in the absence of a contradictor.

28 Through the Court’s critical review of applications, its insistence upon publication of notices of an intention to apply for a grant of probate or administration (etc), service of notice of proceedings, and an allowance for all adversely affected parties to have a reasonable opportunity to be heard, the Court performs functions not found in other types of proceedings. Although a concern for absent parties often affects other proceedings in the Court (eg, in the Family Provision List and the Corporations List), the range of “absent parties” routinely required to be identified and consulted is unique in probate proceedings.

29 In the management of probate proceedings, the Court must often go in search of potentially competing testamentary instruments (Wills, Codicils, “Informal Wills”), potentially interested parties and estate property.

30 There is an increasing tendency on the part of parties who invoke the Court’s probate jurisdiction to include in their originating process a full range of claims beyond routine probate applications.

31 As a working assumption, in this context, the central focus and concern of a “routine probate application” is identification and empowerment of a suitable person who (as an executor, an administrator, a special administrator or a receiver and manager) can collect, preserve and manage (that is, administer) a deceased estate in a manner calculated, under the supervision of the Court and subject to any orders made under Chapter 3 of the *Succession Act*, to give effect to the testamentary intentions of the deceased.

32 Not uncommonly, plaintiffs seek to include in their summons or statement of claim claims for relief which properly reside in the legal personal representative of a deceased estate. In a different context, such a claim might be characterised as a “derivative” suit or a “representative” claim.

Where a claim of that character is made questions have to be asked as to whether due management of the proceedings requires, first, the appointment of a "special (interim) administrator" to represent the estate or an order under rule 28.2 of the *Uniform Civil Procedure Rules* 2005 NSW for the separate determination of a probate claim in advance of claims which invoke other heads of jurisdiction.

33 An order (under rule 7.10 of the *Uniform Civil Procedure Rules* 2005 or upon an exercise of the Court's inherent equity jurisdiction) that an estate be represented by a particular party in proceedings, or an order under section 91 of the *Succession Act* for a limited purpose grant of administration in aid of an application for family provision relief, may be expedient in some cases. That is, for example, in a case in which all estate property is readily identifiable and within the Court's reach. However, in a case of any complexity, there may be no substitute for a general grant of probate or administration or a special (that is, interim) grant of administration before the Court embarks upon complex litigation directed towards recovery of property on behalf of a deceased estate.

34 Not uncommonly a probate claim is accompanied by a claim for "family provision relief" under Chapter 3 of the *Succession Act*. Proceedings in which a claim for family provision relief is the dominant form of relief claimed are generally best managed in the Family Provision List. In other cases, a pragmatic decision may have to be made about whether the proceedings should be managed in the Probate List or in the Family Provision List. Probate proceedings in which there is a claim for family provision relief may be transferred to the care of the Family Provision List Judge on the Court's own motion. There is a constructive working relationship between the List Judges. Forum shopping is discouraged.

35 But it is not only Equity and Family Provision claims that these days can be found embedded in probate proceedings. In an age in which professional indemnity insurance is compulsory for practising lawyers, it is not uncommon

for a claim for Common Law damages to be made against a solicitor involved in what might, generically, be called estate administration.

36 In case management of probate proceedings, priority has to be given to constructing an orderly process for the due and proper administration of each estate. That necessarily requires a focus on the identification of competing testamentary instruments, interested parties and competent administrators.

37 More than might sometimes be realised, it often requires an understanding that misfeasance in the administration of an estate might be attributable to the fact that an incumbent executor is in possession of property (usually the family home) in circumstances in which there is no incentive for a timely realisation and distribution of estate property. In those cases, proceedings may be managed in the Probate List, beyond orders for an effective grant of probate or administration, to ensure that estate property is delivered up to a legal personal representative of the deceased who is willing, and able, to administer the estate without undue delay.

38 A priority in "case management" in the Probate List is to move cases as quickly as practicable through a process of constructive engagement culminating in a mediation or settlement conference - as a gateway towards fully contested proceedings in which all interested persons have a reasonable opportunity, at their own risk as to costs, to participate.

39 To achieve this objective, in a manner adaptable to what may be required in a particular case, the Court is mindful of a need to control the course of proceedings; to facilitate early disclosures, without costly or oppressive use of subpoena or other "discovery" processes; to provide, at an early stage of proceedings, firsthand evidence about the preparation, or execution, of a will, and information about the assets and liabilities of an estate; to ensure that there is a timely service of notice of proceedings on all persons interested in the outcome of proceedings; and to insist upon disciplined probate pleadings.

