THE ADOPTION CONFERENCE

TOWARDS DIGNITY: The Adoption Process in NSW and Aboriginal and Torres Strait Islander Children

THE SESSION

AFFORDING DIGNITY TO YOUNG PEOPLE AND CHILDREN IN LITIGATION

THE TOPIC

AFFORDING DIGNITY TO CHILDREN AND YOUNG PEOPLE IN ADOPTION HEARINGS

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DIGNITY AND ADOPTION IN THE EYES OF A CHILD OR YOUNG PERSON: The Perspective of An Equity Judge

By

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INTRODUCTION

1 The jurisdiction of the Supreme Court of New South Wales to make an order that one person be "adopted" by another is governed by statute. For the time being, that statute is the *Adoption Act* 2000 NSW.

2 Although a study of the history of the law of adoption in NSW is beyond the scope of this paper, a few historical observations are necessary to provide context for a discussion of the role of an "equity judge" in the adoption process. This paper endeavours to view the NSW adoptions law and practice within the broader work of an equity judge, recognising that a particular focus of this

Conference is the engagement of adoption law with Aboriginal and Torres Strait Islander children and young people.

3 In this paper, a reference to "Indigenous" people is intended to embrace both our Aboriginal and our Torres Strait Islander compatriots, acknowledging that different communities identify with different badges of pride. Respect is due in each case to how particular communities self-identify.

4 As a judge of a State court far removed from the Torres Strait Islands, my professional engagement with Indigenous communities has been limited, so far as I am aware, to those who self-identify as Aboriginal. For that reason and to respect Torres Strait Islanders' consciousness of their distinct cultural heritage, most references in the paper are to Aboriginal people, not Aboriginal and Torres Strait Islander peoples collectively. At the same time, I acknowledge that, as between themselves, Aboriginal communities may have different cultural norms arising from a variety of life experiences.

5 Ultimately a judge needs in each case involving the welfare of a person to focus attention on that person as a member of the community, or communities, to which he or she belongs and with whom he or she lives.

ADOPTION LAW IN HISTORICAL CONTEXT

6 The Conference provides an opportunity to mark the commencement about 100 years ago of Part XIV (sections 123-129) of the *Child Welfare Act* 1923 NSW, the State's introduction of a legislative regime for adoptions. The Act received the Governor's assent on 30 November 1923. It commenced operation on 15 December 1923.

7 Part XIV was based upon the *Adoption of Children Act* 1896 WA which introduced Australia's first regime of "legal adoption", the origins of which can be traced back to a Massachusetts "Act to Provide for the Adoption of Children", Chapter 324 of 1851: AC Wright, B Luu and J Cashmore, "Adoption in Australia: Past, Present and Considerations for the Future" (2021) 95 ALJ 67; JS Zaninaldin, "The Emergence of a Modern American Family Law: Child Custody,

Adoption and the Courts 1796-1851" (1979) 73 *Northwestern University Law Review* 1038.

8 Before enactment of legislation such as the *Child Welfare Act* 1923, "adoption" in the general community of NSW appears to have been based upon an agreement between one or both of birth parents and a foster family or necessity in taking care of a "neglected child" whose need of care arose from the absence, neglect or poverty of birth parents or a hope of exploitation based upon a perceived capacity of a child to contribute economically to either or both of a birth family or a foster family. In the absence of a "transfer" of "parental rights" to an adoptive parent, a birth parent (or, more particularly, a birth father) could insist upon reclaiming custody of an adopted child. This state of affairs reflected a tendency (long since abandoned) to treat control of a child as a species of property rather than treating the child as a repository of independent rights.

9 Presumably, in theory, the Supreme Court of NSW, sitting in equity, could have made a child a ward of the Court (upon an exercise of the Court's protective, "infancy" jurisdiction) and released the child into the custody of a foster parent (guardian); but that would have been a potentially expensive and cumbersome process beyond the reach, if not the lived experience, of ordinary people. So too the possibility of an adoption being effected by a private Act of Parliament in an individual case, as were divorces before the enactment of "matrimonial causes" legislation.

10 The introduction of a generally available, statutory form of adoption opened the door to a distinction between "legal" (or "formal") adoption and "*de facto*" (or "informal") adoption.

11 In an Aboriginal community the expression "informal adoption" may not do justice to established, non-linear kinship relationships. A correct use of terminology depends on context rather than fixed labels. Context is important. A judge generally has to master "the text" of the law to be applied, consider the "context" within which the law is to be applied, and to apply the law in a manner that gives effect to the purpose for which the Court's jurisdiction exists. This is

not generally a mechanical application of fixed rules but a purposive application of legal rules or principles in the factual context of a particular case.

