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THE GROUNDS FOR “CHALLENGING A WILL”– A CLOSED CLASS?

by

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INTRODUCTION

- 1 The idea that a “will” may be “challenged” depends for meaning on the context in which it is encountered. The object of this paper is to explore the basic idea of a “will” under “challenge” in a variety of contexts intended to demonstrate the nature, scope and adaptability of “probate law” as an integral part of the law of succession in NSW.

- 2 In speaking of a “will”, the paper does not distinguish between a “will” and a “codicil”. Both are testamentary instruments. In contemporary understanding, the latter is but a subsidiary form of will which generally serves to amend or confirm a will. The formalities attending admission of a codicil to probate are the same as those attending admission of a will to probate. A codicil is but a “will” by another name.

WHAT IS A “WILL”?

- 3 In a legal environment in which legislation abounds, there is no statutory definition of the word “will” that does not assume a basic understanding of the underlying concept.

- 4 Section 3(1) of the *Succession Act* 2006 NSW defines a “will” as *including* “a codicil and any other testamentary disposition”.
- 5 Section 3(1) of the *Probate and Administration Act* 1898 NSW is more elaborate, but not much more informative. It provides that “‘Will’ extends to a testament and to a codicil and to any appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of the Imperial Act twelfth Charles the Second, chapter twenty-four, and to any other testamentary disposition.”
- 6 Succession law presents layers of complexity which often tempt an antiquarian mindset into a study of legal history. However, probate law is profoundly practical, pragmatic and, in concept, functional. A full understanding of this observation cannot readily be had without an appreciation of the different historical origins, cultural traditions, procedural imperatives, functional purposes and boundaries of jurisdictions now variously described as protective (formerly lunacy) jurisdiction; probate (formerly ecclesiastical) jurisdiction; equitable jurisdiction; common law jurisdiction; and family provision jurisdiction.
- 7 The days have long passed since the word “will” was confined in meaning to a testamentary disposition of *real* property, reserving the word “testament” to describe a testamentary disposition of *personal* property. In the modern era, the word “will” is used to refer to an instrument providing for the testamentary disposition of property of *any* description although, in deference to custom, a formal “will” may be entitled “The Last Will and Testament” of the will-maker (a testator or testatrix, as the case may be).
- 8 The functionality of probate law focuses on two principal objects: (a) ascertaining and giving effect to the testamentary intentions of a will-maker; and (b) the due administration of the deceased estate of a will-maker, subject to such (if any) orders as might be made by the Court upon an exercise of family provision jurisdiction under Chapter 3 of the *Succession Act* 2006.

- 9 Amongst contemporary NSW succession law practitioners, a “will” is commonly thought of as: (a), “a formal will” compliant with section 6 of the *Succession Act 2006 NSW*; (b) “an informal will”, governed by section 8 of the Act; or (c) “a statutory will”, authorised by an order of the Supreme Court made by reference to sections 18-26 of the Act.
- 10 Each of these particular concepts, in one way or another, is a creature of statute. The bare concept of a “will” remains undefined.
- 11 Confining the concept to the realm of property law (its major field of operation), a “will” might be defined, in general terms, as a statement by a natural person of his or her intention (for disposition of his or her property upon death), taking effect on death, remaining revocable until that time: RS Geddes, CJ Rowland and Paul Studdert, *Wills, Probate and Administration in NSW* (LBC Information Services, 1996), paragraphs [3.01]-[3.03]; Mason and Handler, *Succession Law and Practice in NSW* (LexisNexis Butterworths, Looseleaf Service), paragraph [s3.5].
- 12 This paper does not explore use of a will for purposes other than dispositions of property, such as the appointment of a testamentary guardian; the bare appointment of an executor; a non-binding statement of wishes; or a political testament. It is important, nevertheless, to be reminded from time to time that (in the infinite variety of social experience) a will might be deployed for purposes other than a disposition of property.
- 13 Current NSW law does not countenance an “oral will” unattended by formality. Section 6(1) of the *Succession Act* provides that “a will is not valid” unless compliant with formal requirements specified in that section or it takes the form of a “statutory will”, authorised by an order of the Court made under section 18 of the Act. Section 8 provides for an informal will to be a deceased person’s “will”, if the Court is satisfied that the person intended it to be so. The concept of a “nuncupative will” has no place in current NSW law.

- 14 That said, in an age of technology, with recording equipment close at hand for most people, an “informal will” can be made *via* a video or other form of electronic recording: eg, *Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107.
- 15 On one view, NSW can also be said to accommodate an “oral will”, indirectly, *via* a claim made to property comprising a deceased estate, or part of a deceased estate, based upon an allegation of a “contract to make a will” (*Birmingham v Renfrew* (1937) 57 CLR 666) or an allegation of estoppel to similar effect (*Giumelli v Giumelli* (1999) 196 CLR 101).
- 16 These avenues for a claim to estate property are not uncommon. However, neither of them fits neatly, without qualification, into the mould of a “will”. One requires proof of a contract – a legally enforceable agreement, intended to create legal relations and supported by consideration. The other requires clarity in a representation, undertaking, promise or the like by the (prospective) “deceased”, coupled with detrimental reliance on the part of the person claiming estate property. Each of them, in modern parlance, is a “cause of action” upon a claim to estate property rather than a will.
- 17 They are, nevertheless, more common in practice than a claim based on the concept of *donatio mortis causa* (a gift made in contemplation of the donor’s death, conditional upon the donor’s death, accompanied by a delivery of the subject matter of the gift or transfer of the means or part of the means of getting at the property or a transfer of the indicia of title to the property): *Dufficy v Mollica* [1968] 3 NSW 751; *Public Trustee v Bussell* (1993) 30 NSWLR 111 at 115G. Such a gift is, perhaps, the ultimate death-bed will.
- 18 Given the extent to which enduring powers of attorney are these days *misused* by attorneys in order to effect a “succession” to property *via* an *inter vivos* transaction, one imagines that the lay community sometimes confuses an enduring power of attorney with a will: eg, *Smith v Smith* [2017] NSWSC 408. Whichever that may happen, equity lawyers need to remain informed about the metes and bounds of fiduciary law.

