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**THE “WHY?” AND “WHAT?” OF “SUSPICIOUS CIRCUMSTANCES”
IN PROBATE LITIGATION**

by

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INTRODUCTION

The Macro-Perspective of “Suspicious Circumstances”

- 1 The due administration of the law of succession is a fundamental prerequisite for peace and good order, in government of a civil society, in a democratic state.
- 2 Such a society is grounded upon an assumption that respect is due, and must be paid, to each person as an autonomous individual living, and dying, in a community that values the dignity and freedom of action of every person – a freedom that extends, within defined limits, to a testamentary disposition of property.
- 3 If there be any doubt about this, take note of the circumstances in which “elder law” has emerged as a separate field of study in the Australian legal system and elsewhere. “Elder law” is an offshoot of succession law. An important component of “elder law” is the law governing wills and the administration of deceased estates: the territory occupied by probate law and practice. “Elder law” has been called forth as a specialist field of study by

widespread concerns about whether elderly people (and vulnerable people generally) are being exploited, not only in their person, but also in their enjoyment and disposition of property. Recent days have witnessed a multitude of official inquiries into “elder abuse”. Courts are commonly looked to for redress arising from misconduct of persons who, in their own interests, deal with property involving a vulnerable person. Vulnerable persons are not uncommonly persuaded to make a will in favour of a person relied upon for care.

- 4 The probate jurisdiction of an Australian Supreme Court looks 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.
- 5 In serving that purpose, the Court must endeavour, with firm resolve, to ascertain whether (and in what terms) a deceased person duly expressed his or her testamentary intentions for the disposition of property.
- 6 By definition, the person whose state of mind is central to this inquiry is a person who is, by reason of death’s intervention, dependent upon the Court to exercise wisdom (including restraint from intermeddling personal views with those attributed to the deceased) in adjudication of disputes about administration of the deceased’s estate.
- 7 A judge needs to engage in a critical, but empathetic, process of decision making, with emphasis on the perspective of the deceased. Repeated exposure of a judge to competing claims on deceased estates generally conditions the judge to be intuitively suspicious of all claims involving personal interest on the part of a claimant. That is the clay with which advocates must work.

The Micro-Perspective of “Suspicious Circumstances”

- 8 In the paradigm case of a probate suit in which a plaintiff applies for admission of a formal will to probate, a defendant commonly pleads an allegation that a grant of probate or administration should not be made because “suspicious circumstances” attended the making of the will.
- 9 An allegation of “suspicious circumstances” is not, strictly, a defence to an application that a will be admitted to probate. It does not, of itself, negate a finding that a testamentary instrument propounded by the plaintiff is the last will of a free and capable testator, the ultimate question for the Court’s determination in a probate suit. It is generally a forensic device for: (a) drawing to attention allegations of fact which might invite the Court’s close scrutiny of evidence adduced in support of an application for a grant; (b) inviting the plaintiff to make admissions of fact; and perhaps (c) foreshadowing an attack on the plaintiff’s credit.
- 10 The principles governing an allegation of “suspicious circumstances” are sometimes spoken of as “the suspicious circumstances *rule*”. The seminal case of *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089 spoke of “rules of law” and “principles” interchangeably. Care needs to be taken not to treat a judge’s observations about “rules” as if legislation. To do so may be to invite a degree of rigidity beyond anything intended by the judge. Judgments need to be read in context.
- 11 A modern example of a reference to “the suspicious circumstances rule” is the authoritative judgment of Meagher JA in *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [55], where his Honour (with the concurrence of Basten and Campbell JJA) wrote the following:

“... The suspicious circumstances rule does not operate at large. It operates to displace presumptions of fact in favour of those propounding [a] 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 a affirmatively established knowledge and approval, the onus of proving undue influence or fraud is on those alleging it....”

- 12 The “suspicious circumstances rule” is generally stated in terms such as the following (taken from GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2nd ed, 2017), paragraph [2.29]):

“The presumption relating to knowledge and approval arising from a capable testator’s execution of a will does not apply if the circumstances surrounding its execution combine to excite the Court’s suspicion. While suspicion here not infrequently stems from a third party’s (alleged) wrongdoing, this is not essential; it is ‘simply a question of circumstances giving rise to a suspicion that the testator may not have known of and approved the contents of his will’. If suspicious circumstances exist, probate cannot be granted unless the suspicion is removed, by affirmative proof of the testator’s knowledge and approval. To this end, the effect of the suspicious circumstances doctrine is, it is said, ‘relatively narrow’; it does not apply, ‘at large’, it being essential to ‘identify the presumption to which particular circumstances are said to be relevant”.

- 13 From this, note that: (a) the “suspicious circumstances rule” is a function of analysis of probate law and practice in terms of presumptions relating to testamentary capacity and due execution of a will; and (b) the field of operation of the “rule” is conventionally, but perhaps not necessarily, limited to the element of “knowledge and approval of the contents” of a will, the onus of proof of which lies on the party propounding the will.
- 14 The concept of “suspicious circumstances” is conceptually so amorphous that one wonders why its field of operation is so limited. If there is something “suspicious” about the validity of a will, one should not be surprised if it excites attention across the full spectrum of decisions to be made about the validity of a will. Nevertheless, conventionally, “suspicious circumstances” are generally spoken of in the context of “knowledge and approval”.