12 Depending upon the nature of the formalities attending a formal adoption, the public resources devoted to support for persons affected by such an adoption and the effectiveness of any administrative regime for supervision of the adoption process and adoption outcomes, a formal adoption provides a framework that diminishes the transaction costs of parenting a child or young person outside his or her birth family and may ameliorate social dysfunction attending a birth family.

13 A problem with the system of formal adoption is, however, that "formalities" do not always promote flourishing of a family, the more rules you have, the more rules you need in the regulation of relationships and over regulation can be both costly and counter-productive.

14 On the other hand, a social arrangement in the nature of an informal adoption may, in a world in which many activities of life (such as engagement with banks, schools and social security administrators) require proof of identity and authority, encounter barriers (and transaction costs) in the guardianship of a child or young person; and dysfunctionality in personal relationships might be concealed from public view, if not open to public regulation.

15 Piecemeal legislative reforms in the last quarter of the 19th century and the first half of the 20th century or thereabouts worked towards the building of a social welfare system serviced by government and approved institutional agencies until, in the last few decades of modern times, increasing emphasis has been placed on greater community involvement and "openness" in the adoption process.

16 There is, perhaps, a parallel between trends over the last 30 years or so in the "adoption" of children and those attending the management of the affairs of a person incapable of self-management.

17 In both areas of the law the language of "substitution" (a "substituted family" in adoption cases and "substitute decision-making" in protective management cases) has come under challenge by forces contending that what is required of the law is not a process of "substitution" of one thing for another but a process of facilitating "assistance" of vulnerable people to enable them, so far as practicable, to care for themselves in a family setting of their own choice.

18 In both areas an aspiration of government has been to de-institutionalise vulnerable people and to encourage them to live a "normal" life in the general community. In the adoption realm this aspiration is reflected in talk of "open adoptions" and ongoing contact between an adoptee and his or her birth parents. In the protective management realm it is reflected in the promotion of enduring powers of attorney and enduring guardianship appointments as a vehicle for vicarious self-management.

THE ESSENTIAL LEGAL NATURE OF AN ADOPTION

19 Two essential features of the *Child Welfare Act* 1923 have remained fundamental to the law of adoption in NSW.

20 First, the Act placed the welfare of a child proposed for adoption at the heart of an application to the Supreme Court for an order of adoption. The Act provided that an order of adoption was not to be made unless the Court was satisfied, *inter alia*, "that the person applying for the order [was] of good repute and a fit and proper person to have the care and custody of the child, and of sufficient ability to bring up, maintain, and educate the child; and that the welfare and interest of the child [would] be promoted by the adoption …".

21 Secondly, the Act provided for a transfer of parental power over a child to an adoptive parent, thereby "[terminating] all rights and liabilities existing between the child and his [or her] natural parents [other than in limited circumstances relating to property, not now material]"

22 The 1923 Act was replaced, in turn, by the *Child Welfare Act* 1939 NSW, the *Adoption of Children Act* 1965 NSW and the *Adoption Act* 2000 with various amendments from time to time along the way.

23 Still within living memory, the 1965 Act centralised control of the adoption process in executive government. It was predicated upon an assumption that, unless and to the extent that adoptive parents counselled their adopted child about his or her birth parents, the fact of adoption was to remain confidential or, at least, an open secret.

24 The *Adoption Act* 2000 gave expression to a contrary assumption (embraced in the 1990s) that adoptions should be "open" and adoptees and adoptive parents should be encouraged to acknowledge and maintain connections with birth parents, members of birth families and cultural traditions. It was accompanied by an acknowledgement that "kin" relationships and cultural traditions within Aboriginal families may differ from those of non-Aboriginal families.

25 My judgment in *Re Estate Wilson, Deceased* [2017] NSWSC 1; 93 NSWLR 119 illustrates how this new "openness" facilitated the making (under section 134 in Part 4.4 of the *Succession Act* 2006 NSW) of a "distribution order" affecting the deceased estate of an Aboriginal person who (having been adopted by a non-Aboriginal couple) died intestate leaving "legal" and "natural" siblings who (under Chapter 4 of the *Succession Act* 2006) had competing claims to the intestate estate.

26 In essence, I approached the concept of Aboriginal "customary law" through the prism of family relationships in the particular case without a need for expert evidence about the anthropology of different clan groups. Based on that approach, I preferenced substance over form and ordered that the bulk of the deceased estate of an Aboriginal man pass to his Aboriginal half-sisters (with whom he had a substantive family relationship after they were able to identify him as their long-lost adopted brother) over his adoptive non-Aboriginal half

sisters (with whom he had no personal relationship but, by virtue of an adoption order, a legal connection).

