

**THE LAW SOCIETY OF NEW SOUTH WALES**

**YOUNG LAWYERS**

**SEMINAR ON WILLS, PROBATE AND ESTATES LAW**

**(Thursday, 22 August 2013)**

**ONUS OF PROOF IN ESTATE LITIGATION :  
Implications for Practical Advocacy<sup>1</sup>**

**INTRODUCTION**

1. This paper advocates no wholesale changes either in substantive or adjectival law. It does, however, invite practitioners of the law to reflect on how our legal system operates in practice, taking into account the different perspectives of both substantive and adjectival law. It is timely that this be done, if only, because: (a) Australian lawyers are bound to review Australian law, practice and precedence in light of the national system of law emerging after enactment of the *Australia Acts* of 1986; and (b) the parallel rise of case management theory in judicial administration focuses attention on how litigants define, and move towards an adjudication of, “real questions in dispute”.
2. Underlying these reflections on the law in action is an interest in the broad question whether it is reasonably practicable to articulate equitable principles by reference, not merely to English legal history and the historical role of the Lord Chancellor in English legal practice, but, at a higher level of abstraction, by reference to the nature of the cases which equity lawyers practising in Australia have been, and are, routinely called upon to solve.

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<sup>1</sup> This is a revised version of a paper delivered at a seminar on “Wills, Probate and Estates Law” convened by the Young Lawyers Section of the Law Society of NSW on 22 August 2013. The paper develops the topic “Onus of Proof” in the equity jurisdiction in directions beyond “Reflections on Onus of Proof” presented, as paragraphs 61-137 in a paper entitled “Perspectives from the Equity Bench”, delivered to NSW Young Lawyers on 23 March 2013 and posted on the website of the Supreme Court of NSW.

3. This interest is not wholly dissimilar to that which motivated Professor Sarah Worthington to write her book, *Equity*, published in the Clarendon Law Series by Oxford University Press (1<sup>st</sup> ed, 2003; 2<sup>nd</sup> ed, 2006). However, the utility of that book is qualified, for an Australian lawyer, by the fact that its perspective is driven by a Birksian aspiration for the elimination of equity as a separate field of study. The High Court of Australia has directed us to look away from that utopia. If, as “fusionists” hope, Australian equity jurisprudence is to be “successfully integrated into a unified system” of law (as Lord Millet, in his foreword to Professor Worthington’s book, says of her aspiration for English law) it will have to come to terms with a dualist mindset. That mindset is comfortable, as fusionists are not, with the idea that a “dualist” perspective of the relationship between the common law and equity jurisdictions is consistent with an already existing, integrated, unified system of law.
4. English jurisprudence continues to provide useful historical, and comparative law, analogues for the development of Australian law. However, since the enactment of the *Australia Acts* has liberated both Australian and English lawyers from a need to think of our legal systems as different manifestations of the same thing, there is no longer (as was once our reality) a need to expect equivalence between Australian and English perceptions of the equity jurisdiction.
5. This paper is predicated on a working theory that at least some of the perceived differences between Law and Equity can best be appreciated if attention is focussed, not upon perceptions of doctrinal differences between statements of common law “rules” and equitable “principles”, but upon the nature of practical problems sought to be solved by Australian lawyers and the procedural machinery of Australian courts available to solve them.
6. The concept of “onus of proof” is an adaptable vehicle for testing this theory, hopefully in a way that will offer practical guidance to Australian lawyers, and engage their interest.
7. This paper, first, relates the general topic of “Onus of Proof” in equity proceedings to the art (or, for those who prefer it to be so, the science) of advocacy. Secondly, it dwells upon three areas of legal practice of concern to lawyers who practice in “Estate Litigation”:
  - (a) An Application for Probate;
  - (b) An Application for Family Provision Relief; and
  - (c) An Application for Judicial Advice.