PROBATE PROCEEDINGS

Pleadings and Standard Grounds of Challenge to a Will

- 15 An understanding of any form of suspicious circumstances “rule” requires appreciation of the standard grounds of defence available, and commonly pleaded, in opposition to an application for admission of a formal will to probate.
- 16 That, in turn, requires an appreciation of the idiosyncratic form of pleadings in a probate suit. They are a hybrid between an old style common law form of “issue pleading” and an old style equity pleading of “material facts”. That is especially so if a defendant pleads an allegation of “suspicious circumstances” – not strictly a defence to an application that a will be admitted to probate, but an invitation to the Court to take identified factors into account in decision making.
- 17 Despite rules of court characteristic of a *Judicature Act* system of pleading (in the equity tradition) – requiring that “the material facts” on which a party relies be pleaded, rather than a generalised form of “cause of action” or other form of pleading characteristic of an old style common law claim - the prevailing culture in probate proceedings retains a strong flavour of common law “issue pleading”.
- 18 Conventionally, a plaintiff generally pleads in a statement of claim: the testator’s death; the “jurisdictional” fact of property left within the state; execution of the will propounded in a manner and form prescribed by legislation; the standing of the plaintiff (eg, as an executor named in the will); and publication of notice of an intention to apply for admission of the will to probate. A plaintiff does not generally anticipate a defendant’s grounds of challenge to the will. Questions about onus of proof in probate proceedings do not turn on the form of a pleading, but on established principles.
- 19 By convention, probate practitioners generally proceed (unconscious of the historical origins of conventional practice) on a core assumption that the

available grounds for a defence to an application for admission of a will to probate are those reflected in what was rule 40A of the English *Probate Rules* (promulgated in 1865) as reproduced in the classic reference text of HC Mortimer, *The Law and Practice of the Probate Division of the High Court of Justice* (Sweet and Maxwell, London, 1911), pages 913-914. That rule was once reflected in local Australian rules of court. In the afterglow of such rules following their repeal, practising lawyers conform to their spirit. A conventional defence still asserts one or more of the standard grounds of challenge to the validity of a will, and descends to detail only in the provision of particulars, or in affidavits to be relied upon at a final hearing.

- 20 Amongst lawyers, particular editions of a practice text can acquire a reputation as particularly authoritative. So it is with the first (1911) edition of *Mortimer on Probate*. Its progeny in NSW include the first (1939) and second (1948) editions of Hastings and Weir, *Probate Law and Practice* (Law Book Co, Australia, as well as their successor: RS Geddes, CJ Rowland and Paul Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, Sydney, 1996).
- 21 Given the important role played by a court's probate registry in administration of the court's probate business, a newly appointed Probate Judge of the 21st century is unlikely to forget the instruction of a learned and vastly experienced Probate Registrar that difficult points of probate law or practice might be resolved by reference to an English practice text published about a century earlier. Senior Deputy Registrar Paul Studdert (then the NSW Supreme Court's "Probate Registrar") thus brought *Mortimer on Probate* to my attention shortly after my appointment as the Court's Probate List Judge.
- 22 The English rule reproduced in *Mortimer* (copied in NSW until 1972) was in the following terms:

"[40A]. The party or parties pleading to a declaration propounding a will or testamentary script shall be allowed to plead only the pleas hereunder set forth, unless by the leave of [a] judge, to be 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 testament] of capital AB, late of, etc, deceased, was **not duly executed according to the provisions of [legislation governing the formalities of execution of a will] 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 execution of the said alleged will [or codicil] was obtained by the **undue influence** of CD and others acting with him.

(4) That the execution of the said alleged will [or codicil] was obtained by the **fraud** of CD and others acting with him.

(5) 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.

Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) **deliver** to the adverse parties and file in the Registry **particulars in writing**, stating shortly the substance of the case he intends to set up thereunder; **and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith.**”

23 Probate lawyers are not constrained in NSW (or, I apprehend, in South Australia) by a need to obtain the leave of the Court to include in a defence a ground other than those identified in rule 40A. Nevertheless, the rule continues to provide insight into available grounds for challenging the validity of a will.

24 A project for legal historians is to locate the reasons for promulgation of rule 40A in 1865. Those reasons were probably entirely practical, of a type modern lawyers would classify as “case management” considerations. However, the rule may have been introduced to bring intellectual discipline into the analysis of probate litigation.

25 If so, it was not immediately successful because after 1865, as before, some judges continued to treat concepts of “undue influence” and “fraud” as the same or composite concepts: see *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 at [59]-[61].

26 The intellectual rigour of a metaphysical analysis of “(testamentary) intention” such as characterises rule 40A and modern probate law and practice is liable to breakdown when lawyers deal with cases at the margins of supposedly distinct categories. And, in any system of classification, there is generally need of a residual category which accommodates facts which, in the intuitive judgement of many, don’t quite fit elsewhere. For some lawyers the concept of “suspicious circumstances” is a residual category despite formal protests to the contrary; if in doubt, allege “suspicious circumstances”!