WHAT IS MEANT BY A “CHALLENGE” TO A WILL?

- 19 What is required in order to “challenge” a will depends, at least to some extent, upon what is meant by the concept of a “will”.
- 20 In the context of a “**formal will**”, it is customary for succession law practitioners to distinguish between the “formal validity” and the “essential validity” of a will.
- 21 The distinction is easy enough to understand in the context of consideration of whether the formalities of section 6 of the *Succession Act* have, or have not, been complied with. On the one hand a challenge to a will focusses upon compliance with section 6. On the other hand, a challenge focusses on such things as “testamentary capacity” to make a will and a will-maker’s “knowledge and approval” of a will said to have been made.
- 22 The distinction is less clear if one wanders away from fixed contrasts of that nature. Territory in the middle ground is arguably occupied by restrictions on the beneficial entitlements of a witness to a will (*Succession Act*, section 10; *Miller v Miller*; *Estate Miller* (2000) 50 NSWLR 81) or by the terms upon which a will may be revoked by marriage or divorce (*Succession Act*, sections 12-13; *Re Estate Grant, deceased* [2018] NSWSC 1031; *Hoobin v Hoobin* [2004] NSWSC 705; *Layr v Burns Philp Trustee Co. Ltd* (1986) 6 NSWLR 60).
- 23 A distinction between “formal validity” and “essential validity” is but an analytical tool designed to focus attention on the need to focus upon *both* the formal requirements for a will prescribed by legislation *and* the broader character of a “will”.
- 24 In practical terms, a challenge to the formal validity of a will is less significant than was once the case because of the breadth of the Court’s power to admit a “document” to probate as an “informal will”.
- 25 The fact remains that a “challenge” to a “will” of a particular description can take the form of a denial that there has been compliance with legislative

imperatives governing the particular form of will, coupled with reliance upon the onus of proof borne by a person who propounds a will.

- 26 Whether an application for admission of an “**informal will**” to probate is properly characterised as a “challenge” to a will is doubtful because it seems to put the cart before the horse. An informal document bears the character of a “will” only if, and when, the Court is satisfied that statutory criteria have been met: *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [141]; *Estate Angius* [2013] NSWSC 1895 at [260]; *Estate Moran*; *Teasel v Hooke* [2014] NSWSC 1839 at [26]-[28]. However, perhaps only a lawyer would think in these terms. The lay community may well be prepared to call an informal document a “will” well before a succession law practitioner can do so.
- 27 The circumstances in which a “**statutory will**” is made generally do not lend themselves readily to a post-death “challenge”: *GAU v GAV* [2016] 1 Qd R 1; *Re K’s Statutory Will* (2017) 96 NSWLR 69; *Re Fenwick* (2009) 76 NSWLR 22; *Re The Will of Bridget* [2018] NSWSC 1509. A court-authorized will is generally made in anticipation of death, in close proximity to it, on notice to persons who might otherwise be expected to challenge its validity.
- 28 This is not a universally true proposition, however. Statutory wills are increasingly made, and likely to be made, for children and young people who are recipients of substantial personal injury compensation and are unlikely ever to have testamentary capacity.
- 29 Perhaps a challenge to a will of that description is likely to occur in the form of a fresh application for a statutory will after there has been a change in the circumstances of the person on whose behalf a will has been authorised by the Court.
- 30 Orders authorising a statutory will for a person possessed of a substantial life expectancy should, if practicable, include a mechanism for review defined by a specified period or a significant change of circumstances.

- 31 This type of case might be a rare exception to the proposition that the validity of a will is not open to challenge during the lifetime of the will-maker because a will ordinarily does not take effect until the will-maker's death.
- 32 Amongst lay people generally a "challenge to a will" probably translates, in legalese, to **an application for a family provision order** made under Chapter 3 of the *Succession Act* 2006. Only a succession law practitioner would quibble with this because the practical effect of a family provision order is to displace a will, and (by virtue of section 72 of the *Succession Act*) such an order does generally take effect, *vis a vis* a testate estate, as a codicil.
- 33 A succession law practitioner naturally knows that an application for family provision relief can be made whether the deceased person whose estate is under challenge died with a will (testate) or without one (intestate). Nevertheless, one might be tempted to speak of a "challenge to will" even in the context of **an intestacy** – treating Parliament's "intestacy rules" (Chapter 4 of the *Succession Act*) as a surrogate form of will.
- 34 That might be a bridge too far for a succession law specialist; but it is not altogether far fetched, and it leads to these observations. First, some people choose not to make a will and, for them, the intestacy rules are a state sanctioned substitute for a will, the nearest thing we have to an expression (or presumed expression) of testamentary intentions. Secondly, a family provision application is not the only form of challenge to an intestacy that is available. A claim to a discretionary form of "distribution order" can be made in respect of an estate involving "multiple spouses" or an Indigenous intestate (*Re Estate Wilson, deceased* (2017) 93 NSWLR 199; *In the estate of Mark Edward Tighe* [2018] NSWSC 163; *Re Estate Jerrard, deceased* [2018] NSWSC 781); and a spouse may have special rights, sometimes within the power of the Court to regulate, regarding an acquisition of estate property (*Hoobin v Hoobin* [2004] NSWSC 705; *Re Estate Grant, deceased* [2018] NSWSC 1031).