27 My summary of *Re Estate Wilson, Deceased* appears in a paper entitled "Indigenous Estate Distribution Orders" presented on 1 March 2018 and published on the website of the Supreme Court. A more critical examination of the judgment by Professor Prue Vines appears as Chapter 20 (entitled "Re Estate Wilson, Deceased (2017): The Last Frontier for Aboriginal Intestacy in Australia?") in B Sloan, *Landmark Cases in Succession* (Hart Publishing, Oxford, 2019). A sympathetic report of the case made the front page of *The Australian* newspaper, indicative of public interest in Aboriginal affairs, whatever the merits of my analysis of the law.

28 It is fitting in this "Centenary" year of NSW's adoption legislation that the Supreme Court of NSW is currently celebrating its bicentenary. The *Third Charter of Justice* (issued pursuant to the *New South Wales Act* 1823 Imp) was proclaimed on 13 October 1823, anticipating the first sitting of the newly established Supreme Court on 17 May 1824.

29 Under the *Child Welfare Act* 1923 the Court's jurisdiction to make an adoption order was conferred on the Court's "equity judges". Those judges have continued since that time to have primary responsibility within the Court for the making of adoption orders. This reflects the historical jurisdiction of the English Lord Chancellor (England's senior equity judge) in management of the affairs of vulnerable people: "infants" and those who, today, are described as "people incapable of managing their own affairs".

30 The word "adoption" is not expressly defined by the Act. Its meaning is left to inferences to be drawn from the stated objects of the Act; identification of persons who can be adopted and those with standing to apply for an adoption order; administrative processes associated with an application for an adoption order; the criteria to be applied by the Court upon determination of an application for an adoption order; and a prescription of the legal effect of an adoption order.

31 In the era of "open adoptions", with emphasis placed upon maintaining social connections between birth families and adoptive families, one might be forgiven sometimes from harbouring a suspicion that the challenge for adoptive parents is to accept that their adoption of a child may, as their future unfolds, involve "adoption" of at least some members of the birth family as well.

32 This is, perhaps, part of larger changes within Australian society in which, over several decades, the law has accommodated changing concepts of "family". This can be seen, for example, in the assimilation of "*de facto* relationships" with "formal marriage" and expansion of the categories of persons "eligible" to apply for a family provision order under Chapter 3 of the *Succession Act* 2006 NSW against a deceased estate.

THE COURT'S SUPERVISORY ROLE

33 The Court's role in the adoption process is largely that of a gatekeeper, not an active participant. In its determination of an application for an adoption order it may, indirectly, supervise the adoption process; but it is not generally an active player in that process and, once an adoption order is made, its role is generally at an end. Unless an application is made to it for further relief, the Court generally has no function to perform in the implementation or "working out" of an adoption order.

34 The role of the Court as a "gatekeeper" in the adoption process is even more marked on the determination of an application for a parentage order under the *Surrogacy Act* 2010 NSW. By the time such an application is made a child will have been born into an extended family and comprehensive formal administrative procedures, safeguarding the integrity of the process, will have been engaged.

35 Adoption and surrogacy cases alike demonstrate the symbiotic interdependency of the Court and executive agencies in management of the affairs of families. The Court largely depends upon others (including the legal profession as well as government agencies and approved organisations) for the performance of executive functions which, in a less complicated world long ago, were sometimes performed by clerks or registrars of courts.

36 The role of an "independent child representative", as an intermediary between a child or young person and institutional players (executive agencies and the Court) can also be critical to an orderly exercise of the Court's protective (and adoption) jurisdiction.

37 The statutory regime for an adoption is separate and distinct from any jurisdiction that might be exercised by the Court in its inherent "protective jurisdiction" over a minor or a person who (by reason of mental illness or otherwise) is incapable of managing his or her affairs; but operation of the *Adoption Act* 2000 is informed by that jurisdiction.

38 This can be seen in section 7(a) of the *Adoption Act* which states as the "first" *object* (or purpose) of the Act emphasis upon "the best interests of the child concerned, both in childhood and later life" as "the paramount consideration in adoption law and practice".

39 That emphasis finds express reflection also in section 8 of the Act that spells out *principles* to be applied in making decisions about the adoption of a child.

40 This reflects the Court's "protective jurisdiction" under the general law as explained in the seminal judgment of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB* (Marion's Case) (1992) 175 CLR 218 at 258-259 by reference to *Re Eve* [1986] 2 SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14-21, a decision of the Supreme Court of Canada.

41 *Marion's Case* (1992) 175 CLR at 237-238 is also the leading Australian authority (following a decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112) for the proposition that there is no fixed age of a child that governs his or her capacity to give informed consent to medical treatment but, rather, capacity depends upon a child having a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.