27 *Mortimer on Probate* (1911), at pages 651-652, explains the origins and experience of rule 40A in the following terms (with editorial adaptation):

“By the practice of the Ecclesiastical Courts and of the Court of Probate, the forms of defence in probate actions became fixed and stereotyped. The Court discountenanced innovations in pleading. Thus it was for long doubted whether a plea that the testator did not know and approve of the contents of his will was good in law: see *Hastilow v Stobie* (1865) 1 P & D 64. A favourite plea was ‘That the said alleged will was not the will of the deceased,’ [a probate law equivalent of a common law pleading of ‘the general issue’ in anticipation of a trial by jury], under which evidence might be given at the trial that the will was not duly executed, or that it was a mere sham will, never intended by the testator to operate, or even that the testator’s signature had been forged. In fact, Dr Wambey, in *Twells v Clarke* 3 S & T 281, stated that it involved every plea that could go to the validity of a testamentary instrument; and in *Owen v Davies* (1864) 3 S & T 588 this plea, after having served so long, was finally discredited.

Under Rule 40A..., five pleas were recognised, and no party could plead any other plea, except by leave of a judge. Those pleas were undue execution, incapacity, undue influence, fraud, and want of knowledge and approval. Only under the last of these were particulars directed to be given, and it is obvious that the plaintiff in a probate action was under a grave disadvantage in many cases, since the mere general statement of the defences above enumerated left him in ignorance of the nature of the case which he would have to meet.

Accordingly in 1901 a rule was framed to mitigate this grievance; and now by Order XIX, rule 25A, ‘in probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely’.

Accordingly, although the old stereotyped pleas are still used, the defence must state, in respect of each of them, ‘the substance of the case’.

In complying with this rule, the pleader is not obliged to set out his evidence, or to give elaborate particulars of his defence. It is sufficient, and it is essential, that the plaintiff should be given enough information to enable him to ascertain with certainty the nature of the case on which the defendant relies”.

- 28 Missing from the standard grounds of challenge to the validity of a will is any reference to a “suspicious circumstances rule”.
- 29 An allegation of “suspicious circumstances” is, as a matter of strict pleading, surplus to needs. A danger inherent in a pleading of “suspicious circumstances” is that defendants sometimes are tempted to blurr their contentions, relying upon an allegation of “suspicious circumstances” to hint at a ground (such as undue influence or fraud) not sufficiently supported by evidence to be overtly embraced.
- 30 This problem is all the greater because of a general lack of appreciation that “probate” undue influence (coercion) is materially different from “equity undue influence”.
- 31 Having canvassed the territory of any “suspicious circumstances rule” in a well-ordered probate suit, consideration must also be given to the interaction between the probate and equity jurisdictions. At least some seminal judgments on the “suspicious circumstances rule” (including *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089 and *Wintle v Nye* [1959] 1 WLR 284) have been set in a factual context which, if the principles governing undue influence in equity were recognised as applicable, could have attracted a presumption of undue influence. Amongst those types of case is one in which a testator’s solicitor is named as a beneficiary.

The “Suspicious Circumstances Rule” in Context

- 32 The “suspicious circumstances rule” has its origins in *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089. *Mortimer on Probate* (1911) records, at page 84 note (g), that “the principle” laid down by *Barry v Butlin* is sometimes referred to as “the rule laid down in *Barry v Butlin*, *Fulton v Andrew* and *Brown v*

Fisher". *Fulton v Andrew* is reported at (1875) LR 7 HL 448. *Brown v Fisher* is reported at (1890) 63 LT 465.

33 In *Barry v Butlin* the Privy Council upheld the judgment of an ecclesiastical court admitting to probate a will, prepared by the deceased's solicitor, under which the solicitor took a considerable benefit and the only son of the deceased was excluded. The judges were satisfied that the deceased and his son were estranged; that the deceased had no other relatives with whom he was on terms of friendship; that the fact that the deceased looked to others with whom he was on terms of friendship was not irrational; and that the process of preparation and execution of the will was open and fair. They were satisfied that the will propounded was the last will of a free and capable testator.

34 So far as it summarises principles for which the case is authority, the headnote to *Barry v Butlin* is in the following terms:

"The *onus* of proving a Will being on the party propounding it, is in general discharged by proof of capacity, and the fact of execution; from which the knowledge of and assent to its contents by the Testator will be assumed.

The fact of a party preparing a Will, with a Legacy to himself, is at most only one of suspicion, of more or less weight according to the circumstances, demanding, however, the vigilant care of the Court in investigating the case before granting probate: and though evidence of the instructions given by the deceased, and the reading over of the instrument are the most satisfactory proofs of the Testator's knowledge of the contents, they are not the only description of proof by which the cognizance of the contents of the Will may be brought home to the deceased, even in a case of doubtful capacity."

35 In the body of the reasons for judgment of the Privy Council (delivered by Baron Parke) the following observations appear:

"The rules of law according to which cases of this nature are to be decided, did not admit of any dispute, so far as they are necessary to the determination of the present Appeal: and they have been acquiesced in on both sides. These rules are two; the first, that the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.

The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased. [2 Moo PC 482-483; 12 ER 1090]”.

36 In accepting the authority of *Barry v Butlin*, and embracing the concept of an operative “rule”, Isaacs J set the parameters of the “suspicious circumstances rule” in Australia with the following observations in *Nock v Austin* (1918) 25 CLR 519 at 528:

“The relevant law is not doubtful. It may be stated thus:-

(1) In general, where there appears no circumstance exciting suspicion that the provisions of [a testamentary 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: *Barry v Butlin* 2 Moo PCC at p 484; *Fulton v Andrew* (LR 7 HL 448.