8. The term “Estate Litigation” is not an expression liable to be defined with precision. It provides a generic frame of reference for the work of litigation lawyers who regularly encounter cases involving an exercise of the jurisdiction of the Supreme Court touching upon the law of succession (including family provision legislation) and the law of trusts.
9. At a pinch, it might also embrace cases involving an exercise of the Court’s protective jurisdiction, which focuses squarely upon the “estate”, as well as the person, of “a person in need of protection” – typically, in today’s language, a person incapable of managing his or her affairs. That, however, is a subject matter large enough for separate treatment.
10. Considerations of convenience have been engaged in defining the concept of “estate litigation” for the purpose of this seminar, At more than a few levels of abstraction, high and low, the very essence of the equity jurisdiction encountered in the everyday practice of an equity lawyer - the essence of the equity jurisdiction - is found in the *management* of property, and personal relationships, in which there is a prudential need to allow for the competing interests of a variety of parties, not all of whom may be present or accounted for in the litigious arena.

#### **CONTRASTING PARADIGMS : LAW, EQUITY and CASE MANAGEMENT**

11. The complexity, and diversity, of problems that may present themselves to an Equity judge for solution are far removed from the paradigm of a jury trial at common law.
12. Common law jury trials have their own complexities, and a rich tradition too readily abandoned over the last half century. They too provide a topic worthy of separate treatment, on occasion other than this seminar. *Cf*, AM Gleeson, “Finality” (Winter 2013) *Bar News* 33 at 34.
13. The importance, in this seminar, of a contrast between the equity and common law jurisdictions is the insight into the concept of “onus of proof” potentially available from the contrast.
14. Comparatively, a common law jury trial presents the Court with a limited number of parties engaged in an adversarial contest about presently existing claims of right, over a single issue (or, at least, a small number of issues), defined with such formality that they can be decided “Yea” or “Nay” by a lay jury not required to publish reasons for decision. This is, perhaps, the ideal environment for the operation of rules about onus of proof.

15. By contrast, equity proceedings routinely present a multiplicity of questions (pleaded in the alternative) for decision; moreover, proceedings in which both procedural and substantive law consideration must be given to entitlements of absent parties and future interests. This type of proceeding is, by nature, less amenable to simple rules about onus of proof.
16. History aside, the nature of the problems presented for solution in common law proceedings is more amenable to claims *of right* than found in equity; and the nature of disputation in equity proceedings is generally more amenable than needs be in common law proceedings to judicial insistence that curial relief is *discretionary*, not available “as of right” in the common law sense of an entitlement to redress.
17. These fundamental differences still inform our jurisprudence, although less so since the practical demise of civil jury trials since the mid-1960’s, and the emergence of the case management philosophy currently embodied in the *Civil Procedure Act 2005 NSW* and the *Uniform Civil Procedure Rules 2005 NSW*, the rules of court made under the Act.
18. The nature of the problem, or problems, presented to the Supreme Court for solution can affect the nature of advocacy. That is so whether proceedings happen, as a matter of administrative convenience, to be assigned to the Common Law Division or the Equity Division.
19. References in this paper to a “common law” paradigm or an “equity” paradigm are intended to direct attention to the nature of litigation rather than particular arrangements for judicial administration.
20. Not all estate litigation (however defined) necessarily involves an exercise of equitable, and only equitable, jurisdiction. Developments in the law of negligence over recent decades prevent the making of such a blanket observation. Witness, for example, *Hawkins v Clayton* (1988) 164 CLR 539, *Hill v Van Erp* (1997) 188 CLR 159 and *Vagg v McPhee* [2013] NSWCA 29.

### **“ONUS OF PROOF” : The Nature of the Beast**

21. Strictly, the concept of “onus of proof” is directed to the process of determination of a contest, or resolution of a doubt, about an issue of *fact*.

