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THE ROLE OF "EVALUATION" IN THE DETERMINATION OF SUCCESSION (PROBATE AND FAMILY PROVISION) LITIGATION

by

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INTRODUCTION

1 The probate and family provision jurisdictions of the Supreme Court of New South Wales are closely aligned but, in operation, they suffer from opposite problems. The family provision jurisdiction was created, and is governed, by statute; but, in operation, the text of the statute lends itself to impermissible glossing in any endeavour at elaboration. The principles governing an exercise of probate jurisdiction are governed by the general law, not legislation; but they are often articulated by reference to rules of practice rigidly applied as if a statutory formula.

2 A need to understand the nature of each head of jurisdiction, and the way the two jurisdictions connect in operation, is highlighted by the fact that, in NSW estate litigation, disputed probate and family provision questions are now routinely heard and determined together, not separately, in the one set of proceedings, and all such proceedings are ordinarily subjected to a compulsory mediation before proceeding to a final hearing.

3 Any disconnection between the probate and family provision jurisdictions can be minimised (but perhaps never eliminated) by recognising that:

(a) each jurisdiction operates upon a common assumption that proceedings are to be viewed through the prism of a central personality (usually deceased) living, and dying, as an autonomous individual, in community;

(b) the purposes for which the two jurisdictions exist are complementary, focusing upon the due administration of a deceased estate, giving effect to a deceased person's duly expressed testamentary intentions (in probate proceedings), qualified by such (if any) orders for family provision made, upon application to the Court, to provide for persons for whom the deceased ought, in retrospect, to have made provision or (as may be the case) further provision;

(c) an exercise of each jurisdiction involves *management* of property, people and relationships rather than merely a determination of competing *rights and obligations*; and

(d) both jurisdictions involve a process of "evaluative" reasoning (which may require a balance to be struck, intuitively, between a variety of interests) rather than a process of decision making limited to the determination of facts to which are applied established rules of law (often governed by written instruments, including legislation and contractual documents).

(e) an exercise of both types of jurisdiction requires the Court to learn enough of the central personality to be able to identify, and solve, problems through his or her perspective. This may require more than just a reading of words on a page or applying an "objective" standard of reasoning without regard to the subjective mindset of the central personality.

4 That the family provision jurisdiction requires evaluative reasoning is well known, governed as it is by legislation that implies a moral imperative:

testamentary provision “ought” to be made for a person who demonstrates an unsatisfied claim on the bounty of a deceased person.

5 The probate jurisdiction’s association with evaluative reasoning is perhaps less well known. Principles governing an exercise of probate jurisdiction are obscured by rules of practice which do not reflect today’s case management system of conducting contested proceedings. An object of this paper is to highlight the probate law’s evaluative process of reasoning by distinguishing the contributions of substantive and procedural law to probate practice.

6 The Australian model of succession law (reflected in the seminal authority on the meaning of “testamentary capacity”, *Banks v Goodfellow* (1870) LR 5 QB 549 at 563-566) recognises in each autonomous individual a right to dispose of property by will (“testamentary freedom”) subject to the operation of a discretionary power in a court, on application, to make an order that provision be made out of a deceased estate for a person found to have an unsatisfied claim on the deceased’s bounty. In this way, Australian law seeks to balance competing claims of “the individual” and “family” (personification of a “collective” interest) in the community in which an individual lives and dies.

THE FAMILY PROVISION JURISDICTION

7 The jurisdiction of the Court to make a family provision order is currently found in Chapter 3 of the *Succession Act* 2006 NSW. Section 3(1) of the Act defines a “family provision order” to mean “an order made by the Court under Chapter 3 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of an eligible person.” Section 57 of the Act defines an “eligible person” in terms that imply a concept of “family” that transcends the traditional notion of a “nuclear family” comprised of husband, wife and children.

8 Upon an assumption that a claimant for family provision relief has standing as an “eligible person” (under section 57 of the Act), makes his or her application for a family provision order within the timeframe contemplated by section 58 and (if not a “spouse” or child of the deceased) satisfies the Court that there

are factors which warrant the making of an application (section 59(1)(b)), the focus for attention is usually concentrated particularly on sections 59(1)(c), 59(2) and 60(2) of the *Succession Act* 2006.

9 Section 59(1)(c) requires an applicant for a family provision order to satisfy the Court that, *at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life* of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules (found in Chapter 4 of the *Succession Act*) in relation to the estate of the deceased, or both.

10 Section 59(2) provides that a Court *may* make such order for provision out of the estate of the deceased person *as it thinks ought to be made for the maintenance, education or advancement in life of the applicant, having regard to the facts known to the Court at the time the order is made*.

11 Section 60(2) provides a checklist of matters (including matters bearing upon personal relationships, available resources, competing needs, provision earlier made, and character and conduct) that may be considered by the Court, *inter alia*, for the purpose of determining whether to make a family provision order and the nature of any such order.

12 The starting point for any analysis of the Court's family provision jurisdiction is the text of Chapter 3 of the *Succession Act*. That text provides the starting point, a guiding light and a test of orthodoxy for any factual analysis of an application for a family provision order.

13 Grounded upon an eligible person's statutory right to apply for a family provision order, and satisfaction of the Court that the person has been left without adequate provision for his or her proper maintenance, education or advancement in life, the family provision jurisdiction is discretionary in character.

14 The reasoning process attending assessment of an application for a family provision order requires an empathetic, but clear-eyed assessment of personal relationships in a family setting, respectful of the deceased's assessment of those relationships and his or her testamentary intentions.

15 The respect due to a deceased's assessment of relationships and to his or her expression of testamentary intentions does not permit the Court simply to endorse the deceased's views. Quite apart from anything else, sections 59(1)(c) and 59(2) of the *Succession Act* require the Court to found its decision making upon evidence available to it at the time of the hearing of an application for a family provision order, necessarily a time after the death of the deceased. The Court may have knowledge of facts unknown to the deceased. Events material to decision-making about disposition of an estate might have occurred subsequent to the death of the deceased.

16 In common understanding, family provision proceedings are concerned with identification of property of a deceased person available for disposition and his or her testamentary intentions; and considerations of "moral duty" on the part of the deceased person to make provision for a plaintiff, any identifiable "need" on the part of the plaintiff for provision, and the weight of competing claims on the bounty of the deceased. This may require consideration of the past, present and, insofar as can be known, the likely course of the future in the lives of persons affected by the proceedings.

17 Decisions central to an exercise of family provision jurisdiction require consideration of:

(a) the expression "adequate provision for the proper maintenance, education or advancement in life"; and

(b) the word "ought".

18 Although the jurisdiction is statutory, the statutory criteria invite elaboration of guidelines or the like in their application to the facts of the particular case

under consideration. However, any attempt at elaboration is at risk of including observations about family relationships liable to be characterised as an impermissible gloss on the statute. There is an inevitability about this that is paradoxical; but central concepts embodied in the legislation ("adequate", "proper", "ought") invite an exercise of intuitive judgment, not always amenable to precise articulation, but prone to "error" in a world in which intuitive judgements easily differ.

19 Every so often, general observations about "family", "relationships", "need" and "moral duty" (which are at best implicit in Chapter 3 of the *Succession Act*, and difficult to avoid in addressing the criteria for which the Act expressly provides) tend to be disclaimed by an appellate court as a "gloss" on the statute as attention is re-focused on the text. By this means, the jurisdiction is constantly refreshed and adapted to social change.