(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: *Baker v Batt* 2 Moo PCC 317 at 321; *Tyrrell v Painton* [1894] P 151; *Shama Churn Kundu v Khetromoni Dasi* LR 27 Ind App 10 at 16.

(3) If in such a case the conscience of the tribunal, whose function it is to determine the fact that 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: *Baker v Batt* 2 Moo PCC at 320; *Fulton v Andrew* LR 7 HL 448.

(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: *Barry v Butlin* 2 Moo PCC 480 and *Fulton v Andrew* LR 7 HL 448; per Lord Shaw in *Low v Guthrie* [1909] AC 278 at 284.

(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 (per Lord James in *Low v Guthrie* [1909] AC at 282-283.

(6) Nor does the rule require as a matter of law any particular species of proof to satisfy the onus: *Barry v Butlin* 2 Moo PCC at 484.

(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: Lord Loreburn LC in *Low v Guthrie* [1909] AC at 281-282.”

37 Note, in passing, that in these observations, Isaac J wrote not only of a “rule”, but also of “an assumption” (rather than “a presumption”) of knowledge and approval of the contents of a will arising from proof of a testator’s capacity and of the fact of due execution of the document.

38 When Isaacs J came, in *Bailey v Bailey* (1924) 34 CLR 558 at 570-572, to summarise “working propositions” derived from earlier authorities (in a case in which the issues at trial were whether a testator knew and approved the contents of his will, whether he had testamentary capacity, and whether undue influence was exercised upon him in the making of the will) his Honour managed to do so without reference to any “suspicious circumstances rule” or “presumptions” of any kind. He wrote as follows (omitting authorities):

“It is all important to understand the proper method of approaching this question. Cases of the highest authority have shown the way. It will perhaps be of more general use if I collect them in the form of working propositions the effect of those authorities so far as they affect cases like the present: -

(1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged the Court is bound to pronounce against the instrument.

(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 evidence.

(3) The proponent’s duty is, in the first place, 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) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.

(6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances.

(7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.

(8) Once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.

(9) To displace a *prima facie* case of capacity and due execution mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

(10) The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions.

(12) Where instructions for a will are given on a day antecedent to its execution, the former is by long established law the crucial date."

39 Although his Honour avoided express reference to a "suspicious circumstances rule" or to "assumptions" or "presumptions", he traversed similar territory by embracing the language of "*prima facie* case", "onus of proof" and "displacement" of a *prima facie* case.

40 A restatement of Isaac J's "working propositions" which continues to find favour is that of Powell J in *Re Estate of Paul Frances Hodges deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707.

41 So far as is material (with emphasis added, but omitting all references to authority) Powell J's restatement is in the following terms:

- [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...
- [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...."**

42 This restatement is framed in the language of "onus of proof", "*prima facie* case" and "presumptions" or the like; but it manages to escape elevation of suspicious circumstances into a "rule".

43 The more recent touchstone for a consideration of "the suspicious circumstances rule" is the judgment of Meagher JA in *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 where, at paragraphs [43]-[54], his Honour wrote the following:

"[43] The appellants' first argument, as the primary judge observed, raises for consideration the relationship between knowledge and approval of the contents of the will, which the proponent must establish, and undue influence which is a defence to be made out by the opponent. More broadly it raises the inter-relation of suspicious circumstances, undue influence and testamentary capacity which, as Sopinka J observed in *Vout v Hay* [1995] 2 SCR 876 at 885, has perplexed both courts and litigants since *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089.

[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 Billinghamurst* [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 Billingham* 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 Colclough 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 Hayat* [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 ...’.

- 44 This treatment of the topic, as with others, is set in the language of “onus of proof” and “presumptions”, as well as reference to “the suspicious circumstances rule”.

The Role of “Presumptions” in a Probate Suit

- 45 Although conventional, this style of language does not sit comfortably with the way a modern probate suit is heard by a judge sitting alone, without a jury, receiving almost all the evidence on both sides of a question by affidavits, upon which deponents are selectively cross examined. In the modern form of “judge alone (case managed) trial” it is generally artificial, at least at a final hearing, to analyse a case 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.
- 46 What is perceived to be “law” upon an exercise of probate jurisdiction is often no more than a reflection of ingrained attitudes of mind about case management based upon established practice. One needs to approach talk of “presumptions” and shifting “burdens of proof” with respect, but critically. When the language of the law does not sit comfortably with actual practice, a re-assessment of law, practice and their interaction may be called for in order to bring them into line. This might be done relatively easily with an appreciation that a “presumption” is not, in the current context, so much a “legal rule” as a common “inference” drawn from particular types of evidence. It is, after all, a “rebuttable presumption of fact” even if hedged about by formalistic reasoning.
- 47 In practice, a modern probate suit is likely to extend beyond the jurisdictional boundaries of probate law, and to be exposed to the procedural imperatives of other forms of jurisdiction. There is, for example, an increasing tolerance for a “probate suit” to be heard at the same time as an application for family provision relief, or (less often, but still commonly) an application for equitable

relief, either against the estate or (with authority conferred by a representative order) on behalf of the estate.