22. In practice lawyers tend to conflate the process of adjudication of questions of fact and questions of law, and run together the presentation of evidence bearing upon questions of fact and the presentation of arguments about legal analysis and desired outcomes, in adversarial debate. We slip too comfortably into an assertion that, for example, “the plaintiff bears the onus of proving its case” rather than confining ourselves, with greater precision, to an assertion that “the plaintiff bears the onus of proving a particular fact (which is an element in the case it seeks to establish)”.
23. Conventionally, discussion of “onus of proof” distinguishes between a “legal (or ultimate) onus” (which is said never, during the course of a trial, to shift from the party upon which the burden rests) and an “evidentiary onus”, which characteristically shifts from one party to the other with the ebb and flow of evidence adduced during a trial: eg, *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168; Julius Stone (and WAN Wells), *Evidence, Its History and Policies* (Butterworths, Sydney, 1991), ch 30.
24. A classic statement of the distinctions here drawn, and the process of reasoning underlying an allocation of the legal burden of proof, can be found in *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125:

“... if recourse is had to the rules of pleading, the fixing of the burden of proof is not always to be tested simply by asking which party is alleging the affirmative. In *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168 it was said that the proposition there quoted from *Phipson on Evidence*, 10<sup>th</sup> ed., par. 92, has been frequently acknowledged. The proposition was that the expression ‘the burden of proof’, as applied to judicial proceedings, ‘has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence’. The author went on to say, and this also was approved in the case last cited, that the burden of proof in the first sense is always stable, but the burden of proof in the second sense may shift constantly. In my opinion, the burden of proof in the first sense lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g., if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an ‘avoidance’ of the claim which, prima facie, the plaintiff has.”

## **ADVOCACY IN EQUITY : The Forensic Challenge**

25. In the broader context of litigation, the “rules of evidence” are not the only source of adjectival law that must be consulted in pursuit of substantive outcomes. The “practice and procedure” of a court governing the decision-making processes of that court is, or may be, at least as important in a particular case.
26. Conceptually, at least in conduct of civil (as distinct from criminal) proceedings, the rules of evidence ultimately boil down to just two rhetorical questions: First, is the evidence sought to be adduced *relevant* to an issue; and, secondly, is it *probative* of an issue to be decided?
27. Each of these questions depends critically upon identification of *issues* to be decided. In its turn, the process of identifying issues depends upon the practice and procedure of the decision-maker.
28. Upon a consideration of “onus of proof” that fact is easily overlooked. Discussion of the concept of “onus of proof” is generally confined to text books on evidence and rarely treated, as such, in texts on practice and procedure.
29. Recent emphasis, in expositions of case management of litigation by courts, provides greater opportunities for escaping the confines of a “rules of evidence” mentality because of a focus upon a need to identify “the real questions in dispute”. Interlocutory disputation about whether formal admissions should be made, whether interrogatories can be administered, or whether potentially incriminating business records should be discovered can bear directly upon the practical operation of “onus of proof” considerations at a trial or other form of contested hearing.
30. In this broader environment, perhaps the concept of “onus” needs to recognise that, in the conduct of litigation, the concept of “onus of proof” must be supplemented by recognition that litigants, in varying measure, bear a “forensic onus” (including the burden of persuading a court or tribunal to define questions in dispute in a particular way or to embrace a particular outcome), an onus that bears, at least indirectly, on the facts to be established by one party or another.
31. More generally, the forensic challenge for a litigation lawyer involved in an equity dispute (or, more particularly, estate litigation) is, in the interests of a client, to engage the client, competing interests and the Court in the identification of: (a) a problem, or problems, in need of solution; and (b) potential solutions designed to secure the ends of justice.

32. This follows, generally, from the nature of claims for relief in equity, focussing (as they do) on an application for discretionary relief, moulded to the facts of a particular case, dealing with property or personal relationships, affecting interests not necessarily limited to the interests of adversarial parties presently before the Court.
33. The best advocates, generally, are those who contribute, constructively, to a just outcome – mindful of their client’s interests, but not constrained by a sense of obligation to serve merely as a mouthpiece of the client.
34. Two quotes from Sir Owen Dixon come to mind as reinforcement of personal experience that this is so. Earlier generations of lawyers tended to cite them more than does the present generation. They are drawn to attention here as much to emphasise the process of problem solving as to the notice the professional obligations of lawyers.
35. Upon taking the oath of office as Chief Justice of the High Court of Australia in 1952, Dixon J made a speech that included the following passage (extracted from Dixon, *Jesting Pilate*, Law Book Co, Australia, 1965 at pp 247-248):

“I would like to say that from long experience on the Bench and a not much shorter experience at the Bar there is no more important contribution to the doing of justice than the *elucidation of the facts* and the *ascertainment of what a case is really about*, which is done before it comes to counsel’s hands. Counsel, who bring his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself [Emphasis added].”