42 Although the inherent protective jurisdiction of the Court (in NSW, commonly called the *parens patriae* jurisdiction) is available to deal with exceptional circumstances, "care proceedings" relating to a child or young person are

routinely dealt with by the Childrens Court of NSW in the exercise of jurisdiction conferred by the *Children and Young Persons (Care and Protection) Act* 1998 NSW.

43 The administrative processes associated with an application for an adoption order often have their genesis in care proceedings. That is where hard decisions are routinely made about whether a child should be taken into care by a Minister of the State.

44 In many cases of this type, by the time an application is made to the Supreme Court for an adoption order a child or young person has bonded with the proposed adoptive parents, in foster care, to such an extent that there is no practical alternative to grant an adoption order, albeit perhaps with an adoption plan approved or registered.

45 Within the Equity Division of the Court several specialist Lists are maintained for case management of proceedings under the supervision of a "List Judge". Justice Stevenson is currently the Adoptions List Judge. The List Judge manages the List and hears a fair share of applications for adoption orders but the adoptions work of the Court (particularly uncontested applications for an adoption order) is distributed across the Equity Division.

46 On the filing of a summons for adoption in the Supreme Court cases fall into two categories. A contested application for an adoption order follows a course chartered by the Court's Practice Note SC Eq 13. An uncontested application takes a more summary course and is generally determined by a judge in chambers with, or without, a formal sitting attended by family members at which time an adoption order is made.

47 An application for an adoption order is often classified as "uncontested" because, although protesting against the prospect of an adoption order, birth parents fail to enter (or, at least, do not enter) an appearance in the proceedings. A protest coupled with a deliberate decision not to appear in

proceedings is, perhaps, a rational way for a birth parent to place on record love for a child and a reluctance to let go.

48 The period between the time a child is taken into care and the time considered opportune for the making of an application for an adoption order appears to be governed largely by decisions made in the ordinary course of business of executive government with the benefit of social workers and the like who, over an extended period, can be meticulous in their attention to the welfare of a child and the community (of birth parents, foster carers and others) to which the child belongs.

49 This is a process which might be thought to be preordained to culminate in an adoption order. Birth parents often fall away, distracted by their own (often considerable) problems, resigned to fate and wearied by the process. Over time (and, in the case of a young child, not a particularly long time) a child becomes bonded to his or her foster family. The patience of family members, including the child, can be worn thin. A child living in happy circumstances with a foster family becomes impatient to be assimilated with the family in law as in fact. Prospective adoptees often long for official permission to use "the family name" as their own. They want to "belong" and to feel "secure" in the community to which they belong.

SEARCHING FOR "DIGNITY" IN THE LANGUAGE WE USE

50 The advertised title of this paper is "Affording Dignity to Children and Young People in Adoption Hearings".

51 My preferred title is: "Dignity and Adoption in the Eyes of a Child or Young Person: The Perspective of an Equity Judge".

52 There are several reasons for this. First, the preferred title highlights a need to privilege the perspective of an adoptee and to recognise that one judge's perspective of the adoption process is but one perspective and perhaps not shared by other judges. Secondly, it recognises a need to view the adoption process in the context of the work ordinarily undertaken by an "equity" judge

accustomed to exercising civil (as distinct from criminal) jurisdiction across a range of jurisdictional categories which might fairly be described as "welfare jurisdictions" of the Supreme Court of NSW. Thirdly, a focus upon the perspective of an adoptee, as viewed by a judge, calls to mind the essentiality of empathy for an adoptee in any attempt to "afford dignity" to the adoptee in an adoption hearing.

53 Sometimes a single word, or a few words, can present an image more powerful than a picture or a thousand words. The word "dignity" conveys an image of "worth" as "a person" entitled to "respect" by "self" and the "community" (not limited to "family") to which a person "belongs" and within which a person lives as a "member" of the community. These are more than merely buzz words, although they may commonly be thrown about. A full appreciation of their deep significance is critical to an understanding of the adoption process.

54 The importance of a person "belonging" to a community (family) and feeling "secure" in relationships within that community (family) cannot be gainsaid. For a prospective adoptee it is, one expects, more significant than a loss of inheritance rights to the estate of a birth parent consequent upon an adoption order. Leaving aside the fact that the birth parents of an adoptee are often trapped in poverty, a remote prospect of a doubtful inheritance is generally less attractive than an immediate prospect of family happiness.

55 Upon an exercise of a welfare jurisdiction, endeavouring (however imperfectly) to afford dignity to an adoptee, a judge must aspire to empathy for *all* people affected by the Court's processes and orders, recognising the "personhood" of the adoptee and his or her "family" (however defined), including birth parents, adoptive parents and other "significant others".