- 48 To these complications may be added an alternative claim for admission to probate of an “informal will” (pursuant to the *Succession Act* 2006 NSW, section 8, or an equivalent statutory provision). The statutory language does not accommodate, or require, discussion in terms of “presumptions” or the like, and, for example, by definition, there can be no presumption arising from “due execution”: *cf, Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107 at [18]-[24].
- 49 All in all, the language of succession lawyers is slowly being weaned from talk of “presumptions” as anything other than guidelines to informed decision-making. They remain important as *guidelines* to sound decision-making. However, they might best be viewed as *inferences* drawn, on the basis of common experience, arising from proof of particular facts.
- 50 The ultimate question for a judge is whether the Court is satisfied that an instrument propounded for admission to probate is the last will of a free and capable testator: *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [44]. Whatever utility there is in talk of “presumptions” or the like, decision making must begin, and end, with that question.
- 51 In *Carr v Homersham* [2018] NSWCA 65 at [46]-[47], Basten JA recently wrote the following, after introductory references to *Worth v Clashom* (1952) 86 CLR 430 at 441-442 and 453 and to observations of Gleeson CJ in *Re Estate Griffith, deceased* (1995) 217 ALR 284 at 290:

“[46] There is a ready temptation to reformulate these propositions [about onus of proof and the power to dispose of property by will] in the language of presumptions and shifting burdens, and by reference to burdens of adducing evidence and burdens of proof. However, such complexity is unlikely to be helpful and may distract from a determination of what is in substance a purely factual issue, the resolution of which will turn on the nature of the particular matters raised, and by whom.

[47] To speak of there being a “doubt” as to testamentary capacity is to say little more than that a real issue has been raised on the evidence, which requires the resolution of the court. Unless such an issue has been raised, testamentary capacity need not be addressed; its existence will be presumed. Once the issue is raised, the court must resolve it; that must be done by a consideration of all the evidence and the inferences which may be drawn from it. It is true that the court must be affirmatively satisfied as to testamentary capacity, but in doing so, it should be alert to the fact that to find incapacity and thus invalidate a formally valid will is, in the words of Gleeson CJ, “a grave matter.” A doubt which does not preclude the probability that the testator enjoyed testamentary capacity cannot warrant a finding of invalidity.”

Factors to be Addressed in a Probate Suit

52 The ultimate question for the Court’s determination in a probate suit is whether a testamentary instrument propounded for admission to probate is the last will of a free and capable testator: *Mortimer on Probate* (1911), at pages 79-80, citing *Barry v Butlin* (1838) 2 Moo PC 480 at 482; 12 ER 1089 at 1090.

53 As ingredients in a determination that an instrument expresses the testamentary intentions of a deceased person:

- (a) “testamentary capacity” (in the old language, “sound mind, memory and understanding”) is concerned with the ability of a testator: (i) to understand the nature of the act of making a will and its effects; (ii) to understand the extent of the property the subject of the will; and (iii) to understand competing claims on his or her bounty, and to weigh those claims. Insofar as a medical perspective is brought to bear on these topics, in practice it takes the form of a question whether (unconstrained by 19th century concepts of “disorders of the mind” or “insane delusions”) there is any medical reason that a testator cannot be found to have had the requisite understanding. The primary focus is on a testator’s ability to remember; to reflect; and to reason.

- (b) “knowledge and approval” of the contents of a will are concerned with the intention of the testator to make the particular instrument concerned as his or her will.
- (c) “undue influence” and “fraud” are concerned with whether an intention to make a will has been vitiated in some way: (i) in the case of “undue influence”, by coercion; and (ii) in the case of “fraud”, by misleading or deceptive conduct.

54 These elements represent a logical dissection of the concept of “intention”. They address capacity to form an intention; knowledge and approval of the terms in which an intention is expressed; and factors which negate the existence of an intention in the particular case.

55 If an issue arises as to “testamentary capacity” or “knowledge and approval”, the party propounding the will bears the onus of proving those elements. If an issue arises as to “undue influence” or “fraud”, the onus of proving those vitiating factors lies on the party asserting them.

56 In this scheme of things “suspicious circumstances” merit no mention as a stand-alone factor.

Testamentary Capacity

57 In 1911 *Mortimer on Probate* recorded, at page 655, that a plea that a testator was “not of sound mind, memory and understanding” (raising an issue of testamentary capacity) was “usually accompanied by a plea of want of knowledge and approval”. Not much has changed, across time or space.

58 The classic starting point for consideration of “testamentary capacity” remains the observations in *Banks v Goodfellow* (1870) LR 5 QB, 549 at 565, extracted in paragraph 12 of Powell J’s restatement of the law in *Re Estate Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707 (set out above).

59 However, conscious of a need to accommodate advances in medical science, and to mark out the province of the law in making a determination of (in)capacity, modern judges tend to view *Banks v Goodfellow* in a context broader than the language used by that case.

60 *Banks v Goodfellow* lends itself to being read in a formulaic fashion; but (to paraphrase Leeming JA in *Carr v Homersham* [2018] NSWCA 65 at [132]) the judgment should not be read as if it is a statute.

61 In *Zorbas Sidiropoulos (No. 2)* [2009] NSWCA 197 at [65] Hodgson JA wrote as follows:

“The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in a way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgement on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity of the deceased to have understanding of the matters in the *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased’s assets, the deceased’s family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.”

62 Insofar as the *Banks v Goodfellow* criteria refer to negative factors (“no disorder of the mind” that poisons affections, perverts a sense of right, or prevents the exercise of natural faculties; and “no insane delusion” influencing a will’s disposition of property), those criteria are only relevant to the extent that they are shown to interfere with a testator’s normal capacity for decision making: *Carr v Homersham* [2018] NSWCA 65 at [6].