36. On first presiding as Chief Justice at a Melbourne sitting of the High Court, later in 1952, Dixon CJ delivered another speech. From that speech (extracted from *Jesting Pilate* at pp 243-254), the following may be taken:

“In advocacy [in an appellate court constituted by several judges], you learn many things. Not the least of all that candour is not merely an obligation, but that in advocacy it is a weapon. You learn, too, that *it is not case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law*. But you may learn that the difficulty which has to be solved must be felt by the Bench before the proper solution can exert its full powers of attraction. It is only human to underestimate the value of the solution if it is presented to you before you are completely alive to the nature and difficulty of the problem which it solves, and the judges who were more than human are long since dead [Emphasis added].”

37. These sentiments apply equally to common law proceedings as they do to equity proceedings. However, in the classic common law paradigm there may be greater scope for a raw adversarial contest (between parties with competent legal representation) than there is in the classic equity paradigm (whether or not the parties are legally represented).

### **THE LAW IN PRACTICE**

38. In the broader scheme of things, and taking into account both the nature of equitable jurisdiction and the objects and imperatives of case management philosophy, the concept of “onus of proof” discussed in texts on the law of evidence is less dominant in legal thinking than might appear to be the case on a review of the law of evidence in the abstract.
39. The rules of evidence, adapted over time as a protocol for regulation of the receipt of evidence by a court at a trial or contested hearing, may well inform the interlocutory business of a court in preparation of proceedings for a trial or final hearing. However, as Spigelman CJ noted, the concept of a “trial” no longer has the centrality it once had in the resolution of disputes: Spigelman, “Truth and the Law” (2011) 85 ALJ 746 at 751-752.
40. In estate litigation, in particular, there can be a strong administrative flavour to proceedings leading to a final outcome. Property has to be preserved and managed on an interlocutory basis. Consideration has to be given to the service of notice of the proceedings on absent parties, and consequently to the representation of competing interests and the constitution of the proceedings. The context in which judicial decisions must be made is broader than a mere *inter partes* dispute. There is, not uncommonly, a public interest aspect that goes beyond the administration of a comparatively “private” dispute between identified parties. In the interests of containing disputes, and costs, within manageable limits, the Court may actively discourage parties from “overkill” in the resources they apply towards “proving” a case. Special aspects of the rule of evidence may come into play in dealing with statements of deceased people whose state of mind, or statements, lie at the heart of the subject matter of disputes.

### **An application for Probate**

41. To the modern Australian lawyer, the law of probate is nothing more, or less, than a subset of the equity jurisdiction. The modern mind passes lightly over the historical origins of probate law in the ecclesiastical courts of England, and historical differences between the probate and equity jurisdictions.