20 One commonly hears a family provision case debated almost exclusively in terms not found (or, at best, barely found) in the text of the statute. Practitioners will commonly debate whether an applicant for family provision relief has, or has not, a proven "need" for provision, or whether the deceased did, or did not, have a "moral duty" to make provision (or further provision) for the applicant. Practitioners commonly use the expressions "need" and "moral duty" as a short hand way of referring to the criteria for which sections 59(1)(c) and 59(2) of the *Succession Act* provide, but to use those expressions without reference to the legislation is an invitation to error.

21 The concepts of "adequate" and "proper" embedded in section 59 must be understood as relative to the facts of the particular case: *Pontifical Society for the Propagation of the Faith v Scales* (1962) 17 CLR 9 at 19. As generally understood, "adequate" is a word concerned with *quantum* whereas "proper" is a word directed a *standard* of maintenance, education and advancement in life. Both words focus attention on the circumstances of the particular case viewed from the perspective of the deceased and contemporary community standards.

22 In their application, the words “adequate” and “proper” require an exercise of judgement. The word “ought” implies a moral imperative: acting “correctly”, in conformity with community norms or in performance of an implicit duty, an “appropriate” order for family provision “should”, or “should not” be made. The word “ought” is not amenable to definition in terms less precise than itself.

23 In the exercise of its statutory powers in the determination of an application for a family provision order (in particular, sections 59(1)(c) and 59(2) of the *Succession Act*), the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 17 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific statutory criteria referred to in section 60(2) of the Act so far as they may be material.

24 Minds may differ about the perspective to be adopted by the Court in approaching evaluative decision-making. Traditionally, the Court viewed decision-making through the prism of the deceased, treating him or her as “wise and just rather than fond and foolish”. In more recent times, judges have adopted the perspective of current “community standards”, an expression regarded by some as meaningless. A compromise here commended is one that requires the Court to endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish, and making due allowance for current social conditions and standards. Wisdom and justice are criteria that should not lightly be disregarded, but an assessment of what is wise and just needs to be made not in the abstract or by reference to social conditions no longer prevailing, but by reference to contemporary times.

25 Although the deceased is the central personality in family provision proceedings, the object of the proceedings is not to vindicate testamentary intentions of the deceased (actual or presumed) but to consider whether an order can, and should, be made for the plaintiff to receive provision, or further provision, out of the estate, or notional estate, of the deceased.

26 Speaking broadly, whereas probate proceedings are directed to ascertaining, and giving effect to, a testator's testamentary intentions, family provision proceedings are directed to providing a safety net of one description or another for claimants on the bounty of the deceased who, for whatever reason, are (in the judgment of the Court, representing the community) left without "adequate provision" for their "proper maintenance, education and advancement in life" from resources attributable to the deceased's wealth.

THE PROBATE JURISDICTION

The Purpose of the Jurisdiction

27 The purpose of the probate jurisdiction is to look to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intentions of the deceased and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

A Basic Conceptual Structure

28 Fundamental to performance of the Court's function is identification of the instrument, or instruments, which represent the last will of the deceased as a free and capable testator: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at 44. This is the starting point, guiding light and test of orthodoxy for an exercise of probate jurisdiction.

29 Upon an application for admission of a duly executed will or codicil (compliant with the formal requirements of the *Succession Act*) to probate, the question

whether the Court is satisfied that a particular instrument (in the form of a will or codicil) is the last will of a free and capable testator is conventionally (and logically) analysed by reference to four main questions; namely:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had *testamentary capacity*.

(b) whether the will was made with the testator's *knowledge and approval* of its contents.

(c) whether the testator's execution of the will was obtained by an exercise of *undue influence* on the part of an identified individual or individuals.

(d) Whether the testator's execution of the will was obtained by the *fraud* of an identified individual or individuals.

30 The concepts central to these questions (testamentary capacity, knowledge and approval, undue influence and fraud) are often elaborated by reference to procedural or evidentiary ideas: "presumptions" or "onus of proof" of one type or another, proof of "suspicious circumstances" that displace a presumption, proof of conduct that is "coercive" or evidence of trickery. They are, however, amenable to elaboration in conceptual terms bearing upon the ultimate question of whether a particular instrument is the last will of a free and capable testator.

31 Whatever role may be played by "presumptions" in probate law and practice, recognition of the conceptual side of "testamentary capacity", "knowledge and approval", "undue influence" and "fraud" is not inconsistent with an acknowledgement of the importance of "presumptions" or "onus of proof" in a contest as to the validity of a testamentary instrument.

32 The party propounding a testamentary instrument bears the onus (a "legal onus") of proving the ultimate fact that it represents the last will of a free and capable testator, and the subsidiary elements of testamentary capacity and knowledge and approval.

33 A party alleging undue influence or fraud bears the onus (an "evidentiary onus") of proving the allegation as a factor vitiating the testamentary intention of the deceased.

Seeing through Probate's Misty Amalgamation of Substantive and Procedural Law

34 Probate law and practice are often presented, and analysed, as an amalgam of substantive and procedural law. A prime example of this is discussion of the concepts of "testamentary capacity" and "knowledge and approval" in terms of "presumptions" and "shifting burdens of proof". In a particular case, these procedural constructs may be decisively important, but it is equally important to bear in mind that they are called in aid of substantive law concepts. The ultimate question on an application for a grant of probate or administration of a testamentary instrument is whether the instrument was the "last" will of a free and capable testator. In the administration of justice, procedural imperatives are generally subordinate to substantive law concepts and more prone to change.

35 A conventional exposition of the principles governing admission of a formal will or codicil to probate by reference to "shifting burdens of proof" and "presumptions" obscures substantive law concepts by presenting them in a form that implicitly elevates rules of practice to the status of "rules" ostensibly binding. Conceptually, probate law is more flexible than it appears when presented in that guise.

36 The role of "shifting burdens of proof" and "presumptions" in probate law is open for discussion. One needs to know something of them in order to put discussion of them to one side for a time. However, a proposition advanced by this paper is that a better understanding can be had of probate law if

discussion of them is subordinated to a discussion of substantive law concepts.

37 The "evaluative" character of reasoning involved in an exercise of probate jurisdiction requires an engagement with substantive law concepts. This can be illustrated by reference to the following:

(a) Recognition of the purpose served by an exercise of probate jurisdiction, and of the ultimate importance of determining whether a testamentary instrument represents the last will of a deceased person as a free and capable testator, provides a perspective of probate law and practice which rises above the operation of "presumptions" and "shifting burdens of proof" found in discussion of "testamentary capacity" and "knowledge and approval".

(b) Recognition of the language of evaluation (including expressions such as "ought" and "rational and proper") in *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-666, either side of the classic "test" for an assessment of testamentary capacity at 565, militates against a rigid application of the test, as does the word "ought" found in "the test" itself.

(c) Insofar as "knowledge and approval" of the terms of a testamentary instrument requires the Court to be satisfied that those terms represent a testator's "real" testamentary intentions, an evaluative judgement needs to be made about whether formal acknowledgement of a testamentary instrument is attended by a testator's substantive embrace.