- 35 If the intestacy rules can fairly be characterised as a “will” substitute, then these various forms of court procedure affecting the administration of an intestate estate provide opportunities for such a “will” to be challenged.
- 36 When succession law practitioners contemplate a “challenge” to a will they may mean **assertion of a claim that estate property is held on trust** by reason of (a) a contract to make a will; (b) a claim grounded upon estoppel; (c) mutual wills; or possibly (d) a claim based upon an allegation of undue influence in equity.
- 37 One should hesitate before speaking exhaustively about available grounds for a challenge to a will. The common law system of jurisprudence enjoyed by Australia does not lend itself to such analyses. Where, for example, does an application of the common law “forfeiture rule” (adapted by the *Forfeiture Act* 1995 NSW) fit in? See *Re Settree Estates; Robinson v Settree*. [2018] NSWSC 1413. Every case needs to be considered on its own facts, in light of “public policy” and any application made under the *Forfeiture Act* 1995. A person who unlawfully kills another might forfeit his or her entitlements flowing from the estate of the deceased, but the consequences of a forfeiture may require close consideration of the law of trusts: eg, *Egan v O’Brien* [2006] NSWSC 1398.
- 38 However, “trust claims” of any description are likely to be distinguished from a “probate suit” in which **the “essential” validity of a formal will is challenged on one or more of established grounds.**
- 39 Conservatively, those grounds comprise the following forms of allegation:
- (a) An allegation that, at the time a will was made, the will-maker lacked “*testamentary capacity*”.
 - (b) An allegation that a will was not made with “*knowledge and approval*” of the contents of the will on the part of the will-maker.

- (c) An allegation that a will was obtained by an exercise of “*undue influence*” (meaning “*coercion*”) on the part of an identified individual or individuals.
- (d) An allegation that a will was obtained by the “*fraud*” of an identified individual or individuals.

40 Not uncommonly, one finds a further allegation of “**suspicious circumstances**” surrounding the making of a will sufficient 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.

41 Strictly, an allegation of “suspicious circumstances” may fall short of true characterisation as a ground of challenge to the validity of a will; but, mostly, no harm is done by enumeration of “suspicious circumstances” surrounding the execution of a will and, not uncommonly, their enumeration tends to crystallise questions in dispute in a probate suit.

42 However, once one enters upon questions about “onus of proof” and “presumptions” in a probate suit, one enters territory encumbered by an appearance of technicality beyond common understanding.

ONUS OF PROOF AND “PRESUMPTIONS” : THE TRADITIONAL PARADIGM

43 A convenient exposition of the law governing proof of a will (largely founded upon *Bailey v Bailey* (1924) 34 CLR 558 at 570 *et seq*) is the summary of Powell J in *Re Estate of Paul Francis Hodges deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707, here reproduced in an edited form without citation of authority (acknowledging that the formalities attending the execution of a will have been modified by section 6 of the *Succession Act* since Powell J summarised the law):

- [1] **The onus of proving that a document is the will of the alleged testator lies on the party propounding it; if that is not established, the Court is bound to pronounce against the document.**
- [2] **This onus means the burden of establishing the issue; it continues during the whole case, and must be determined upon the balance of the whole of the evidence.**
- [3] **The proponent's duty is, in the first instance, discharged by establishing a *prima facie* case.**
- [4] **A *prima facie* case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator.**
- [5] **The first step in establishing a *prima facie* case is proof that the will was duly executed, that is to say:**
- (a) that it was signed by the testator, or by some person in his presence and by his direction;
 - (b) that such signature be at the foot or end of the will;
 - (c) that such signature be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;
 - (d) that such witnesses attest and subscribe the will in the presence of the testator;
- [6] **Where what is propounded as a will comprises more than one sheet of paper, it is not necessary that every sheet be signed, although it was, at one time, held that, for the prevention of fraud, the sheets must, at the time of execution, be attached in some way..., although as time went by the degree of 'connection' insisted upon seems progressively to have been relaxed; if, however, the pages are authenticated beyond doubt, there appears to be no reason why 'connection' at the time of execution need to be insisted upon.**
- [7] **A testator's signature is sufficiently 'made' in the presence of the attesting witnesses if the signature was in fact made in the presence of witnesses who either saw, or had the opportunity to see, the testator writing, even though they did not actually see the signature itself.**
- [8] **A testator's signature is sufficiently 'acknowledged' in the presence of the attesting witnesses if, by word or gesture, the testator invites the witnesses to sign his will, or witness his signature *and* the witnesses either see, or have the opportunity of seeing, the testator's signature.**
- [9] **Unless suspicion attaches to the document propounded, the testator's execution of it is sufficient evidence of his knowledge and approval.**