63 There is no direct, necessary correlation between testamentary (in)capacity and the presence, or absence of a delusion. Testamentary incapacity can be established by a mental disorder which does not involve delusions. The existence of a delusion is not indicative of testamentary incapacity if it has no bearing upon, or linkage with, a choices made by a testator in his or her will.

- 64 Definitions of what constitutes a “delusion” vary. Discussion of the concept generally includes a reference to *Bull v Fulton* (1942) 66 CLR 295: a belief which is not true to fact, which cannot be corrected by an appeal to reason, and which is out of harmony with the individual’s education and surroundings, a fixed and incorrigible false belief out of which the testator could not be reasoned. Reference is generally also made to the judgment of Gleeson CJ in *Re Estate of Griffith (Dec’d); Easter v Griffith* (1995) 217 ALR 284, in which his Honour counselled against any tendency to attribute incapacity to a testator whose choices appear to have been unreasonable or unconscionable rather than irrational.

Knowledge and Approval

- 65 The treatment of this topic by *Mortimer on Probate* in 1911, at pages 655-656, remains reflective of current practice:

“Strictly [a plea of want of knowledge and approval by a testator of the contents of his will at the time of its execution] is only appropriate when the capacity of the testator is not disputed, but it is alleged that the contents of the will were never properly brought to his notice. It is, however, not unusual to plead want of knowledge and approval when testamentary incapacity is also alleged....

The substance of the case should state (if the facts are so) that the deceased gave no instructions for [the will under challenge] , that it was not read over to him or explained to him, nor did he himself read over the same. If fraud is alleged, it should be separately pleaded; if the defendant’s case is that, although the will was read over to or by the deceased, the latter was incapable of appreciating its effect, testamentary incapacity should also be pleaded. It is sometimes convenient to plead both testamentary incapacity and want of knowledge and approval, and to frame a common substance of the case to cover both pleas”.

- 66 A testator must know and approve the contents of his or her will. This does not require that a testator understand the legal terminology employed by the drafter of the will. It is sufficient if the testator knows that the document is his or her will, and correctly assumes how it deals with his or her property: Dal Pont and Mackie, *Law of Succession* (2nd ed), paragraph [2.27].

67 A testator may be found to have “knowledge and approval” of the contents of his or her will even if he or she cannot read the document and has not done so, provided he or she has knowledge, and has given approval, of the contents of the document as his or her will: *Astridge v Pepper* [1970] 1 NSW 542.

Probate “Undue Influence” (Coercion)

68 *Mortimer on Probate* (1911) , at pages 656-657, contains the following observations on “undue influence” in probate law and practice:

[A plea of undue influence] raises the issue that the will was obtained by coercion, or something which the law treats as equivalent to coercion on the part of the plaintiff. It does not raise an issue of fraud, which must, if alleged, be expressly pleaded....

The plaintiff is entitled to particulars setting out the names of the persons against whom the charge of undue influence is preferred.

The defendant must state the nature of the conduct which, he alleges, constitutes undue influence on the part of the plaintiff, eg, actual physical coercion, such as by force or fear, or importunity upon weakness, or whatever his case may be.

The issue of undue influence ought not to be raised except on very good grounds.... [It is a plea which must be strictly proved,.... The cautious pleader will make very sure of his evidence and the strength of his case before he places this plea upon the record”.

69 These observations remain relevant; but, to the extent that they suggest that the plaintiff must have been privy to coercion, they go beyond what is necessary. A plaintiff who propounds a will might, personally, be innocent of any coercive conduct. He or she might simply be an executor named in the will.

70 In probate, an allegation of undue influence made in support of a challenge to the validity of a will requires proof of actual coercive conduct vitiating the free will of the testator, without the benefit of any form of presumption of undue influence arising from relationships: *Winter v Crichton* (1991) 23 NSWLR 116. This reflects a concern to accommodate the facts that: (a) testators are not uncommonly subjected to a range of social pressures bearing upon their

testamentary intentions; and (b) a robust attitude must be taken to what constitutes “undue influence” if the probate jurisdiction is to function effectively.

71 To prove undue influence in probate, it must be shown that the testator did not intend to make a will, but was coerced into making it. The onus of proving undue influence lies on those who allege it: *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [55]; *Winter v Crichton* (1991) 23 NSWLR 116.

72 Judgments in which a will is held invalid on the ground of (probate) undue influence are rare.

73 Two recent examples are *Petrovski v Nasez* [2011] NSWSC 1275 at [263]-[277] and *Dickman v Holley* [2013] NSWSC 18 at [162].

Fraud

74 Whereas (probate) undue influence coerces a testator, fraud misleads him or her. Fraud, sufficient to result in the invalidation of a testamentary instrument, is concerned with misleading or deceptive conduct: *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 at [65]-[66].

75 As recognised in *Becker*, an example of conduct capable of constituting fraud is misleading or deceptive conduct involving 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.

76 If an allegation of fraud is to be relied upon, it must be pleaded: *Becker* [2007] NSWCA 136 at [69]. The onus of proving fraud is on those alleging it: *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [55].