(d) Evidence of "suspicious circumstances" does not bear directly on the validity or otherwise of a will; its role is to place the Court on notice of a need for an evaluative judgement.

(e) Consideration of whether "influence" is "undue" requires an evaluative judgement about whether the will of a testator was overborne in his or her execution of a testamentary instrument, again necessitating a search for substance over form.

(f) Although the standard of proof required in probate proceedings is the civil standard of proof "on the balance of probabilities" recognising that the standard may vary according to the gravity of the fact to be proved (*Evidence Act* 1995 NSW, section 140; *Briginshaw v Briginshaw* (1938) 60 CLR 336), recognition of the evaluative process of reasoning inherent in a probate case may be found in the tendency of courts to speak, for example, about being "comfortably satisfied" of a particular outcome after a "vigilant examination of the whole of the evidence".

The Role of "Presumptions" and "Shifting Burdens of Proof" Open to Review

38 Analysis of evidence bearing upon the essential (as distinct from formal) validity of a testamentary instrument is aided by rules of practice traditionally characterised as "presumptions" (discussed in terms of a shifting burden of proof or the existence of a "*prima facie* case", as in the classic formulation in *Bailey v Bailey* (1924) 34 CLR 558 at 570-572), but (as contemplated in *Carr v Hommersham* (2018) 97 NSWLR 328 at [46]-[47], *Mekhail v Hana* [2019] NSWCA 197 at [164]-[172] and, in the context of an informal will, *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107 at [18]-[24]) perhaps better understood as inferences drawn, on the basis of common experience, from proof of particular facts.

39 In *Mekhail v Hana* [2019] NSWCA 197 at [163]-[173] Leeming JA, with the concurrence of Basten JA (at [1]), drew attention to what he perceived to be "some unsatisfactory aspects" of probate law. It is sufficient for present purposes to extract what his Honour wrote in paragraphs [164]-[167] under the heading "A Preferred Approach":

"[164] First, I respectfully doubt the utility in adhering to the language of testamentary capacity as stated in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 as if that were a legislative text: cf *Carr v Homersham* (2018) 97 NSWLR 328; [2018] NSWCA 65 at [6] and [133]-[134].
[165] Secondly, it is ironic that while reliance continues to be placed on nineteenth century English decisions such as *Banks v Goodfellow* and *Barry v Butlin*, the law in England and Wales appears to have moved on in cases such as the present. In *Gill v Woodall* [2011] Ch 380; [2010] EWCA Civ 1430, Lord Neuberger MR approved a single stage approach, applicable to cases where as here there has been a lengthy trial on all issues. His Lordship said at [21]-[22]:

> "The Judge approached the issue of knowledge and approval on a two stage basis. He first asked whether Dr Gill had established sufficient facts to 'excite the suspicion of the court', which really amounts to establishing a prima facie case that Mrs Gill did not in fact know of and approve the contents of the Will. Secondly, having held that Dr Gill had excited the suspicion of the court, he then turned to consider whether or not those suspicions were allayed by the RSPCA, who were of course supporting the Will. This approach accords with Parke B's analysis in *Butlin* ... and it is reflected in the approach in a number of other cases.
>
> Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval appears to me to be questionable. In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs LJ in *In re Crerar* (unreported) but see (1956) 106 LJ 694, 695, cited and followed by Latey J in *In re Morris* [1971] P 62, 78, namely, that the court should:
>
> > 'consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.'"

[166] This has been reiterated in *Greaves v Stolkin* [2013] EWCA 1140; [2013] WTLR 1793 at [68]-[73]; and *Simon v Byford* [2014] EWCA Civ 280; [2014] WTLR 1097 at [47].

[167] I respectfully agree that it is artificial and has the potential to lead to error for a judge who has heard the entirety of the evidence in a case, where the so-called suspicious circumstances "rule" is in play and where undue influence has been pleaded, to proceed on the basis of onus and presumptions. The "presumption" involved when a person who is to take under a will is involved in its preparation is a standardised inference which

arises where “common experience is that the existence of one fact means that another fact also exists”, as explained in a similar context in *Thorne v Kennedy* (2017) 263 CLR 85; [2017] HCA 49.”

Dominant Concepts best Understood as Subsidiary

40 Conceptually, the subsidiary questions underlying the question whether a testamentary instrument was the (last) will of a free and capable testator each have a distinct field of operation:

(a) The concept of “testamentary capacity” is directed to whether the testator had the *mental capacity* to make a valid will. That generally requires consideration of a further layer of logical, subsidiary questions considered, in common experience, to bear upon the existence of testamentary capacity: whether, at the time the will was made, the testator understood the nature of a will and its effects; whether he or she understood the extent of the property available for disposition; whether he or she was able to comprehend and weigh claims on his or her bounty; and whether his or her faculties were materially impaired by a medical condition.

(b) The concept of “knowledge and approval” is directed (upon an assumption of testamentary capacity) to whether the testator truly *knew* the terms of a will and *intended* to give effect to them.

(c) The concept of “undue influence” (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, “influence” is “undue” if it overbears the testator’s independent judgement. In probate law, “undue influence” is often described as “coercion”; but that word,

standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person's undue influence (coercion) is not the instrument of the testator, but of the other.

(d) The concept of "fraud" (upon an exercise of probate jurisdiction) is directed to whether the testator was *misled* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

41 The ostensibly logical precision of these concepts provides a structured approach to a determination of whether a testamentary instrument was the (last) will of a free and capable testator. However, their application is not a mechanical exercise. Any "tests" they embody are evaluative in character. An element of practical wisdom is required in the evaluation of evidence, focusing upon the perspective and personal circumstances of the testator, whose absence from the witness box is a central fact of probate proceedings. Medical evidence may be critical but, in contested proceedings, as in these proceedings, it may not in the final analysis be determinative.

42 The following observations by Kirby P in *Re Estate of Griffith (Dec'd); Easter v Griffith* (1995) 217 ALR 284 at 295-296 bear repeating:

> "(6) In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent — more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will: see [*Banks v Goodfellow* (1870) LR 5 QB 549 at 560]. Nor will partial unsoundness of mind, which does not operate on the relevant capacities to appreciate the extent of and dispose of the estate, necessarily deprive the testator of testamentary capacity if it is shown that the will was signed during a lucid interval: see *Banks*, above, at 558. Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law [freedom of testamentary disposition] would be undermined and the expectations of testators unreasonably destroyed.

(7) If, by reason of evidence, a doubt is raised as to the testamentary capacity of the testator, that doubt must be resolved by the civil and not the criminal onus: see *Worth v Clasohm* (1952) 86 CLR 439 at 453:

> 'The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is thought by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.'

(8) In judging the will propounded, and the challenge to it, the court must consider all of the facts proved which are relevant to the testamentary capacity of the testator. It must not be deflected into a consideration of medical evidence, still less of jargon, as to whether particular conditions such as a 'delusion' or 'paranoia' have been established. Such evidence is only relevant as it throws light on the court's responsibility to decide whether the testator has appreciated the extent of the property to be disposed of; realised the various calls for disposition to which consideration should be given; and was able to evaluate those calls to give effect to the resulting dispositions by the provisions of the will: see *Banks* at 557. There is nothing excessively technical in any of these considerations. What the court is asked to do is to determine, on all of the evidence, whether for the purpose for which the law provides and protects testamentary freedom, the testator had the capacity to give effect to the legal privilege. Determining that question, courts must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh. …"

43 These observations should be read with those Gleeson CJ in the same case (at 290): "The power freely to dispose of one's assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter."