42. For the most part, deployment of a broad brush causes no problems. There are, however, traps in failing to appreciate distinctions between the two jurisdictions.
43. An example of a distinction of importance – one that has a functional significance – is found in the different concepts of “undue influence”. In equity, a party who pleads undue influence may be able to call in aid a presumption of undue influence, arising from an established relationship of influence (eg, solicitor and client) or from proof, on the facts of the particular case, of an actual relationship of influence.
44. 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 will-maker, without the benefit of any form of presumption of undue influence arising from relationships: *Winter v Crichton* (1991) 23 NSWLR 116; Young, Croft and Smith, *On Equity* (Law Book Co, Sydney, 2009), para [5.520].
45. Had probate law embraced the approach of equity, there might never have been many wills that could have survived challenge. Intuitively, one suspects that few testators or testatrix are left to make a will without a degree of “influence” being brought to bear on them by expectant beneficiaries, with or without intent to affect the outcome of testamentary deliberations. There is a functional difference in the nature of the law as administered in the two jurisdictions.
46. The paradigm for present consideration of onus of proof in probate proceedings may be taken to be an application for a grant of probate in solemn form.
47. The fact that an application for probate can be made in two different forms – one an application for a grant “in common form” (that is, in proceedings with a distinct administrative flavour), the other for a grant “in solemn form” (in proceedings more often adversarial in character) – of itself marks out the probate jurisdiction as idiosyncratic and grounded, in large measure, on pragmatism in the administration of deceased estates. A grant of probate is a form of court order that serves as a title to property.
48. Another pointer to the distinctive character of an application for probate is the need to accommodate persons who are, or may be, interested in an estate, by procedures designed to ensure that an application for any grant is made in a public setting. *Prima facie*, an intention to make an application for probate, or subsequently to distribute an estate, must be advertised. Notice of an application must, *prima facie*, also be served on interested parties. Determination of an application for a grant in solemn form is not, ever, simply made by consent, unsupported by evidence.

49. An application for a grant of probate in solemn form has special rules about, or bearing upon, “onus of proof”, most of which can bear description as “presumptions”.
50. The fundamental rule, best characterised as a principle governing “onus of proof”, is that, in every case, the onus is on a party propounding a will to prove that the instrument is, in fact, the will of the deceased: *Bailey v Bailey* (1924) 34 CLR 558 at 570; Julius Stone (and WAN Wells), *Evidence, its History and Policies* (1991), p 697; A Kiralfy, *The Burden of Proof* (Professional Books, Oxford, 1987), pp 129-130.
51. This fundamental rule is hedged about by a myriad of “presumptions”, conveniently summarised for New SouthWales lawyers in *Re Eger; Heilprin v Eger* (Powell J, 4 February 1985) BC8500997 at 72-74; *Butterworths’ Succession Law and Practice (NSW)*. [13,001]; *Ridge v Rowden; Estate of Dowling* (Santo J, 10 April 1996) BC 960 1342 at 39-46, *Butterworths Practice*, para [13,045].
52. Witness, for example, Powell J’s summary of the principles in *Re Eger*:
  - “I have taken the principles of law to be borne in mind, and, if relevant, to be applied, in a case such as this to be as follows:
    1. the onus of proving that an instrument 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 instrument (*Bailey v Bailey* (1924) 34 CLR 558, 570 *et seq*;
    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 (*Bailey v Bailey* , *supra*);
    3. the proponent’s duty is, in the first place, discharged by establishing a prima face case (*Bailey v Bailey* , *supra*);
    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. unless suspicion attaches to the instrument propounded the testator’s execution of it is sufficient evidence of his knowledge and approval (*Guardhouse v Blackburn* (1866) LR 1 P & D 109);
    6. facts which might well cause suspicion to attach to an instrument include:

- (a) that the person who prepared, or procured the preparation of, the instrument receives a benefit under it (*Barry v Butlin* (1838) 2 Moo PC 480, 12 ER 1089; *Nock v Austin* (1918) 25 CLR 519 528 *et seq*);
  - (b) that the testator was enfeebled, illiterate or blind when he executed the instrument (*Tyrrell v Painton* [1894] P 151; *Kenny v Wilson* (1911) 11 SR (NSW) 460 469; 28 WN (NSW) 124);
  - (c) where the testator executes the instrument as a marksman when he is not (*Kenny v Wilson, supra*);
7. where there is no question of fraud, the fact that a will has been read over to or by a capable testator is, as a general rule, conclusive evidence that he knew and approved of its contents;
8. 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 (*Symes v Green* (1859) 1 Sw & Tr 401; 164 ER 785; *Sutton v Saddler* (1857) 3 CB (NSW) 87; 140 ER 671; sanity is to be presumed until the contrary is shown (*Burrows v Burrows* (1827) 1 Hagg Ecc 109; 162 ER 524);
9. 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 (*Banks v Goodfellow* (1870) LR 5 QB 549);
  - (b) extreme age or sickness (*Battan Singh v Amirchand* [1948] AC 161; *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179; *Kenny v Wilson supra*); or alcoholism (*Timbury v Coffee* (1941) 66 CLR 277);
10. however, while extreme age (*Bailey v Coffee, supra*; *Worth v Clasohm, supra*) or grave illness, (*Kenny v Wilson, supra*) will call for vigilant scrutiny by the court, neither (even though the testator may be in extremis (*In the Goods of Chalcraft (dec'd)*; *Chalcraft v Giles* [1948] P 222)) is, of itself, conclusive evidence of incapacity; it will only be so if it also 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 (*Battan Singh v Amirchand, supra*, *Bailey v Bailey, supra*; *Worth v Clasohm, supra*)." )