56 "Empathy" may be taken to be the ability to understand another person's thoughts and feelings in a situation from their point of view, rather than your own.

57 An important function of a judge in the determination of a contested application for an adoption order can be to guide all affected parties to a regime of care and protection for a child that not only serves a proposed adoptee's best interests but accommodates the views of other affected parties. If an adoption order is made a judge may need to help a fretful birth parent to understand, and to accept, that outcome; and to encourage adoptive parents to stay the course in ongoing engagement with birth parents, natural relatives of the adoptee and cultural traditions of interest to the adoptee and his or her significant others.

THE "WELFARE JURISDICTION" OF THE SUPREME COURT OF NEW SOUTH WALES

58 I should explain what I mean here by the expression "welfare jurisdiction". It is not an expression in common use in the world inhabited by the Supreme Court of NSW.

59 It draws together experience of the protective, probate, family provision and equity jurisdictions of the Court acquired upon establishment of the Court by the *New South Wales Act* 1823 Imp and the Third Charter of Justice, supplemented by the *Australian Courts Act* 1828 Imp (continued in operation by section 22 of the *Supreme Court Act* 1970 NSW) as supplemented more generally by section 23 of the *Supreme Court Act* 1970.

60 The Imperial legislation conferred "protective" jurisdiction on the Court by reference to the jurisdiction exercised by the Lord Chancellor in "infancy" and "lunacy" cases. "Probate" jurisdiction was conferred on the Court by reference to the jurisdiction exercised by an English Ecclesiastical Court. "Equity" jurisdiction was conferred on the Court by reference to the jurisdiction exercised by the Lord Chancellor sitting in the English Court of Chancery. "Common law" jurisdiction (often seen in jurisprudence as a contrast with equity jurisdiction) was conferred on the Court by reference to the English Courts of Common Law: the Court of King's Bench, the Court of Common Pleas and the Court of Exchequer. The Court's family provision jurisdiction is statutory, presently governed by Chapter 3 of the *Succession Act* 2006 NSW but introduced by the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 NSW.

61 Although the *jurisdiction* of the Supreme Court at the time of its establishment was defined by reference to that of particular English courts and officeholders what was conferred was, in substance, a suite of *powers to perform the functions* performed by those Courts and officeholders across a national system for the administration of law.

62 When the *Supreme Court Act* 1970 NSW commenced operation in 1972 the NSW Parliament conferred upon the Court a general head of jurisdiction to cover the possibility of procedural gaps that might lie hidden in the historical conferral of jurisdiction by reference to several institutional sources. Section 23 provides that "[the Supreme] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

63 When judges speak of the "inherent jurisdiction" of the Court in connection with performance of protective functions they sometimes refer to the jurisdiction conferred by Imperial legislation and sometimes to the jurisdiction conferred by section 23: *Re AAA; Report on a Protected Person's Attainment of the Age of Majority* [2016] NSWSC 805 at [20]-[27]. Both sources of jurisdiction are broad enough to support the Court's work without any realistic prospect of conflict between them. The historical functions performed by the England Lord Chancellor continue to inform Australian law. Whether the protective jurisdiction is view through the prism of the Court's establishment or section 23.

64 The extent to which SCA section 23 has been assimilated with SCA section 22 as a source of *parens patriae* jurisdiction can be seen in the following observations of Mason J in *Fountain v Alexander* (1982) 150 CLR 615 at 633:

> "*The Nature of the Wardship Jurisdiction*
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> The origin of the wardship jurisdiction was the sovereign's feudal obligation as *parens patriae* to protect the person and property of his subjects, particularly those unable to look after themselves, such as infants. This obligation was delegated to the Chancellor, and passed to the Chancery Court (see *In re D. (A Minor)* [1976] Fam. 185 at 192-193; *Hope v Hope* (1854) 4 De G.M.&G. 328 at 344-345; 43 ER 534 at 540-541). In New South Wales the jurisdiction is now exercised by the Supreme Court under s 23 of the *Supreme Court Act* 1970. The jurisdiction to make a child a ward of court is not dependent upon the child having property the subject of a suit *(Meyer v Meyer* [1978] 2 NSWLR 36 at

> 39). In exercising the jurisdiction the court has a wide power in relation to the welfare of intants. It has always been recognised that the dominant matter for the consideration of the court is the welfare of the child (*In re McGrath (Infants)* [1893] 1 Ch. 143 at 148). In *In re X. (A Minor)* [1975] Fam. 47 at 57, Lord Denning M.R. said:
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> > 'No limit has ever been set to the jurisdiction. It has been said to extend 'as far as necessary for protection and education' …. The court has power to protect the ward from any interference with his or her welfare, direct or indirect.' "

65 A child-centred view of the English (and, derivatively, the Australian) courts' wardship jurisdiction (also known as the "infancy", "*parens patriate"*, "guardianship" or "protective" jurisdiction) is probably a product of developments in a post-feudal age, commencing in the early years of the 19th century (at about the time that Lord Eldon was Lord Chancellor) and slowly gathering pace in the mid-20th century.