The Role of "Presumptions" in True Perspective?

44 In contemporary practice, execution of a formal will or codicil compliant with current statutory requirements ("due execution") is a point of entry to practical reasoning by reference to "presumptions" bearing upon proof of "testamentary capacity" and "knowledge and approval". The foundational assumption (presumption) is that, if a testator had wit enough to execute a will in due form (with two attesting witnesses) he or she must have been mentally competent to do so; must have known what a will was; must have known the contents of

the particular document executed; and must have intended the will to take effect according to its terms. In the absence of evidence to the contrary, common experience suggests that that line of reasoning is correct.

45 Importantly, probate presumptions as presently understood are *rebuttable* presumptions *of fact*, not presumptions *of law*. Save, arguably, for the fact of "due execution" (mandated by legislation for a "formal" will), they do not mark out jurisdictional boundaries of any kind; although, upon an assessment of evidence in a particular case, they may provide assistance in determining whether or not an onus of proof has been discharged. They provide guidance in the assessment of evidence bearing upon "testamentary capacity" and "knowledge and approval". They have no routine role to play in the assessment of "undue influence" or "fraud", allegations of which must be specifically made and proved. Whether they are rebutted depends upon an assessment of all available evidence in context.

46 Where a determination of the validity of a will falls to be made by a judge, sitting alone, without a jury, at the close of evidence adduced by all interested persons, the judge is required to consider what findings of fact should be made (about whether the will was the last will of a free and capable testator, and subsidiary questions) on the whole of the evidence, drawing such inferences as may be available on the whole of the evidence. In that context, the profile of "presumptions" may be less visible than in other contexts – such as upon the determination of an interlocutory application for an interim (special) grant of administration or upon consideration of a routine application made to a registrar for a grant of probate or administration "in common form".

47 The distinction between a grant "in common form" and a grant "in solemn form" (explored in *Estate Kouvakis; Lucas v Konakas* [2014] NSWSC 786) is indicative of the fact that probate law and practice must accommodate a wide range of cases, from routine administrative applications to hotly contested litigation.

48 In a routine administrative application for probate (the vast majority of probate applications) the existence of a duly executed will that is rational on its face may be held sufficient for the admission of the will to probate: *Veall v Veall* (2015) 46 VR 123 at [171]. In contested proceedings in which the Court operates under a statutory mandate "to facilitate the just, quick and cheap resolution" of "real issues", debate about whether a "presumption" applies may aid or hinder an orderly resolution of the proceedings, depending upon the factual matrix of the case. The utility and prominence of "presumptions" may vary depending on the nature of the case; including, particularly, the real issues in dispute.

49 Whether they bear their conventional character as "presumptions" or they are characterised as "inferences" drawn from common experience, and whether or not they are analysed in terms of an allocation of an "onus of proof", they are never entirely absent because they reflect common experience. The facts that give rise to a "presumption" (particularly the foundational fact of due execution of a formal instrument rational on its face and apparently regular) remain relevant to any consideration of the issues in aid of which they are said to ground a presumption (testamentary capacity and knowledge and approval), and any rebuttal requires consideration of the whole of the evidence then available, as does a determination of those issues without conscious invocation of a presumption.

50 In particular cases it may be important to know who bears the evidentiary onus of proving a particular matter and in what circumstances the onus of adducing evidence concerning that matter may shift: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [2]. In other cases, primary attention may focus directly upon issues (usually "testamentary capacity" and "knowledge and approval") identified by parties for determination on the whole of the evidence placed before the Court.

51 In some cases probate "presumptions" can serve as helpful aids to analysis of evidence bearing upon "testamentary capacity" and "knowledge and approval"; but in other cases they may serve as a formalistic distraction from a

proper consideration of the larger issues of “testamentary capacity” and “knowledge and approval” and the still larger, ultimate question of whether an instrument was the (last) will of a free and capable testator.

52 A duly executed will, rational on its face, is conventionally presumed, in the absence of evidence to the contrary, to be that of a person of competent understanding, sanity being presumed until the contrary is shown. Facts which, if established, may provide evidence to the contrary, include the exclusion of persons naturally having a claim on the testator’s bounty and extreme age or illness of a character that has so affected the testator’s mental faculties as to make them unequal to the task of disposing of his or her property: *Re Estate of Paul Francis Hodges, Deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 706E-707B.

53 Not uncommonly, one finds an allegation of “suspicious circumstances” surrounding the making of a will sufficient, it is said, to negate a presumption of knowledge and approval arising from findings of testamentary capacity and due execution of a will: *Nock v Austin* (1918) 25 CLR 519 at [528]; *Tobin v Ezekiel* (2012) 83 NSWLR 757.

54 Where there is no question of fraud, the fact that a will has been read over to, and by, a capable testator may be sufficient evidence that he knew and approved of its contents (*Re Hodges* (1988) 14 NSWLR 698 at F-G), but not necessarily so. Clear evidence that a will was read by, and to, a testator in advance of its execution by the testator may provide persuasive evidence that the testator knew its contents, and intended to give effect to them, in execution of the will. Prudence counsels that a process of “reading the will” be adopted, but there is no rule of law that such a process must be followed or that a want of knowledge and approval must be found if the process is not followed. The same may be said of a process of “explaining” a will to a testator or having him or her explain its contents to a witness. Ultimately, the question is whether the testator “knew and approved” the contents of the will. What may be necessary, or desirable, to provide an evidentiary foundation for

a finding of knowledge and approval depends on the facts of the particular case.

A Conventional Exposition of Probate Law and Practice

55 A convenient exposition of the principles governing admission of a formal will or codicil to probate, articulated by reference to “onus of proof” and “presumptions”, can be found in *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44]-[48] and [55]:

> “[44] The starting point is that the onus of proof lies upon the proponent of the will to satisfy the court that it is the last will of a "free and capable" testator: *Barry v Butlin* at 482; 1092; *Fulton v Andrew* [1875] LR 7 HL 448 at 461; *Tyrrell v Painton* [1894] P 151 at 157; *Bailey v Bailey* [1924] HCA 21; 34 CLR 558 at 570; *Timbury v Coffee* [1941] HCA 22; 66 CLR 277 at 283. To establish that a document is the last will, it must be proved that the testator knew and approved its contents at the time it was executed so that it can be said that the testator comprehended the effect of what he or she was doing: *Barry v Butlin* at 484; 1091; *Cleare v Cleare* (1869) LR 1 P & D 655 at 657-658; *Atter v Atkinson* (1869) LR 1 P & D 665 at 668, 670; *Nock v Austin* [1918] HCA 73; 25 CLR 519 at 522, 528.
>
> [45] If the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity. Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of "sound disposing mind": *Waring v Waring* (1848) 6 Moo PC 341 at 355; 13 ER 715 at 720; *Sutton v Sadler* (1857) 3 CB NS 87 at 97-98; 140 ER 671 at 675-676; *Smith v Tebbitt* (1867) LR 1 P & D 398 at 436; *Bull v Fulton* [1942] HCA 13; 66 CLR 295 at 343; *Kantor v Vosahlo* [2004] VSCA 235 at [49], [50]. That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the court being affirmatively satisfied as to testamentary capacity: *Bull v Fulton* at 299, 341; *Worth v Clasohm* [1952] HCA 67; 86 CLR 439 at 453.
>
> [46] Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator. In *Thompson v Bella-Lewis* [1997] 1 Qd R 429 McPherson JA (dissenting in the result) said (at 451) of the circumstances able to raise a suspicion concerning knowledge and approval that, except perhaps where the will is retained by someone who participated in its preparation or execution or who benefits under it, "a circumstance must, to be accounted 'suspicious', be related to the preparation or execution of the will, or its intrinsic terms, and not to events happening after the testator's death". See also *McKinnon v Voigt* [1998] 3 VR 543 at 562-563; *Robertson v Smith* [1998] 4 VR 165 at 173-174. Once the presumption is displaced, the