53. Although the language used in articulation of this summary of the law is not limited, in terms, to articulation of “presumptions” – there is talk of “a *prima facie* case”, “facts which might well cause suspicion” and “a general rule” as well as matters “presumed” – a variety of synonyms points in the direction of presumptions of the type identified by Murphy J in *Calverley v Green* (1984) 155 CLR 242 at 264:
- “Presumptions arise from common experience .... If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardised inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary.”
54. The “presumptions” identified in Powell J’s summary of the law were formulated long before the formality of the law of wills was qualified by concepts of informal wills (*Succession Act* 2006 NSW, s8), statutory wills (*succession Act*, ss 18-26) and *Family Provision* orders (*Succession Act*, chapter 3).
55. Whether, over time, the force of presumptions of the character summarised by Powell J has changed, or will change, is probably an empirical, rather than a legal, question.
56. In the context of the present paper, however, it should not go unnoticed that many a contested probate suit (in which there is a substantive contest about the mental capacity of a will-maker) is case managed into an application for discretionary orders on an application for family provision relief.
57. This highlights the task of all legal professionals participating in the conduct of a probate application: to *manage* substantive disputes between parties representing *competing interests*; to appreciate the *nature and purpose* of particular types of proceedings; and to work towards an outcome that allows determination of *real* issues in dispute. At one level this is no more, or less, than is required of participants in any contested proceedings. Nevertheless, the words here given emphasis have special resonance in probate litigation.
58. The objective of such litigation is to endeavour, within constraints of substantive and adjectival law, to give effect to duly expressed testamentary intentions in a way that allows *a reasonable opportunity for the legitimacy of intentions, apparently expressed, to be tested, in a public setting, by those with a legitimate interest in doing so.*

### **An application for Family Provision relief**

59. Upon a consideration of “onus of proof” in estate litigation, an application for family provision relief (under chapter 3 of the *Succession Act 2006* NSW) offers a natural contrast with an application for a grant of probate in solemn form.
60. An applicant for family provision relief, uncontroversially, bears the onus of establishing an entitlement to relief. Not uncommonly, that might entail a need to prove, as a jurisdictional fact, the plaintiff’s status as an “eligible person” within the meaning of s 57 of the *Succession Act*. However, many contests focus, not on eligibility to apply for relief, but on the evaluative and discretionary judgements that must be made by the Court under s 59 of the Act, having regard to matters enumerated in s 60 for the Court’s consideration.
61. The public interest character of family provision proceedings is illustrated by the provisions of s 61 of the Act that highlight the need for notice of an application for family provision relief to be served on interested parties if their interests are to be disregarded upon a determination of the application.
62. As a matter of form, a family provision order may take effect as if the provision for which the order provides were made in a will or codicil: s 72.
63. The power of the Court (under s 91) to grant administration in respect of the estate of a deceased person for the purpose of permitting a family provision application to be dealt with provides another, formal link between family provision and probate proceedings.
64. The availability of orders for the designation of property as “notional estate” (ss 78-90) highlights the reach of the jurisdiction that can be exercised under the Act potentially affecting otherwise settled property interests.
65. Forensically, Probate and Family Provision proceedings are fundamentally different. That is because a contested application for probate generally involves a need to decide fundamental questions of fact (commonly, about the mental capacity of a testator) in which the outcome for interested parties may be “all or nothing”; family provision proceedings, by contrast, generally reside in the realm of judicial discretion, where there is generally leeway for an outcome midway along the spectrum between all or nothing.
66. That difference fundamentally affects the forensic challenge for advocates, and the attitude of the Court to the nature and range of evidence to be adduced.