66 I begin my explanation of the concept of "welfare jurisdiction" by advancing the following propositions (call them "working assumptions" if you will) based upon my observations of Australia's legal system in action:

(a) Much of Australian law affecting individuals is viewed through the paradigm of an autonomous individual living and dying in community. NSW adoption law can be viewed through that prism.

(b) Australians live in a "managed society" in which the life of an individual generally comes under government or other institutional notice from cradle to grave and beyond. NSW adoption law is part of our managed society.

(c) Shorn of technicalities, much of the work performed by a judge assigned to the Equity Division of the Supreme Court involves management of people, property and relationships (the classic domain of an equity judge sitting, traditionally alone without a jury) rather than the determination of competing claims of right (the classic domain of a common law judge, historically derived from the practice of determining competing claims via a binary verdict,

for or against particular claims, by a jury"). NSW adoption law bears that character.

(d) In the course of an ordinary life a person may encounter an exercise of one or more of the protective, probate, family provision or equity jurisdictions of the Supreme Court affecting their person or their estate (property). An exercise of protective jurisdiction may be encountered in infancy or, in the case of incapacity for self-management, at any other time of life. An order for adoption is most likely to be made in the context of an exercise of protective jurisdiction operating in aid of the adoption process, but the adoption process requires that thought be given to the potential operation of the probate and family provision jurisdictions because an adoption order, by nature, affects inheritance rights.

(e) The various branches (or "heads") of the Court's jurisdiction serve different, but sometimes overlapping, functions governed by the purpose for which the particular branch of jurisdiction exists.

(f) The protective jurisdiction exists for the purpose of taking care of those who cannot take care of themselves: *Marion's Case* (1992) 175 CLR 218 at 258-259. The Court focuses, almost single-mindedly, upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.

(g) The probate jurisdiction looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention 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 (if any) and, in the absence of a duly expressed testamentary intention, to apply statutory rules governing the distribution of an intestate estate, seeing that beneficiaries get what is due to them. The "intestacy rules" include a statutory discretion to vary the general scheme for the distribution of an intestate estate to cater for the special cultural circumstances of an Aboriginal person.

(h) The family provision jurisdiction, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for an eligible applicant for relief out of a deceased estate, or notional estate, in whose favour an order for provision "ought" to be made. The concept of "testamentary freedom" foundational to probate law and practice is qualified, upon an exercise of family provision jurisdiction, by a judicial assessment of whether considerations of wisdom, justice and community standards require that provision be made for an eligible applicant. In the exercise of its statutory powers in the determination of an application for a family provision order the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating the deceased as wise and just rather than fond and foolish, making due allowance for current social conditions and standards and, generally, consulting specific statutory criteria so far as they may be material.

(i) The equity jurisdiction, generally, serves the purpose of maintaining standards of conduct (including protection of the vulnerable) by restraining conduct that is against good conscience and enforcing duties where non-performance of a duty would be unconscionable. The jurisdiction defies simple definition because it may be called in aid to fill a gap in the general

law and because, as illustrated by adoption legislation (and, more recently, the *Surrogacy Act* 2010 NSW), equity judges often have assigned to them statutory jurisdiction in particular areas of the law.

67 What the protective, probate, family provision and equity jurisdictions of the Supreme Court have in common is that they each may involve management of "the person" or "estate" of a central personality who (by reason of incapacity, legal or factual, or death) is not able to represent himself or herself as in an adversarial contest about competing claims of right (the traditional common law paradigm), and questions of management may require evaluative judgements about risk management looking forward to an uncertain future.

68 The need of a court to make an evaluative judgement about management of the affairs of a central personality not fully able to represent, and protect, his or her own interests in an adversarial contest requires advocates to rise above partisan interests if they are to persuade a judge towards a particular outcome. The paramountcy of the welfare and interests of a proposed adoptee provides a filter through which all decision-making and argument must pass.

69 The need for an evaluative judgement is uniquely true of adoption proceedings because a judgment must be made about the suitability of arrangements for an adoption taking into account, not only past and present experience, but also future challenges and opportunities that can never be known with certainty.

70 The success or otherwise of an adoption may, ultimately, only be known in retrospect and, then, it might depend upon whether participants in the process have lived a life of happiness and fulfilment; safe secure and with a settled sense of belonging.