proponent must prove affirmatively that the testator knew and approved of the contents of the document: *Barry v Butlin* at 484-485; 1091; *Cleare v Cleare* at 658; *Tyrrell v Painton* at 157, 159; *Nock v Austin* at 528.

[47] Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be "the most satisfactory evidence" of actual knowledge of the contents of the will: *Barry v Butlin* at 484; 1091; *Gregson v Taylor* [1917] P 256 at 261; *Re Fenwick* [1972] VR 646 at 652. What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case; for example in *Wintle v Nye* [1959] 1 WLR 284 the relevant circumstances were described (at 291) as being such as to impose "as heavy a burden as can be imagined". Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it. In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: *Fulton v Andrew* at 472; *Tyrrell v Painton* at 160. That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator: *Tyrrell v Painton* at 157, 160; Nock v Austin at 523-524, 528; *Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097 at [33]; *Dore v Billinghurst* [2006] QCA 494 at [32], [42].

[48] In this context the statements prescribing "vigilance" and "careful scrutiny" and referring to the court being "affirmatively satisfied" as to testamentary capacity and knowledge and approval are not to be understood as requiring any more than the satisfaction of the conventional civil standard of proof: see *Worth v Clasohm* at 453. What such statements do is emphasise that the cogency of the evidence necessary to discharge that burden will depend on the circumstances of each case and in particular the source and nature of any doubt or suspicion in relation to either of these matters: *Kantor v Vosahlo* at [22], [58]; *Dore v Billinghurst* at [44]. They also recognise that deciding whether a document is indeed a person's last will is a serious matter, so any decision about whether the civil standard of proof is satisfied should be approached in accordance with *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 or, now, s 140(2) of the *Evidence Act* 1995.

[49] It is then necessary to consider the relationship between the requirement that the will be that of a "free" as well as "capable" testator and the principles relating to the proof of undue influence. In this context undue influence means that the testator has been coerced into doing what he or she did not desire to do. What must be established is that execution was obtained by the exercise of "the power unduly to overbear the will of the testator": *Wingrove v Wingrove* (1885) LR 11 PD 81 at 82-83; *Baudains v Richardson* [1906] AC 169 at 184-185; *Craig v Lamoureux* [1920] AC 349 at 357; *Bailey v Bailey* at 571-572; *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 457 at [62] fn 55; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136; 14 BPR 26,867 at [60]-[64]. Where the will has been executed by a person of competent understanding and, judged by the circumstances of execution, "apparently a free agent", the burden of proving that the will was executed under undue influence is on the party who alleges it: *Boyse v Rossborough* (1857) 6 HL Cas 2 at 49; 10 ER 1192 at 1211; *Parfitt v Lawless*

(1872) LR 2 P & D 462 at 469; Craig v Lamoureux at 356-357; *Bailey v Bailey* at 571-572; *Trustee for the Salvation Army (NSW) Property Trust v Becker* at [76].

[50] In *Boyse v Rossborough* it was alleged that the will of the testator, Mr Colclough, had been obtained by undue influence or fraud of his wife. Mr Colcough had sent for his solicitor, in the absence of his wife given instructions for the preparation of the will and later executed it in the presence only of his solicitor and another disinterested witness. In those circumstances Lord Cranworth said (at 50; 1212) that the burden was on those challenging the will to show "that though what was done bore the semblance of being the voluntary act of Mr Colclough, yet it was an act which he was induced to perform under the influence of terror or fraud".

[51] Circumstances which may suggest undue influence or fraud will often also give rise to a suspicion or doubt as to the testator's knowledge and approval of the contents of the will. *Tyrrell v Painton* was such a case. There it was said by each of the members of the Court (at 157, 159) that those propounding the will must prove affirmatively knowledge and approval before the onus is cast on those who oppose the will to prove undue influence or fraud. For that reason it is appropriate, in the absence of good reason, to consider any issue as to suspicious circumstances and proof of knowledge and approval or testamentary capacity before addressing any ground of objection on which the opponent bears the onus: see the discussion in *McKinnon v Voigt* at 551, 557, 561-562. However, the principle which requires that the suspicion or doubt be cleared away is directed only to requiring that affirmative proof. It does not also require that any remaining suggestion of undue influence be disproved: *Low v Guthrie* [1909] AC 278 at 281-282; *Nock v Austin* at 528; *Vout v Hay* at [29]-[30]. At the same time, the absence of any allegation of undue influence or fraud does not prevent the opponent putting knowledge and approval in issue and vigorously challenging the veracity of those propounding the will: *Wintle v Nye* at 294.

[52] In *Boyse v Rossborough* Lord Cranworth (at 44-45; 1209) distinguished between a testator who knows and approves the contents of the will and executes it of his or her own volition and a testator who knows and approves the contents of the will but executes it as a result of coercion or fraud. To illustrate the difference he gave this example (at 44-45; 1209):

> "If I meet a man in the street, and he puts a pistol to my breast, and threatens to shoot me if I do not give him my purse, and to save my life I yield to his demand; or if a neighbour, meaning to steal my horse, asks for the loan of it, stating that he wants it in order to go to market, and trusting to this representation I deliver it to him, and then he rides off and sells it,-in both these cases it was my will to hand over the purse and the horse; but the law deals with the case as if they had been obtained against my will, my will having been the result in one case of fear, and in the other of fraud. The same principles must guide us in determining whether an instrument duly executed in point of form, so far as legal solemnities are concerned, is or is not a valid will."

[53] That analysis will not apply to all instances involving the exercise of undue influence or fraud. For example, coercion may result in the testator signing an instrument whose contents are to some extent unknown. Or the

testator may be mistaken as to the contents of the will as a result of fraud. In such cases the circumstances may also give rise to a suspicion or doubt as to knowledge and approval and the satisfaction of the requirement of affirmative proof would likely disprove the suspected undue influence or fraud. In the remaining cases, notwithstanding that the court may be satisfied that the testator appreciated what he or she was doing, there will still be a live issue as to whether what was done was as a result of coercion or fraud.