67. The common, and reasonable, assumption within the profession is that family provision proceedings can, and should, ordinarily be less expensive to conduct than an application for a grant of probate in solemn form.
68. However, parties to family provision proceedings, unconstrained by experienced lawyers, not uncommonly want to prove a case other, or more, than what is necessary or expedient to be proved for the purpose of a grant of relief.
69. With or without the benefit of the enumeration of relevant factors found in s 60, the range of facts that might be made the subject of evidence in support of, or in opposition to, an application for family provision relief is potentially extensive. Family grievances too readily become gladiatorial contests.
70. Nobody appears, as yet, to have solved this problem or the consequential problem of how to contain legal costs associated with the conduct of family provision proceedings.
71. Counter intuitively, a litigation lawyer experienced in the conduct of family provision applications will realise the practical need for restraint in seeking to advance, or oppose, an application.
72. In this area, perhaps more urgently than in probate proceedings, there is a need for litigation lawyers to work with the Court to achieve outcomes that are cost effective as well as just.
73. That requires that close attention be given to the disciplined preparation of affidavits, to exploration of the possibilities for a negotiated settlement and to restraint in the presentation of evidence (including cross-examination) at a contested hearing, as well as the importance of facilitating the conduct of a final hearing by agreeing upon interlocutory orders or agreements for the preservation of an estate pending the determination of a contested application.
74. The practical operation of family provision legislation depends, critically, upon work done by barristers and solicitors, with their respective clients and in their engagement with opponents and the Court, outside court. Any scope for the operation of principles relating to “onus of proof” depends very much on the co-operation of all concerned in defining the real questions in dispute, not only formally but informally as well.

## **An Application for Judicial Advice**

75. Perhaps one of the clearest illustrations of the symbiotic relationship between the Equity bench and the practising profession, bearing upon the question of “onus of proof”, is found in the ability of trustees (including executors and administrators) to apply to the Court for judicial advice in the administration of an estate.
76. The jurisdiction of the Court to entertain an application for advice, and to grant it, is found in the general equity jurisdiction of the Court (on an application for an “administration order” under, or by reference to, Part 54 of the *Uniform Civil Procedure Rules 2005 NSW*) and under s 63 of the *Trustee Act 1925 NSW* (as elaborated by the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v Bishop Petar* (2008) 237 CLR 666).
77. I do not seek, in this paper, to elaborate this topic any more than I have already recently done in *Re Estate Late Chow Cho-Poon; Application for Judicial Advice* [2013] NSWSC 844 (26 June 2013).
78. It is sufficient, for present purposes, to observe that, for practical purposes, at least some controversies arising in the administration of an estate might be quieted by utilisation of a procedure that permits a court to express an opinion based upon assumptions of fact, with or without confirmatory evidence.
79. In proceedings of this nature, the concept of “onus of proof” is generally relegated entirely to the background, and the Court is dependent upon steps taken outside court by parties and their lawyers to maximise the utility of the proceedings.

## **CONCLUSION**

80. Estate Litigation, at least in the context of an exercise of equity jurisdiction, generally requires decision-making processes that have a strong managerial flavour in the administration of an estate. The focus is upon management of property and personal relationships, recognising that “third party” interests, present or future interests, and public interest factors may need to be accommodated.
81. Insofar as the concept of “onus of proof” may be engaged in these types of proceedings, it needs to be assessed by reference to the particular nature of the subject matter of the proceedings, and their purpose.
82. Sensitivity to this, and an appreciation of a need to assist the Court in the process of solving problems thrown up by proceedings, are necessary to successful advocacy in the equity jurisdiction.

**JUSTICE GEOFF LINDSAY**

2 September 2013