[10] **Facts which may well cause suspicion to attach to a document include:**

- (a) **that the person who prepared, or procured the execution of, the document receives a benefit under it.**
- (b) **that the testator was enfeebled, illiterate or blind when he executed the document.**
- (c) **where the testator executes the document as a marksman when he is not.**

[11] **Where there is no question of fraud, the fact that a will has been read over to, and by, a capable testator is, as a general rule, conclusive evidence that he knew and approved of its contents.**

[12] **The *locus classicus* for the test of whether or not a person has testamentary capacity is the judgment of Cockburn C J in *Banks v Goodfellow* (1870) LR 5 QB 549) in which case his Lordship said (at 565):**

‘... it is essential to the exercise of such a power’ (scil, testamentary power) ‘that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about it a disposal of it which, if the mind had been sound, would not have been made.’

[13] The test of what the law, in this context, at least, regards as ‘a disease of the mind’, or ‘an insane delusion’, was discussed by Sir JP Wilde (as Lord Penzance then was) in *Smith v Tebbitt* (1867) LR 1 P&D 354; 398) in which his Lordship said (at 402-403):

‘It is, no doubt, true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may therefore be called ‘delusive’. But what I want to convey on this head is that the question of insanity and the question of ‘delusions’ is really one and the same – that the *only* delusions which prove insanity are insane delusions – and that the broad enquiry into mental health or disease cannot, in all cases, be either narrowed or determined by any previous or substituted enquiry into the existence of what are called ‘delusions’.

Although made in the light of then existing medical knowledge, his Lordship’s statement does not appear to differ, in substance, from the latter-day psychiatrist’s test of what is a ‘delusion’, that is, that it is not capable of rational explanation or amenable to reason, and that it is not explicable by reference to the subject person’s education or culture.’

[14] **A duly executed will, rational on its face, is presumed, in the absence of evidence to the contrary, to be that of a person of competent understanding; sanity is to be presumed until the contrary is shown.**

[15] **Facts which, if established, may well provide evidence to the contrary, include:**

(a) **the exclusion of persons naturally having a claim on the testator's bounty;**

(b) **extreme age or sickness, or alcoholism.**

In relation to the former of these two matters, however, it is appropriate to record that, in the speech of Erskine J, when delivering the advice of the Judicial Committee in *Harwood v Baker* (1840) 3 Moo PC 282; 13 ER 117, the following passage appears (at 290-291; 120):

'... the question which their Lordships propose to decide in this case, is not whether Mr Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting those whose relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

If he had not the capacity required, the propriety of the disposition made by the Will is of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, although the justice or injustice might cast some light upon the question as to his capacity.'

[16] **However, while extreme age or grave illness will call for vigilant scrutiny by the Court, neither (even though the testator may [be] in extremis) is, of itself, conclusive evidence of incapacity; it will only be so if it appears that age, or illness, has so affected the testator's mental faculties as to make them unequal to the task of disposing of his property...."**

44 This summary is out of date in its description of the specific requirements of "due execution" (now governed by section 6 of the *Succession Act*) but it does capture a conventional view of the role of a "presumptions" in connection with the foundational proposition that the onus of proving that a document is the will of a testator lies on the party propounding it.

- 45 With the widespread resort to “informal wills”, the tendency of the modern mind might be to move away from formal “presumptions” bearing upon “onus of proof” and towards treating “presumptions” as inferences drawn, on the basis of common experience, arising from proof of particular facts: *Carr v Homersham* [2018] NSWCA 65 at [46]-[47]; *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107 at [18]-[24]. With a modern form of “judge alone (case managed) trial” (that is, a final hearing and determination of proceedings without a jury), heard on affidavit evidence read on both sides of the record before deponents are cross examined, with documents able to be admitted into evidence at any time during the “trial” subject only to considerations of procedural fairness, it can be artificial to analyse a case, at that time, in terms of a “*prima facie* case” or dispositive “presumptions”. By the time a judge is called upon to determine a case, it generally must be determined on all the evidence then before the Court, drawing whatever inferences may be available from that evidence. Talk of a “*prima facie* case” is more apt to a jury trial or an interlocutory procedure (eg, upon an application for an order that a caveat cease to be in force) than it is to a modern form of final hearing in the Equity Division.

THE CENTRAL QUESTION

- 46 In many cases, parties contesting a will need to focus greater attention on a particular question: *Is the Court satisfied that an instrument propounded is the last will of a free and capable testator?*
- 47 Formalities aside, this is generally the single, ultimate question for the Court’s determination: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44].
- 48 In this formula, the word “last” is customary but, in theory, unnecessary. Expressed in the abstract, the question is whether a particular instrument is “the will” of a free and capable testator?
- 49 A tendency, in dealing with formal wills, to define questions in dispute by reference only to the traditional grounds for challenging the essential validity

of a will (testamentary incapacity, lack of knowledge and approval, undue influence and fraud) sometimes obscures the ultimate question.