UNOPPOSED ADOPTION ORDERS: INFORMALITY AT A PREMIUM

71 In proceedings in which an application for an adoption order is unopposed, an adoptive family can generally elect either to have orders made by a judge in chambers in the absence of parties (a *quasi* administrative procedure) or to

have the orders made in the presence of the parties (a process generally attended by informality on the part of the Court, and excitement and enthusiasm on the part of the adoptive family in equal measure).

72 A common feature of both types of procedure is that the judge, in chambers, must take note of the summons for adoption, any written submissions filed in support of the summons, the affidavits filed in support of the summons and the draft orders proposed by the parties. A judge must be satisfied that the technical requirements of the Adoptions Act have been met and that an order for adoption is in all the circumstances appropriate.

73 According to temperament, different judges proceed with different degrees of informality in attending to the making of an adoption order in the presence of parties. In all cases, however, there is a need to strike a balance between formality necessary to maintain the authority of the Court and the transaction of business and the informality necessary to allow parties to "own" the day.

74 In making an adoption order in the presence of the parties, I generally follow a routine pattern involving three distinct phases. In the first phase, I meet the parties in the court room, explain what is to happen, allow the adoptee and his or her family to join together in stamping the Court's orders in anticipation of an adoption order being made, introduce the parties to the wigs and gowns common in legal practice, and allow everybody photo opportunities in the stamping of draft orders and the wearing of wigs and gown. Depending on the age of the adoptee, and family and friends in attendance with him or her, in the first phase, I "insist" that the whole process will be "invalid" unless every person appropriates to himself or herself a chocolate (from a plate of chocolates I provide) for each pocket they might have. Special allowance often has to be made for girls because from a very early age fashion denies them the full range of pockets generally enjoyed by a boy.

75 In the second phase, I invite all attendees to inspect my chambers with a view to "seeing how a judge lives" with a full range of law reports and a scattered mess of papers that deny me the status of a "clean desk person". During this

phase, I take an opportunity to explain the court system underlying the various law reports available in chambers.

76 Not uncommonly, I invite families to speculate about the timing of Australia's independence. They are generally amused when I suggest that, if we must celebrate Australia Day, we should insist upon a public holiday declared for a minute either side of 5pm on 3 March, acknowledging that Australia became legally independent of the British Imperial government at 5pm Greenwich mean time on 3 March 1986.

77 With that settled, I generally invite my tipstaff to show the kids the secret of being a judge, but only on their promise not to disclose the secret to anybody except their local newspaper. I bring them slowly to that secret by inviting them to knock as hard as they can three times on the door through which a judge enters the court room, the signal for everybody in the court room to stand. I invite them to knock as hard as they can in anticipation of a question. The question is "did that hurt?". The pattern is that girls will speak honestly, yes, it hurt (or, at least, it would if I hit hard). Boys on the other hand, sometimes pretend that it did not hurt, come what may. In any event, whatever answers are given I invite my tipstaff to explain the secret: if you use a golf ball (or a substitute of some kind) knocking three times on the door hurts not at all.

78 In the third phase, while the signed and sealed adoption order is being copied (for the family), the family are encouraged to sit at the bar table in anticipation of three knocks on the door and the arrival of "the judge" on the bench in wig and gown. In a rehearsed performance, I ask: "does anybody have an application to make?". The answer is: "Yes, we do." My response: "What is your application?" Their answer: "We want to be adopted!"

79 I then routinely deliver formal (interactive) "reasons for judgment" to the following effect:

> "You should know that a judge cannot make an adoption order just because the judge wants to make an order. The judge must have evidence justifying the making of an order.

> Leaving aside all the technical formalities, before I can make an adoption order I need to be satisfied of two things.
>
> The first is that there is here a 'special kid'. Do we have a 'special kid'? Hands up if we have a 'special kid'. [Everybody obliges].
>
> The second thing is that we must have a happy family.
>
> I have read all the affidavits filed in these proceedings and I am satisfied that we have both a 'special kid' and a happy family. For that reason, I am able to make the orders which you have stamped with the Court's seal today.
>
> Congratulations. You are now adopted!"

80 All the formalities having been attended to, I formally present a photocopy of the adoption order to the adoptee, in the presence of family and any other willing participants, in a final photo opportunity before family and friends routinely go out to a celebratory meal or some other adventure.

81 It helps to "afford dignity" to a family, including especially an adoptee, if we can do our bit to create a happy memory; but care needs to be taken to appreciate that even a happy adoptive family must, in an idiosyncratic way, come to terms with unhappiness (perhaps hidden from view) arising from an adoptee's experience of his or her birth family and work out a way of accommodating past, present and future.

ABORIGINAL ENGAGEMENT WITH THE WELFARE JURISDICTION OF THE SUPREME COURT

82 I have not maintained a record of my engagement with Aboriginal families in the exercise of the functions of an equity judge. What follows is impressionistic.