40 Upon an application for a grant of probate or administration, this generally requires that early consideration be given to the following business:

(a) the filing and service of a "Disclosure Statement" by each party to proceedings, diminishing (if not eliminating) disputes about "discovery". Ideally, where disclosures are required or likely to be sought, each party should file and serve a Disclosure Statement *before the first directions hearing* of probate proceedings in order to facilitate the Probate List Judge's consideration of what case management orders should be made at that hearing. A party who fails to provide a timely Disclosure Statement might be denied an opportunity to issue subpoenas or to have access to documents produced "on subpoena".

(b) control of "subpoena processes" for the production, and inspection, of documents so as to diminish (if not eliminate) speculative "fishing" for a case. Under current administrative arrangements within the Court affecting probate proceedings, a subpoena for the production of documents cannot be issued, and access to "subpoenaed documents" in the custody of the Court cannot be granted, without the leave of a judge.

(c) deposit in the Registry of each original testamentary instrument likely to be the subject of competing claims.

(d) the necessity or otherwise for a "Disclosure Affidavit" to be sworn by a person (usually a solicitor) involved in the preparation, or execution, of a will. *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [80]-[87] and [93]-[103] provides guidance as to the circumstances in which orders for a "Disclosure Affidavit" might be made and the topics to be addressed in such an affidavit.

(e) the early availability of pleadings articulated in terms of standard grounds for challenging the validity of a will (undue execution, testamentary incapacity, lack of knowledge and approval, undue influence in the sense of coercion, fraud and revocation) and the early identification of any broader type of challenge (including an allegation of equitable undue influence or a trust claim based upon mutual wills or a contract to make a will). Particular care is required in distinguishing between "probate" and "equitable" undue influence given their different jurisprudential foundations and their potentially different approaches to parties and remedy: *Boyce v Bunce* [2015] NSWSC 1924 at [29]-[60].

(f) insistence upon due service of notice of proceedings (Form 140) on parties interested in the outcome of proceedings, and the provision of an approved form of affidavit (Form 151) which summarises steps taken in service of notices. All applications for a grant of probate (or administration with a will annexed) should, so far as practicable, be prepared to the point that a final hearing can conveniently culminate in a solemn form grant, having regard to the criteria described in *Estate Kouvakis; Lucas v Konakis* [2014] NSWSC 786 at [249]. This requires close attention to due service (not merely nominal service) of notice of proceedings on all persons with an interest adverse to the party giving notice. The Probate Rules require personal service: SCR Pt 78 rules 57, 59 – 60 and 64. In the absence of personal service an acknowledgement of receipt of a notice may suffice. Despatch of a letter by post, without any acknowledgement of receipt, is not enough.

(g) the early preparation of "standard probate affidavits" (namely, an affidavit of executor or administrator, including evidence of a death certificate, publication of an on-line notice of intention to apply for a grant and an inventory of estate property; affidavits of

attesting witnesses; and an affidavit deposing to the existence, or otherwise, of a *de facto* relationship). See Approved Forms 117-121, 126-127 and 132.

41 With its focus on this business, the Court does not encourage the engagement of parties in unnecessary interlocutory applications.

42 Not uncommonly, such applications (if made) will be dealt with in the broader context of case management of orders designed to proceed in an orderly way in the administration of an estate without being deflected by collateral disputation.

43 Upon a review of each file in preparation for a list day, an endeavour is made to identify steps available to be taken in due administration of the particular estate without unnecessary formality.

44 This can have practical consequences for parties. First, the Court may resist an application for an adjournment which does not patently advance due administration of an estate. Secondly, the Court may make orders calculated to advance administration of an estate whether or not parties apply for such orders. Thirdly, each party who appears before the Court should come armed with draft Short Minutes of Orders which demonstrate considered thought about what is required to advance administration of the estate the subject of proceedings. Fourthly, a failure to comply with the Court's directions may be visited with an order that a defaulting party pay an opponent's costs without recourse to the estate or, at least, be precluded from claiming costs from the estate.

45 In this world, probate proceedings are perhaps best viewed as a means to an end, rather than (as adversarial litigation may be seen) an end in themselves. The purposive character of the Court's probate jurisdiction governs an exercise of the jurisdiction. The primary focus is upon what is required for due administration of an estate, not the dictates of litigation which parties may insist is simply adversarial.

**CONCLUSION**

46 The Court's Probate List Guidelines (including Disclosure Statement and standard form orders) remain under active review, as does the manner of implementation of the Guidelines.

47 Particular areas of concern that may require special attention are: (a) how to streamline accounting procedures; (b) how best to deal with costs disputes; and (c) how to make the best use that can be made of interim grants of administration. Concerns about "discovery" processes, and due service of notice of proceedings, remain a constant.

Date: 11 March 2020

GCL

**********