- 50 This is, perhaps, particularly the case in a challenge to the testamentary capacity of a will-maker. The standard test for testamentary capacity identified by reference to *Banks v Goodfellow* is remarkably adaptable and useful in focusing discussion – particularly the discussion of forensic medical experts – but too heavy an emphasis on the several elements of the test can obscure the larger perspective which needs to be kept in view, and the broader view of the Court’s role discernible in the page or so of *Banks v Goodfellow* before the classic quotation. The criteria in *Banks v Goodfellow* invite consideration in a commonsense way (*Zorbas Sidiropoulos [No. 2]* [2009] NSWSC 197 at [64]-[65], [94] and [99]), mindful that they are not prescribed by statute (*Carr v Homersham* [2018] NSWCA 65 at [132]).
- 51 If kept in view, the larger question reminds one of the potential breadth of the traditional grounds for challenging the validity of a will. They are more flexible than mere recitation of pithy formulae might suggest. That is how, in an appropriate case, “drunkenness” can fit into “testamentary incapacity” (*Timbury v Coffee* (1941) 66 CLR 277); “knowledge and approval” can accommodate a case of mistake (*Geddes, Rowland and Studdert*, paragraph [5.15]); and, against expectations, a case of “probate” undue influence can be made out (*Petrovski v Nasev* [2011] NSWSC 1275 at [263]-[277] and [308]-314; *Dickman v Holley* [2013] NSWSC 18 at [162]).
- 52 An exercise of probate jurisdiction requires attention at more than one level. A “micro” perspective is necessary to negotiate the various types of “rules” (some formal, others customary) which provide guidance in decision making. A “macro” perspective is necessary to ensure that decision making is informed by the purpose for which the Court’s jurisdiction exists. Each perspective provides an opportunity for a “reality check” on decision making.

PRACTICE AND PROCEDURE IN PROBATE LITIGATION

- 53 In considering the nature of a “challenge” to a “will”, and the opportunities for such a challenge, there is a need to understand idiosyncratic features of probate litigation, and the necessary connection between probate litigation and the law of wills, within the broader domain of succession law.
- 54 Probate litigation has several distinctive features (apart from an ever-present, potential need to evaluate evidence concerning the conduct or words of a person, of persons, “absent” by reason of death or incapacity):
- (a) The law of wills is necessarily linked with an exercise of the probate jurisdiction of the Supreme Court because, if a will is to be given full legal effect, it needs to be “proved” to be the last will of a free and capable testator, proof of which is signified to the public by admission of the will to probate by an order of the Court.
 - (b) Probate law straddles the law of wills and the law of property, with a consequence that: (i) a grant of probate represents both an order of the Court and an instrument of title; (ii) probate litigation is “interest litigation” in the sense that one must have an identifiable interest in the outcome of proceedings in order to be a party to them; (iii) in a general sense, a grant of probate “binds the world” because of its function as an instrument of title; and (iv) a grant of probate is a public act: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [228]-[283].
 - (c) Because of the public interest in an orderly succession to property, no form of privilege necessarily attaches to evidence about the circumstances in which a will was executed: *In the Estate of Fuld, Deceased*; *Hartley v Fuld (Attorney-General Intervening)* [1965] P 405 at 409-411; *Re Estate Pierobon, Deceased* [2014] NSWSC 387; *Boyce v Bunce* [2015] NSWSC 1924 at [145] *et seq.*

- (d) The concept of “parties” to proceedings differs in the context of probate litigation compared with ordinary civil litigation; 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; *Estate Kouvakis* [2014] NSWSC 786 at [254]-[260].
- (e) Principles governing the finality of litigation can operate differently in the context of a determination of an application for probate compared to other civil litigation, focusing attention on the distinction between a grant of probate “in common form” and a grant of probate “in solemn form” and the circumstances in which a grant can be revoked: *Estate Kouvakis* [2014] NSWSC 786 at [236]-[274] and [284]-[317].
- (f) Because the law of wills is conceptually, and procedurally, tied to a need (in many if not most cases) to obtain a grant of probate, the law governing both the law of wills and the law of probate is essentially “action-based” – a mixture of substantive and procedural law.
- (g) Probate law, in particular, thus differs from other areas of law commonly encountered. The law of contract and the law of torts are both “personal” rather than “real”, to deploy descriptive labels of an earlier era. The principles governing them have, since the 19th century, evolved independently of the forms of action that once governed their enforcement. The principles of contract law are no longer confined by the actions of assumpsit, covenant, debt and detinue. The principles of tort law are no longer confined by forms of action in trespass, trespass on the case, etc. By contrast, probate law cannot be understood without reference to an application to a court for a grant of

probate or other form of administration. It affects, or may affect, both personal obligations and proprietary interests.

- (h) Probate law is concerned not only with the determination of disputed applications, but also uncontentious applications– thus distinguishing probate proceedings from many other forms of civil proceedings – and the determination of an application for probate is not an end in itself, but a step along the way in due administration of a deceased estate.
- (i) Because probate law is directed to the due administration of an estate, the purposive character of the Court’s probate jurisdiction is prominent in all decision-making. 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.

55 A manifestation of the distinctive features of probate litigation is the form of pleadings generally encountered in a probate suit.

56 Probate pleadings are reminiscent of the “cause of action” or “issue” pleading found in common law proceedings before the adoption of a *Judicature Act* system of court administration (in the case of NSW, on 1 July 1972, upon commencement of the *Supreme Court Act 1970 NSW*) when a narrative form of “fact” pleading, characteristic of old style equity proceedings, became the norm for civil proceedings generally.

57 Because of the distinctive character of probate litigation, one must be conscious of jurisdictional boundaries affecting probate proceedings. A failure to be aware of those boundaries can cause unnecessary costs and delay in the administration of a deceased estate.