Forms of Grant : Severance and Rectification

- 77 Where part only of a testamentary instrument is affected by invalidation as an expression of the last will of a free and capable testator, questions arise as to whether part only of the instrument can be admitted to probate.
- 78 This can be done in the case of a finding that the testator did not know or approve of particular contents of a will (Dal Pont and Mackie, *Law of Succession*, 2nd ed, paragraph [2.38]); or in the case of a fraudulent inclusion of a particular provision in a will (Dal Pont and Mackie, paragraph [2.54]); but not without controversy in the case of a finding that a will is affected by mental incapacity (Dal Pont and Mackie, paragraph [2.12]; *In the Estate of Bohrmann* [1938] 1 All ER 271 at 281-282; *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267; *Public Trustee v Royal Perth Hospital Medical Research Foundation Inc.* [2014] WASC 17 at [184]-[185]).
- 79 *Mortimer on Probate* (1911) acknowledges that, where words have been introduced into a will without the knowledge or approval of a testator (page 101) or as a result of undue influence or fraud (page 90), the tainted part of a will may be rejected, and the remainder admitted to probate, at least if that part to be admitted to probate is so distinct and severable that its rejection does not alter the construction of the true part.
- 80 In the context of questions about severance, consideration might now also be given to admission of a will to probate accompanied by orders made (under section 27 of the *Succession Act* 2006 NSW, section 25AA(1) of the *Wills Act* 1936 SA or equivalent provisions) for rectification of the will so that the testator's testamentary intentions can be given effect.

EQUITY PROCEEDINGS

Agreements to Make a Will : An Equity Enforceable against a Deceased's Estate

- 81 In litigation concerning wills and estates interaction between the equity and probate jurisdictions is commonly encountered when a testator is alleged to

have acted unconscionably in not honouring a contract or an agreement to make a particular testamentary disposition. Equity intervenes to bind the deceased's legal personal representative to hold property on trust on terms other than those the subject of a grant of probate or administration.

- 82 Those types of case are generally recognised as cases involving a contract to make a will (*Horton v Jones* (1935) 53 CLR 475); an agreement to make a will enforceable *via* an estoppel (*Giumelli v Giumelli* (1999) 196 CLR 101; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483) ; or *mutual wills* *Birmingham v Renfrew* (1937) 57 CLR 666; *Barnes v Barnes* (2003) 214 CLR 169). The principles applying to such cases are reasonably well settled.

Equitable Undue Influence : Unconscionable conduct against a Deceased Person

- 83 Not so the question whether the concept of equitable undue influence has any scope for operation in a probate case.
- 84 Speculation about this arises from the following observations of Gaudron, Gummow and Kirby JJ in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63] (omitting citations of authority):

“[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 [in his *Chapters on Equity in New South Wales*], 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*. In the present litigation, with respect to the dispositions made by [a] will, no party submitted that equity might apply or extend its principles respecting undue influence and dispositions *inter vivos*, not to attack a grant of probate itself, but to subject property passing under a will to a trust in favour of the residuary beneficiaries or the next of kin.”

- 85 The possibility that principles governing undue influence in equity might apply, as the High Court contemplated possible, was explored in an interlocutory judgment in *Boyce v Bunce* [2015] NSWSC 1924 at [32] *et seq.* That was a case in which a solicitor and his wife befriended an elderly lady who, by degrees, favoured them with testamentary dispositions at the expense of her only daughter. The proceedings were settled before a final hearing.
- 86 A number of “suspicious circumstance” cases have involved factual situations in which a solicitor has benefited from the testamentary gift of a client.
- 87 If a Court were open to an application of equitable principles of undue influence to testamentary dispositions following a grant of probate or administration (in the manner suggested by the High Court), it is conceivable that such a case could be dealt with upon an exercise of equitable jurisdiction.
- 88 One of the respects in which “equitable undue influence” differs from “probate undue influence” is that it is predicated upon an acceptance that a donor (testator) in fact intended to make an impugned transaction. Equity intervenes, essentially, not on the ground that any wrongful act has in fact been committed by a donee, but on the ground of public policy and to prevent relations which existed between parties and influence arising from their relationship being abused. Equity looks to the enforcement of standards, rather than merely to the existence or otherwise of a testamentary intention.
- 89 The intervention of equity (to preclude effect being given to an unconscientious transaction) may be justified, not by the fact that a donee has brought about a transaction, but in his or her accepting it and the benefits of it, albeit at the invitation of the donor: *Stivactas v Michaletos (No. 2)* [1994] ANZ ConvR 252; (1993) Aust Contract R 90-031; (1993) NSW ConvR 55-683; BC 9301874 per Mahoney JA.
- 90 A convenient exposition of the principles governing equitable undue influence can be found in the judgment of McLelland J (as His Honour then was) in *Quek v Beggs* (1990) 5 BPR [97405] at 11,764-11,765:

“Undue influence

... Legal principles

Generally speaking, the law permits a person of full age and capacity to dispose of his or her property by gift or otherwise in such manner as he or she may choose. However in certain recognised categories of case, principles of equity intervene to render such a gift liable to be set aside by the court. One of those categories is where the donor makes the gift as a result of “undue influence” of the donee. In this context “influence” means a psychological ascendancy by the donee over the donor, and “undue influence” means the donee’s taking improper advantage of such ascendancy: *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720. It is not necessary that the ascendancy amount to domination: *Goldsworthy v Brickell* [1987] Ch 378 at 402-6.