[54] In the several provinces of Canada, other than Quebec, the law in regard to testamentary capacity, undue influence, fraud, coercion and the formalities attendant on the execution of wills is governed by English statutes re-enacted with slight changes and by English usage and decisions: Rodney Hull et al, *Macdonell, Sheard and Hull on Probate Practice*, 3rd ed (1981) Carswell at 14. In a passage cited with approval by Sopinka J in *Vout v Hay* at [29], Crocket J, writing for the Court in *Riach v Ferris* [1934] SCR 725 at 736 [16] described the inter-relation between suspicious circumstances, knowledge and approval and undue influence as follows:

> "Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion by affirmatively proving that the testator did in truth appreciate the effect of what he was doing, there is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator. This, it seems to me, is the real effect of the three cases upon which the learned trial judge relied, and is precisely the principle stated by Lord Chancellor Cranworth in *Boyse v Rossborough* and distinctly approved by the Judicial Committee of the Privy Council in *Craig v Lamoureux* ... in which *Barry v Butlin*, *Fulton v Andrew* and *Tyrrell v Painton* were all considered ...".

[55] … [The] primary judge was correct to proceed on the basis that the suspicious circumstances rule does not operate at large. It operates to displace presumptions of fact in favour of those propounding the will. For that reason it is necessary to identify the presumption or presumptions to which particular circumstances are said to be relevant. With respect to the presumption as to knowledge and approval, those circumstances must be capable of throwing light on whether the testator knew and approved of the contents of the will. If they give rise to a doubt as to knowledge and approval, those propounding the will must dispel that doubt by proving affirmatively that the testator appreciated the effect of what he or she was doing. They do not have to go further and disprove any suspicion of undue influence or fraud. Approval in this context does not include that in addition to knowing what he or she was doing, the testator executed the will in the absence of coercion and fraud. The proponents having affirmatively established knowledge and approval, the onus of proving undue influence or fraud is on those alleging it. The appellants' arguments, which to a large extent are contrary to these propositions, are rejected."

56 Decisions bearing upon the validity of a will are often fact-sensitive even if all conventional formalities in the process of making a will have been observed. Although the validity of a testamentary instrument depends upon findings directed to a particular point in time (usually the time which an instrument is executed) an application of principles governing an assessment of validity may require an investigation of facts that play out over time. Context can be critical.

57 The Court is required by section 56(1) of the *Civil Procedure Act* 2005 NSW "to facilitate the just, quick and cheap resolution of the real issues in the proceedings".

Testamentary Capacity

58 The classic "test" for an assessment of testamentary capacity is found in the following passage of *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566 (with emphasis added):

> "The law of every country has … 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.
>
> It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, 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 his 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 judgment 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. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is a result; ought we, in such case, to deny to the testator the capacity to dispose of his property by will?

It must be borne in mind that **the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself**. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a **rational** disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the depravation of a right the value of which is universally felt and acknowledged. **If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property**, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, **ought not** to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. …"

59 Reproduction of the italicised passage in a broader setting (with emphasis on expressions such as "ought" and "rational and proper") lends weight to recent observations that the italicised criteria are not to be applied as if merely a

statutory formula: *Carr v Homershsm* (2018) 97 NSWLR 328 at [6] and [133]-[134].

60 Despite criticism that they have at times been construed or applied too narrowly, the *Banks v Goodfellow* criteria provide a logical framework for an assessment of testamentary capacity with their identification of the following elements:

(a) A competent testator must understand *the nature of a will and its effects*.

(b) A competent testator must understand *the extent of the property of which he or she is disposing*.

(c) A competent testator must be *able to comprehend and appreciate (that is, to weigh) the claims to which he or she ought to give effect*.

(d) A competent testator must *be free of any medical condition that prevents him or her from having, or duly exercising, those faculties in the making of a will*.

61 In *Carr v Homersham* (2018) 97 NSWLR 328 at [5]-[6] Basten JA characterised these elements in the following terms:

> "[5] Testamentary capacity is not a statutory concept but is derived from the case-law, from which the primary judge fairly took as his starting point the decision of Cockburn CJ in *Banks v Goodfellow*. The concept is sometimes divided into component parts, with affirmative and negative elements. The primary judge accepted that there were three affirmative elements, namely:
>
> > (a) the capacity to understand the nature of the act of making a will and its effects;
> > (b) understanding the extent of the property the subject of the will, and
> > (c) the capacity to comprehend moral claims of potential beneficiaries.
>
> [6] The negative elements, commonly identified in archaic language, do no more than identify the conditions which might be understood to interfere with full testamentary capacity. They include "disorders of the mind" and "insane delusions". Too much attention should not be paid to the precise language of

> the negative elements; importantly, although they tend to be expressed in general terms, they are only relevant to the extent that they are shown to interfere with the testator's normal capacity for decision-making."

62 The qualitative character of the *Banks v Goodfellow* criteria is implicit in their requirement that a testator be able to "understand", "comprehend" and "appreciate" certain things, in use of the word "ought" in identification of claims on a testator's bounty, and in the need for there to be consideration of whether there is a causal connection between any medical condition suffered by a testator and his or her will.

63 That qualitative character has led some to recast the criteria in terms of a formulaic guideline that a testator must be able "to remember, to reflect and to reason" about his or her testamentary arrangements: MS Willmott and CP Birtles, "Testamentary Dispositions – Wills and Codicils" (2016) 43 *Australian Bar Review* 62 at 82-83.

64 In *King v Hudson* [2009] NSWSC 1013 at [51] Ward J recorded the following submission made by Mr Willmott SC in the case before her:

> "[51] Mr Willmott referred in this context to the three "R's" adumbrated by Myers J (writing extra-judicially in the Australian Bar Gazette 1967 Vol 2 p 3), those being the need for the testator to have the capacity to remember, to reflect and to reason:
>
> > He must be able to remember, so that he can call to mind the property at his disposal and those who may have claims upon him, to reflect so that he can consult within himself on the relative weight of their claims, and to reason so that he can judge, having regard to his assets, how far, if at all, he should give effect to them.
>
> Mr Willmott emphasised that his Honour went on to say:
>
> > It is to be observed that it is not necessary for the testator to do any of those things. All that is required is that he should be able to do them and, if he can, his will will be valid no matter how unreasonable or capricious it may be. Testamentary dispositions are always relevant to the question of testamentary capacity, but I have never known a case in which they have done more than create suspicion on the one hand, or served to confirm capacity on the other."

65 This formulation is not far removed from the observations of Rich ACJ in *Timbury v Coffee* (1941) 66 CLR 277 at 280 (omitting citation of authority):

> "The issue of capacity is one of fact. … The question for the jury was: 'whether the testator was of sound and disposing mind and understanding when he made his will. That is the question which the wisdom of ages has framed, and, which as often as the question arises in courts of justice, and is put into form, in those words, it is put into form.' The factors of competency are that the party must know what he is about, have sense and knowledge of what he is doing, and the effect his disposition will have, knowledge of what his property was, and who those persons were that then were the objects of his bounty …"

66 Helpful though these approaches are in encouraging a beneficial view to be taken of the *Banks v Goodfellow* criteria (demonstrating the availability of different formulations of the concept of "testamentary capacity"), they do not displace the abstract logic of the criteria. One must still consider elements relating to the nature and effect of a will; available property; identification and weighing of claims; and medical impediments. These are foundational to a finding that an instrument constituted the duly expressed testamentary intentions of a free and capable testator.

67 "Testamentary capacity" and "knowledge and approval" are distinct concepts but, in practice, evidence bearing upon one concept may also be relevant to consideration of the other: *Mekhail v Hana* [2019] NSWCA 197 at [128]; *Drivas v Jakopovic* (2019) 100 NSWLR 505 at [75].