- 58 Care needs to be taken to focus upon what is necessary, and appropriate, for an exercise of probate jurisdiction – focusing upon due administration of an estate – without being diverted by collateral disputation that attracts other heads of jurisdiction.
- 59 If not properly case managed, a claim for family provision relief can disrupt administration of an estate. However, the type of collateral disputation that more often disrupts probate proceedings is an invocation of general equity jurisdiction in a demand that accounts be taken, or that competing claims to “estate” property be determined, in advance of a determination as to who represents an estate.

COMPETING WILLS AND RISK MANAGEMENT

- 60 In a practical sense, the due administration of a deceased estate commences with whatever arrangements are made, during the lifetime of a will-maker, to ensure that a will is duly made in circumstances in which risks of a challenge to its validity are minimised.
- 61 That fact commends the making of a formal will (if appropriate, on notice to those most likely to challenge it) with the benefit of such, if any, professional assistance (usually that of a lawyer and, sometimes, that of a medical practitioner) capable of preserving, or generating, evidence that the will was duly made.
- 62 Perhaps the most effective method of “challenging a will” upon an exercise of probate jurisdiction is to prove the existence of another will (inconsistent with the first) which was validly made, later in time.
- 63 Any form of later will – if valid – can trump an earlier will, whatever the form of the earlier will – just as a will of any description can trump the entitlements of beneficiaries who take an estate on intestacy.

- 64 Human nature being what it is, this may (for example) lead to controversy based upon characterisation of an email of doubtful provenance as an informal will.
- 65 In *Estate of Demetrios Katsikos* [2018] NSWSC 555 a lawyer informed a party of the possibility that an email *could* constitute an informal will, thereby prompting the party to go in search of a testamentary email... which just happened to be found, giving rise to hotly contested litigation.
- 66 In the modern era, care needs to be taken to search for testamentary instruments wherever they might be found, but to approach with caution documentation which appears beyond the norm.

FORMAL WILLS : GROUNDS FOR CHALLENGE

Precedent Pleadings in the Tradition of “Issue” Pleading

- 67 A person who propounds a will bears the onus of proving that it is the last will of a free and capable testator.
- 68 In contentious proceedings, this is done by the filing of a statement of claim.
- 69 An exposition of the nature of adjudication of a dispute upon an exercise of probate jurisdiction requires that attention be given to the customary means by which parties define questions in dispute under the direction of the Court.
- 70 This requires attention to be given to the customary form of pleadings in a probate suit.
- 71 What is distinctive about probate pleadings is most evident in the standard form of pleading a defence to a pleaded application for a grant of probate.
- 72 For the purpose of demonstrating that, a set of pleading precedents taken from *Geddes, Rowland and Studdert* is reproduced here, acknowledging that use of those forms two decades after their publication requires adaptation in light of: (a) the current criteria for a formal will, found in section 6 of the

Succession Act, and (b) the current *Probate Rules (Supreme Court Rules 1970 NSW, Part 78)* insofar as they provide for electronic publication of a notice of intention to apply for probate.

- 73 An alternative, more up-to-date set of precedent pleadings, with sample particulars for a Defence, can be found in *Mason and Handler*, paragraph [6081].
- 74 The principal purpose of drawing to attention the standard form in which a probate defence is pleaded and particularised is to demonstrate a style of pleading in which an “issue” is pleaded and particularised in lieu of a joinder of issue on “allegations of material fact” from which an inference (that an instrument is not the last will of a free and capable testator) can be drawn.
- 75 *Geddes, Rowland and Studdert* provide (as Form 18.02 on pages 849-850) a precedent form of statement of claim more elaborate than commonly encountered in practice:

- “[1] AB (‘the deceased’) was at the time of her/his death possessed of property in New South Wales.
- [2] On 29 May 1993, being of sound mind, memory and understanding, the deceased executed her/his last will by signing the same with the intention of giving effect to the will in the presence of CD and EF who were present at the same time and who attested and signed the same in the presence of the deceased.
- [3] On 31 May 1993 the deceased died without having altered or revoked her/his will.
- [4] The plaintiff is the sole beneficiary named in the will.
- [5] The plaintiff is not an undischarged bankrupt and has not assigned her/his interest in the estate.
- [6] GH the executor named in the will, died on (date) [or renounced probate on (date)] [or has neglected or refused to prove the will or renounce probate thereof within three months of the death of the deceased].
- [7] On (date) the plaintiff caused notice of her/his intention to apply for probate to be inserted in (name) which is a newspaper circulating in the district where the deceased resided at the date of her/his death [or

(if the deceased resided outside New South Wales) a Sydney daily newspaper].

- [8] On (date) the defendant filed in the Registry of the Court a caveat against the making of any grant in the estate of the deceased without prior notice to her/him.

The plaintiff claims:

- (1) [An order] that administration with the will annexed of the estate of the deceased be granted to her/him in solemn form
- (2) An order that the administration bond be dispensed with.
- (3) Costs.”

76 In practice, an allegation of “soundness of mind” is not normally pleaded in a statement of claim. It is generally sufficient to plead: the testator’s death; the (jurisdictional) fact of property left in NSW; execution of the will in a manner and form prescribed by section 6 of the *Succession Act*; the standing of the plaintiff (eg, as an executor named in the will); and publication of notice of intention to apply for probate on the NSW On-line Registry. It is not generally necessary to anticipate a defendant’s grounds of challenge to the will.