A donor (or if he or she is deceased, a representative of his or her estate) will *prima facie* be entitled to have a gift set aside on the ground of undue influence upon proof of:

- (a) facts establishing that the gift was made by the donor as a result of undue influence of the donee; or
- (b) facts that give rise to a presumption that the gift was so made, unless the donee rebuts the presumption in the manner mentioned below.

A presumption of undue influence arises if it is proved:

- (a) that at the time the gift was made there existed a relationship between the donor and the donee of such a nature as to involve reliance, dependence or trust on the part of the donor resulting in an ascendancy on the part of the donee; and
- (b) that the gift is so substantial, or so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act: *Allcard v Skinner* (1887) 36 Ch D 145 at 185; *Johnson v Buttress* (1936) 56 CLR 113 at 134-5; *Yerkey v Jones* (1939) 63 CLR 649 at 675; *Goldsworthy* at 400-1.

In such cases, ‘the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused’: *Allcard* at 171 per Cotton LJ, applied in *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133; *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 85; *Antony v Weerasekera* [1953] 1 WLR 1007 at 1011, PC. The donee ‘has chosen to accept a benefit which may well proceed from an abuse of his position of ascendancy and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour’: *Johnson* at 135.

The relationships capable of giving rise to the presumption include certain well defined categories (such as parent and young child, solicitor and client, doctor and patient) but are not limited to those categories...

The donee may rebut the presumption of undue influence, when it arises, by proving that the donor (i) knew and understood what he or she was doing; and (ii) was acting independently of any influence arising from the ascendancy of the donee. See *Lancashire Loans Ltd v Black* [1934] 1 KB 380 at 409; *West v Public Trustee* [1942] SASR 109 at 119; *Inche Noriah* at 135; *Wright v Carter* [1903] 1 Ch 27 at 52, 57.

It is not sufficient to prove only the first of these elements. In the frequently quoted words of Lord Eldon LC in *Huguenin* at 300 [ER 536], 'The question is, not, whether she knew what she was doing... but how the intention was produced', to which Sir John Romilly MR added in *Hoghton v Hoghton* (1852) 15 Beav 278 at 299; 51 ER 545 at 553, 'and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside'. See also *Harris v Jenkins* (1922) 31 CLR 341 at 368; *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 54, 85; *Zamet v Hyman* [1961] 1 WLR 1442 at 1447; *Whereat* [v Duff [1972] 2 NSWLR 147].

Nor in relation to the second element is it necessarily sufficient to prove that the proposal to make the gift came from the donor (*Spong v Spong* (1914) 18 CLR 544 at 549; *Whereat* at 169) or that the donee took no active steps to procure the gift; *Allcard* at 183-4, 185-6; *Wright* at 52-3.

The matters which in a particular case will need to be proved in order to rebut the presumption will depend upon the nature and incidents of the relationship on which the presumption is founded, since the influence which arises from different kinds of relationships varies in kind and degree: *Johnson* at 134..."

- 91 As yet, nobody appears to have taken up the challenge of running a case, according to the High Court's *Bridgewater v Leahy* paradigm. That could well be because, on the whole, the traditional grounds upon which probate litigation is fought are capable of resolving most disputes.
- 92 Be that as it may, if a *Bridgewater v Leahy* case is to be conducted, the strong likelihood is that the High Court's paradigm will have to be in view from the commencement of proceedings at first instance. For reasons explained in *Boyce v Bunce*, a claim for equitable relief is likely to require an approach to parties, if not pleading, different from that conventionally found in probate proceedings.

CONCLUSION

93 By cutting across established categories of thought, the concept of “suspicious circumstances” invites critical reassessment of conventional approaches to probate pleading; presumptions and shifting onuses of proof; and standard challenges to the validity of a will.

94 However, the concept itself must be approached critically. An allegation that the execution of a will was attended by “suspicious circumstances” is not, of itself, a defence to an application that the will be admitted to probate. Nor can it be allowed to insinuate an established ground of defence (such as undue influence or fraud) not pleaded.

ADDENDUM

95 This is a lightly revised version of a paper delivered at the Succession Law Conference of the Law Society of South Australia on 16 November 2018.

96 At the Conference attention was drawn to the following observations in *Mortimer on Probate* (1911), at page 91, about the interaction of the probate and equity jurisdictions:

“In a case where a testator had executed a will in favour of the plaintiffs, and subsequently, it was alleged, being desirous of depriving the plaintiffs of all benefit conferred upon them by that will, had a will prepared to that effect, but was prevented by the force and threats of the plaintiffs from executing it, the defendants claimed that the plaintiffs should be held to be trustees of the shares devolving upon them by the former will, in favour of the persons who would have taken such shares, had the later will been executed. The case ended in a compromise.”

97 To these observations *Mortimer* added a footnote in the following terms:

“*Betts v Doughty*, (1879) 5 PD 27. The Court would, it is submitted, make such an order if the facts as alleged had been proved. In the unreported case of *Niepel v Kluge* (1909), an action in which the pleadings were based upon this case came before the Court; fraud was alleged against the plaintiffs in preventing the deceased from altering his will, and the relief claimed was that they should be held trustees of their share in trust to pay the defendant such sum as she would have been entitled to had such alteration been made. No exception was taken to the form of pleading either in the Probate Court or in the Court of Appeal, but the case failed for want of proof.”

98 As *Mortimer's* observations illustrate, there is, or may be, a broader role for the equity jurisdiction in modifying the operation of probate law than is sometimes appreciated.

GCL
21 November 2018