Knowledge and Approval

68 Upon a consideration whether a testator knew and approved the contents of his or her will, the focus for attention is whether the testator knew the contents of the will, and appreciated the effect of what he or she was doing, so that it can be said that the will contains the real intention and reflects the true will of the testator.

69 The principles governing the determination of a question whether a testator "knew and approved" the contents of a will are commonly summarised by reference to observations made by Isaacs J in *Nock v Austin* (1918) 25 CLR 519 at 528, here reproduced without citation of authority:

> "(1) In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and

> approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents.
> (2) Where any such suspicious circumstances exist, the assumption does not arise, and the proponents have the burden of removing the suspicion by proving affirmatively by clear and satisfactory proof that the testator knew and approved of the contents of the document.
> (3) If in such a case the conscience of the tribunal, whose function it is to determine the fact upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the document does contain the real intention of the testator, the Court is bound to pronounce its opinion that the instrument is not entitled to probate.
> (4) The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will.
> (5) But the rule does not go further than requiring vigilance in seeing that the case is fully proved. It does not introduce a disqualification.
> (6) Nor does the rule require as a matter of law any particular species of proof to satisfy the onus.
> (7) The doctrine that suspicion must be cleared away does not create 'a screen' behind which fraud or dishonesty may be relied on without distinctly charging it."

70 Having acknowledged these principles Hallen J, in *Romascu v Manolache* [2011] NSWSC 1362 at [204]-[205], made the following observations:

> "[204] Traditionally, a two stage approach to the evidence may be adopted where knowledge and approval is in issue. The first stage is to ask whether the circumstances are such as to "excite suspicion" on the part of the court. If so, the burden is on the propounder of the Will to establish that the deceased knew and approved the contents of that Will. If the circumstances do not "excite suspicion", then the court presumes knowledge and approval in the case of a Will that has been duly executed by the deceased who had testamentary capacity.
>
> [205] When considering whether circumstances that excite suspicion exist, the court looks at a number of factors including the circumstances surrounding the preparation of the propounded Will; whether a beneficiary was instrumental in the preparation of the propounded Will; the extent of the physical and mental impairment, if any, of the deceased; whether the Will in question constitutes a significant change from a prior Will; and whether the propounded Will, generally, seems to make testamentary sense. Suspicion engendered by extraneous circumstances arising subsequent to the execution of the propounded Will is not a reason for rebutting the presumption arising from the due execution of a Will regular on its face: *In re R (dec'd)* [1950] 2 All ER 117, at 121."

71 Whether "a two stage approach to the evidence" (reflective of probate presumptions) is required in a particular case may depend upon "the real issues" for determination in the particular proceedings. This was implicitly

recognised by Hallen J in *Blendell v Byrne* [2019] NSWSC 583 at [432]-[433] by reference to *Gill v Woodall* [2011] Ch 380 at [22], earlier extracted.

72 Where suspicious circumstances exist, for a court to be satisfied that a testator knew and approved the contents of a will it must be satisfied that the will reflects his or her "real" intention or his or her "true" will. The issue is not necessarily resolved by a finding that the testator read the will himself or herself before its execution. The strength of an inference of knowledge and approval that arises from the reading over of a will by, or to, a testator can depend on the complexity of the will. Where there are suspicious circumstances, a finding that a testator did or did not know and approve of its contents may require an assessment of the degree of suspicion, the capacity of the testator to understand its contents, and whether the testator both knew and approved of its contents such that it represents his or her "real" testamentary intentions: *Stojic v Stojic* [2018] NSWCA 28 at [133]-[136].

73 To establish a testator's knowledge and approval of the contents of a will, it is not necessary to establish that he or she understood each and every clause of the will. It is sufficient to establish that the testator understood the practical effect of the central clauses in the instrument, including the dispositions of property effected by the will and implications for the estate of the appointment of those who are to administer it: *Gerovich v Gerovich* [2021] WASC 77 at [36].

74 "Knowledge and approval" is conceptually distinct from each of "undue influence" and "fraud"; but, in practice, those who oppose the admission of a testamentary instrument to probate sometimes seek to advance an allegation of "undue influence" or "fraud" under cover of a challenge to a testator's knowledge and approval coupled with an expansive allegation of "suspicious circumstances".

75 Care needs to be taken not to permit this or to fall into the trap of elevating an allegation of "suspicious circumstances" into a stand-alone ground of opposition to the validity of a will. Properly understood, an allegation of

"suspicious circumstances" simply serves to put the Court and a propounding party on notice of facts that may bear upon an assessment of a testator's "knowledge and approval" or, perhaps also, his or her "testamentary capacity".

76 Conceptually, the grounds for opposition of an application for admission of a testamentary instrument to probate are generally limited to an allegation of a want of testamentary capacity, an allegation of a want of knowledge and approval, an allegation of undue influence or an allegation of fraud: *Veall v Veall* (2015) 46 VR 123 at [198].

Undue Influence

77 A classic exposition of the law relating to undue influence in probate is found in *Winter v Crichton; Estate of Galieh* (1991) 23 NSWLR 116 at 121C-122G. In propositional terms, as summarised in the headnote, the case is authority for the proposition that, where it is alleged that a will apparently regularly executed and made by a person of competent understanding is challenged on the ground of undue influence:

(a) the burden of proving that it was executed under undue influence lies on the party who asserts it;

(b) the undue influence which must be shown to avoid the will must amount to force or coercion destroying a free agency; and

(c) where what is relied upon is a purely circumstantial case, the person asserting undue influence must go further than merely establishing the circumstances from which it is sought to have the inference drawn; there must be proof that undue influence was exercised and that by means of its exercise the will was produced.

78 In summary terms, undue influence in probate is commonly equated with "actual coercion"; that is, "coercion" established without reliance on any form

of presumption such as is commonly found upon a consideration of "undue influence" upon an exercise of equity jurisdiction. An illustration of this, omitting citation of authority, is found in *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66 at [62]-[63] per Gaudron, Gummow and Kirby JJ:

> "[62] The position taken by courts of probate has been that to show that a testator did not, by reason of undue influence, know and approve of the contents of the instrument propounded as a testamentary instrument, 'there must be - to sum it up in a word – coercion'. The traditional view, repeated by Sir Frederick Jordan, has been that a court of equity will not, on the ground of undue influence as developed by the Court of Chancery, set aside a grant made by a court of probate.
>
> [63] The approach taken in the probate jurisdiction appears to be concerned with the existence of a testamentary intention rather than the quality of that intention or the means by which it was produced. It is a concern of this latter nature which finds expression in the treatment by equity of dispositions *inter vivos*. …"

79 Although "probate" undue influence is primarily concerned with coercion, one does not have to prove actual force, violence or threats of violence. Rather, it is sufficient that any form of pressure be asserted upon the will-maker so as to overpower his or her will. That pressure can arise in many forms. Classic expositions of this can be found in *Hall v Hall* (1868) LR 1 P & D 481 at 482; and *Wingrove v Wingrove* (1885) 11 PD 81.