77 *Geddes, Rowland and Studdert* provide (in Form 18.04 on page 851) their precedent form of Defence:

- “[1] The defendant admits paragraph 1 of the statement of claim.
- [2] The defendant denies that the document referred to in paragraphs 2, 3, 4 and 6 of the statement of claim is a valid will.
- [3] The defendant says that at the time of execution of the document referred to in paragraphs 2, 3, 4 and 6 of the statement of claim the deceased was not of sound mind, memory or understanding (or, as the case may be).

PARTICULARS

- (a) (Set out particulars).
 - (b) (Set out particulars).
- [4] The defendant otherwise admits paragraphs 2, 3, 4 and 6 of the statement of claim.

[5] Subject to paragraphs 2 and 3 of this Defence, the defendant otherwise admits paragraph 5 of the statement of claim.

[6] The defendant admits paragraphs 7 and 8 of the statement of claim.”

78 The same authors provide (in Form 18.05 on page 851) a precedent form of cross-claim:

“[1] AB (‘the deceased’) was at the time of her/his death possessed of property in New South Wales.

[2] On 26 March 1976, being of sound mind, memory and understanding, the deceased executed her/his last will by signing the same with the intention of giving effect to the will in the presence of GH and IJ who were present at the same time and who attested and signed the same in the presence of the deceased.

[3] The cross claimant is the executor named in the will.

[4] On (date) the cross claimant caused notice of her/his intention to apply for probate to be published in (name) which is a newspaper circulating in the district where the deceased resided at her/his death [or (if the deceased resided within New South Wales at her/his death) which is a Sydney daily newspaper].

The cross claimant claims:

(1) [An order] that probate of the will in solemn form be granted to her/him.

(2) Costs.”

79 The author’s precedent Defence to Cross Claim (Form 18.06 on pages 851-852) closes the pleadings:

“[1] The cross defendant admits paragraphs 1, 3 and 4 of the cross claim.

[2] As to paragraph 2 of the cross claim, the cross defendant admits that on 26 March 1976 the deceased executed a document which was at that time intended to be her/his last will and says that the will of 26 March 1976 was revoked by the will of 29 May 1993, pleaded in the statement of claim.”

The Nature of “Issue” Pleading

80 For present purposes, attention is drawn to the form of paragraph 3 of the Defence as an example of a form of “issue pleading”. There is a *general*

assertion of testamentary incapacity, not elaborated by material facts from which an inference of incapacity might be drawn, but simply particularised.

- 81 Most probate pleadings follow a similar form whatever be the type of allegation made as a ground for challenging the validity of a will. There is generally a bare statement of the ground, not elaborated by a pleading of material facts but simply particularised.
- 82 On the whole, the standard form of particulars is at such a high level of generality that the particulars might be thought to be a generic description of a model aged, feeble will-maker.
- 83 Generally, to come to grips with the real questions in dispute in a modern probate suit one needs to read *written submissions* filed and served in anticipation of a contested hearing, *together with the parties' contentious affidavits.*

In a Probate Suit, "Issue" Pleading Survives a Judicature Act System of Court Administration

- 84 This style of pleadings has continued (on the whole, efficiently) despite the fact that the current form of *Probate Rules (Supreme Court Rules 1970 NSW, Part 78)* no longer has a rule to the following effect (a rule applied to probate litigation throughout the preceding century):

"In a suit for probate, the statement of defence shall consist of the following defences alone, unless by leave of the Court, obtained on summons:-

- (1) That the paper writing, bearing date, etc, and alleged by the plaintiff (or defendant) to be the last will and testament (or codicil to the last will and testament) of AB, late of etc, deceased, was *not duly executed as required by law, in manner and form as alleged.*
- (2) That AB, the deceased in this cause, at the time his alleged will (or codicil) bears date, to wit, on the, etc, was *not of sound mind, memory and understanding.*
- (3) That the deceased at the time of the execution of the said alleged will (or codicil) *did not know and approve of the contents* thereof.

- (4) That the execution of the said alleged will (or codicil) was obtained by the *fraud* of CD and others acting with him (setting out the fraud alleged).
- (5) That the execution of the said alleged will (or codicil) was obtained by the *undue influence* of CD and others acting with him....” [Emphasis added].

- 85 This rule can be found as rule 68 in the *Probate Rules* reproduced in R Hastings and G Weir, *Probate Law and Practice* (Law Book Co, Sydney, 1948, 2nd ed) at pages 524-525, a standard text superseded in 1996 by *Geddes, Rowland and Studdert*.
- 86 Rule 68 appears to have been based on rule 40A of the English *Probate Rules* (promulgated in 1865), as reproduced in HC Mortimer, *The Law and Practice of the Probate Division of the High Court of Justice* (Sweet and Maxwell, London, 1911), page 913.
- 87 Note that the traditional grounds of defence do not include any allowance for a pleading of “suspicious circumstances”.
- 88 Within the boundaries of an exercise of probate jurisdiction, the traditional grounds might well be thought to cover the field of challenges that could conceptually be made to the validity of a will. That depends upon them being given a broad and flexible operation, in the context of the ultimate question for determination.
- 89 They are specific forms of denial of the general proposition that a particular will propounded as the last will of a free and capable testator does not bear that character. That general proposition ultimately defines, and limits, the grounds upon which a will can be challenged.
- 90 Probate pleadings, kept within traditional limits, do not traverse issues which might result in the legal personal representative of a deceased person (or perhaps a beneficiary of the deceased) being found to hold estate property on

trust. If equity is to intervene then, strictly, it is likely to intervene only after a grant of probate or administration has been made.