80 The headnote for *Hall v Hall* summarises the law: "persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of a testator, will constitute undue influence, though no force is either used or threatened." An elaboration of that proposition is found in the report's transcript of a direction given by Sir James Wilde (later Lord Penzance) to a jury on the question of undue influence in probate:

> "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, – these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist,

moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and not the record of someone else's."

81 To like effect is the transcript of an address to a jury by Sir James Hannen (later Lord Hannen) in *Wingrove v Wingrove*:

> "Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this Court, that there is no subject upon which there is a greater misapprehension.
>
> The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word 'influence'; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.
>
> To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence.
>
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quiteness' sake, to do anything. This would equally be coercion, though not actual violence.
>
> These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else

> offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it'.
>
> If therefore the act is shewn to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence.
>
> There remains another general observation that I must make and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced."

82 A finding that the execution of a will has been procured by the undue influence of another does not require a finding of impropriety on the part of the other: *Petrovski v Nasev* [2011] NSWSC 1275 at [269]; *Blendell v Byrne* [2019] NSWSC 583 at [459].

83 In *Bracher v Jones* [2020] NSWSC 1024 at [468]-[475] Robb J found that the execution of a will by an elderly lady of doubtful testamentary capacity was procured by undue influence. At paragraphs [468]-[469] and [475] his Honour made the following observations (with emphasis added):

> "[468] If I am correct in my conclusion that Mrs Jones lacked testamentary capacity, then the 19 June 2013 will cannot be upheld. Even if I am wrong in that regard, I remain strongly of the view that Mrs Jones' capacity could only be considered to have been marginal in the actual circumstances in which the will was made. *I consider that her circumstances made her in fact vulnerable to her will being overborne by incessant demands in circumstances where she would have had great difficulty in independently processing and assessing the validity of the reasons given by Stephen in support of the demands*.
> [469] I have concluded that as a real, practical matter, the only way of explaining the making and the terms of the 19 June 2013 will is that, in Mrs Jones' weakened state, she was not able to resist Stephen's demands.
> …
>
> [475] In my view, *constant importuning of an old and weakened person, with compromised testamentary capacity, is capable of overbearing the will of that testator, as much as more blatant forms of coercion*. Here, I do not refer to the mere taking advantage of some relationship of influence under which the other party is susceptible. *I refer to the situation where the testator effectively gives up and abandons free agency in order to stop being subject to incessant demands*. A finding of undue influence for probate purposes may

> not be available where there is a basis for concluding that the testator has ultimately been persuaded to accept the demands of the particular beneficiary, even though the reasons given in support of the demands are wrong and unsupportable. *The question is whether, in reality, the testator has made a "free" decision*. However, where no reason can be found in the evidence that can explain the abandonment by a weakened and susceptible testator of the testator's long-term cardinal testamentary intention, in the face of demands that are both incessant and obsessive, a conclusion of practical coercion may be available. That is the finding that I make in this case."

84 The intervention of a solicitor in preparation of the impugned will did not in that case (or in *Dickman v Holley* [2013] NSWSC 18) preclude a finding of undue influence.

Fraud

85 Although there is no allegation in these proceedings that the deceased's execution of a will or codicil was procured by fraud, recognition of the field of operation of "fraud" in probate proceedings is important to distinguish the concept from the concepts of "undue influence" upon an exercise of probate or equity jurisdiction. That can be done conveniently by noting the observations of the Court of Appeal in *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 at [61]-[69]:

> "[61] It is important, however, to appreciate that undue influence and fraud are two fundamentally different concepts.
>
> [62] Before identifying the principal difference, I would note that the equitable doctrine of undue influence does not apply to testamentary gifts: *Boyce v Rossborough; Craig v Lamoureux* [1920] AC 349; *Winter v Crichton; Estate of Galieh* (1991) 23 NSWLR 116. Importantly, probate undue influence differs from the equitable doctrine of undue influence under which the donor may fully intend and desire the transaction even though an inference of undue influence may arise: *Bridgewater v Leahy* (1998) 194 CLR 457 at 475 per Gaudron, Gummow and Kirby JJ.
>
> [63] Undue influence, in a probate context, is constituted by conduct that overbears the will of the testatrix so that she makes the will without intending and desiring the disposition made thereby. The circumstances must be such that the disposition is not regarded as the free and voluntary act of the testatrix. The volition of the testatrix must be overpowered so that her mind does not accompany her act in making the will. The point was put succinctly in *Wingrove v Wingrove* (1885) 11 PD 81 by Hannen P (at 82):
>
> "[i]t is only when the will of a person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence".

See also *Hall v Hall* (1868) LR 1 P & D 481 where Sir J P Wilde, at 482, described undue influence as the overpowering of the volition without convincing the judgment.

[64] The basic point is that, to prove undue influence, it must be shown that the testatrix did not intend and desire the disposition. It must be shown that she has been coerced into making it. See, generally, *Boyse v Rossborough; Buckley v Maddocks* (1891) 12 LR (NSW) Eq 277 at 282 per Stephen J; *Winter v Crichton; Estate of Galieh*.

[65] On the other hand, fraud, sufficient to result in the invalidation of a testamentary instrument, is concerned with misleading or deceptive conduct. With fraud, there is no overpowering of the volition, no coercion. Whereas undue influence coerces a testatrix, fraud misleads her.

[66] Fraud embraces a wide category of conduct affecting testamentary disposition. Relevantly, as regards the present case, in *The Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, 12 June 1992), Powell J (at 15) gave the following example of fraud capable of invalidating a will:

"wilfully false statements, or the suppression of material facts, intended, either, to gain for oneself benefits under a will, or to prevent benefits being received by a natural object of the testator's bounty."

[67] In *White v White & Cato* (1862) 2 Sw & Tr 504, Sir Cresswell Cresswell distinguished between undue influence and fraud. He observed that there had been a plea of undue influence in the case but no clear plea of fraud. He is reported, at 506, as having said to counsel:

"If you intend to charge the plaintiff with having obtained the execution of this will by instilling into the mind of the deceased false and delusive notions respecting the conduct of the defendant, this is tantamount to a charge of fraud, and you should have placed on the record a plea charging her with having obtained it by fraud."

68 In *Riding v Hawkins* (1889) 14 PD 56, the court distinguished between undue influence and fraud and required fraud to be separately pleaded.

69 There are suggestions in In the *Estate of Fuld* (at 672) and *Re Stott* [1980] 1 All ER 259 that it may not be necessary to make positive allegations of fraud in probate cases. I disagree with that approach. It is contrary to the modern notion of justice as well as the surprise rule. Consistent with the modern attitude to allegations of fraud, generally, in probate actions fraud must be explicitly pleaded."

CONCLUSION

86 When viewed through the prism of evaluative reasoning, the probate and family provision jurisdictions have more in common than is sometimes realised. It is no accident that, whatever the precise language of family

provision legislation, expressions such as “proper” and “ought” are never far removed from decision making about whether a testamentary instrument should be admitted to probate or its operation should be modified by a family provision order.

87 Under Australia’s law of succession, probate law recognises “testamentary freedom” in each autonomous individual, but an exercise of family provision jurisdiction serves as a community constraint in management of an orderly process of property passing on death from one person to another.

88 In their exercise, both the probate and the family provision jurisdictions require practical wisdom in management of the affairs of an individual living, and dying, in community.

GCL

15 June 2021