- 91 The grounds upon which equity might intervene are commonly those involving an allegation of a “contract to make a will”, an estoppel to similar effect or (reflecting both those concepts) mutual wills: eg, *Barnes v Barns* (2003) 214 CLR 169.
- 92 To date, the suggestion of the High Court of Australia that *equitable* principles relating to undue influence might be applicable in a *probate* context (*Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63], discussed in *Boyce v Buncce* [2015] NSWSC 1924) has not been taken up.

CONCLUSION

- 93 At a high level of abstraction, there is usually but one ground for challenging a will – that is, upon the basis that, formalities aside, the ultimate question for the Court’s determination is whether it is satisfied that an instrument propounded is the last will of a free and capable testator.
- 94 At lower levels of abstraction, subsidiary grounds for challenging a will ordinarily represent a working out of that principal ground in the context of the particular form taken by the will – as a formal will, an informal will or a statutory will.
- 95 Given the formalistic (but functional) character of probate practice and procedure, questions for the determination of the Court in probate proceedings are generally able to be accommodated by established grounds, broadly interpreted, without concern about whether those grounds do or do not constitute a “closed class”.
- 96 Despite appearances to the contrary, the probate jurisdiction is purpose-driven rather than rule-bound. Any residual rigidity in probate practice is generally addressed by the availability of ancillary claims for relief in equity and family provision jurisprudence.

- 97 To be effective, an exercise of the probate jurisdiction of the Supreme Court (ordinarily an essential feature of the due administration of a deceased estate) must remain focused on the purpose for which the jurisdiction exists (to give effect to a deceased person's testamentary intentions and to see that beneficiaries get what is due to them), and not be diverted by collateral disputes identified with jurisdictional fields beyond the boundaries of the probate jurisdiction.
- 98 Upon an exercise of probate jurisdiction, the ultimate touchstone for decision is usually encapsulated in the question whether a will propounded for admission to probate is the last will of a free and capable testator or, in the case of a court-authorized will for a person lacking testamentary capacity (as discussed in *Re K's statutory will* (2017) 96 NSWLR 69 at [32]-[37]), whether the proposed will is one which the person, if possessed of capacity, is likely to have made for himself or herself.
- 99 Through the complexity of rules that at times encumber the idiosyncratic procedures of the probate jurisdiction, there is a need to remain focused on the purpose for which the jurisdiction exists and the focus upon carrying testamentary intentions into effect shine through so that lesser "rules" must generally yield to them.
- 100 As a corollary of recognition of the boundaries of probate jurisdiction, there is a need to recognise the fields of operation of other types of jurisdiction – principally, in practice:
- (a) Upon an exercise of equity jurisdiction: identification and accounting for estate property (including property recoverable as a result of breaches of fiduciary obligations owed to a person in need of protection before death), and the various types of claim that might give rise to a determination that the legal personal representative of a deceased person holds property on trust for another (commonly associated with a contract to make a will, mutual wills or an allegation of equitable undue influence).

- (b) Upon an exercise of family provision jurisdiction under Chapter 3 of the *Succession Act*.

- 101 Claims for relief which call for an exercise of jurisdiction beyond the boundaries of probate jurisdiction (be they grounded in an exercise of equitable jurisdiction, family provision jurisdiction or otherwise) need to be kept under a tight rein in case management of probate proceedings lest the whole proceedings become bogged down in aimless complexity.
- 102 In practice, a joint hearing of probate and family provision proceedings may be manageable (subject to an order for the separate determination of questions, if necessary to distinguish the two types of claim) because neither customarily employs a fact-pleading style of joinder of issue, and both are generally heard on affidavit evidence after interlocutory procedures that follow a similar pattern. In a particular case, a large question may be the admissibility of evidence on one, but not on the other, type of claim; but, since enactment of the *Evidence Act* 1995 NSW, relatively few civil (as distinct from criminal) cases turn on the admissibility of evidence.
- 103 In practice, a joint hearing of claims in probate and equity may be more likely to be problematic because a probate claim is customarily pleaded in an “issue pleading” style and an equitable claim (dependent upon proof of facts necessary to establish an equity in aid of a trust) is customarily pleaded in a “fact pleading style”; different imperatives may drive interlocutory disputes about particulars, discovery and interrogatories; and different criteria may affect the admissibility of evidence at a final hearing. A joinder of probate and equity claims in the same proceedings might readily call for an order for the separate determination, or an interlocutory stay, of particular questions in aid of an orderly conduct of proceedings.
- 104 Not uncommonly, identification of the person or persons entitled to administer an estate, and empowerment of whoever is entitled to administer the estate, is a necessary practical step to be taken towards resolution of other disputation.

105 In administration of the Court's Probate Registry, an orderly management of business is generally assisted by probate and non-probate claims for relief being pursued in separate proceedings.

GCL

10 October 2018

(Revised on 11 October 2018 by additions to paragraphs 6, 27,45 and 54; by insertion of new paragraphs 102-103; and by insertion of a new paragraph 105).