83 I am not conscious of ever having made an order for the adoption of an Aboriginal child or young person. This is consistent with what I understand to be a resistance within Aboriginal communities to formal adoption. I can recall one case, however, in which an adoption application was delayed by a late suggestion ultimately (after investigation and consultation with Aboriginal representatives) found to have been misplaced that the proposed adoptee had Aboriginal heritage.

84 Nor am I conscious of dealing with an Aboriginal child or young person on an application, upon an exercise of inherent protective (*parens patriae*) jurisdiction, to interfere with the conduct of proceedings in the Childrens Court of NSW. Conventionally, that jurisdiction is only exercised in "exceptional cases" because proceedings under the *Children and Young Persons (Care and Protection) Act* 1998 NSW are entrusted to the Childrens Court, with most appeals going to the District Court of NSW. Appeals from the President of the Childrens Court come to the Equity Division, but not appeals generally.

85 I have more often encountered Aboriginal children and young people upon an application to the Court for "secure accommodation (and recovery) orders" for the detention of a person at risk in the community and in need of special care and protection, often after experience of sexual abuse and episodes of self-harm in the context of a dysfunctional family affected by drug or alcohol abuse.

86 Whatever the cultural heritage of a child or young person made the subject of secure accommodation orders, an equity judge is commonly involved in a high level process of supervision of implementation of the orders with directions hearings routinely held every three months. The utility of those hearings depends largely upon the provision to the Court and to an independent child representative of a detailed affidavit by a social worker reporting upon all aspects of the welfare of the child or young person, and upon the ability and willingness of the independent child representative to engage personally with the child or young person.

87 In recent times, independent child representatives have arranged for their charges to write a letter to "the judge" communicating questions and concerns and (through an independent child representative) eliciting an encouraging response. More recently, arrangements have been made for the child or young person the subject of the Court's orders to attend directions hearings personally, or via video link, to engage directly with the Court. The nature and extent of that engagement depends on an assessment by "all the adults in the room" about what is likely to be the most constructive course to be taken. From

the perspective of a judge, I am conscious of a need to be careful in what is said or left unsaid.

88 On the whole, it is generally important to ensure that the child or young person has an opportunity to say whatever he or she wants to say and to emphasise his or her central importance to the whole process. It is important to convey the idea that everybody wants the child or young person to succeed and is very pleased with even small steps towards maturity. Not uncommonly, it is appropriate to reinforce the message that a child or young person needs to focus on making “safe choices”, being aware that actions have consequences, and learning to live with others.

89 This is an example of the breadth of the protective jurisdiction, authoritatively confirmed by Brereton J in *Re Thomas* [2009] NSWSC 1490.

90 To my observation, public authorities conscientiously endeavour in these cases to maintain family contacts for a child or young person in care and, in an Aboriginal case, to connect him or her with an Aboriginal mentor. This is sometimes easier said than done.

91 Not uncommonly, as young people in secure accommodation approach their 18th birthday and the age of majority, steps are taken for them to be made the subject of financial management and guardianship orders in the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) and to obtain NDIS funding.

92 Apart from *Re Estate Wilson*, I am not conscious of having dealt with any application for probate or administration relating to the estate of a deceased Aboriginal person. This is consistent with what I understand to be a pattern within Aboriginal communities that does not involve ownership of property that requires the formality of a grant of probate or administration for its succession and a reluctance on the part of Aboriginal people to execute a will.

93 That said, routine applications for a grant of probate or administration are dealt with by the Court's Probate Registry and do not come to the notice of a judge; and, unless alerted to particular issues relating to cultural sensitivities, a busy judge is unlikely to go in search of them if everything else appears routine.

94 In a nation in which employment is accompanied by superannuation entitlements, the formalities of the law of succession cannot easily be circumvented. *Re Estate Wilson* was such a case; the deceased's worldly wealth was a superannuation entitlement, access to which required a grant of letters of administration.

95 I am not conscious of ever having dealt with an application for a family provision order by an Aboriginal person or family provision proceedings affecting an Aboriginal beneficiary. Section 60(2)(o) of the *Succession Act* 2006 provides that in the determination of an application for a family provision order one of the matters that may be considered by the Court is "any relevant Aboriginal or Torres Strait Islander customary law". I am not conscious of ever having heard a case that engages that provision.

96 Whether Aboriginal communities resolve differences about property without resort to "the law", whether they do not resort to the law because individuals living within a community have no property they identify as their own, or whether they simply engage in court proceedings without cultural disclosures, are questions I cannot answer but do pause from time to time to contemplate.

97 In a very sad case of the suicide of a young man of mixed heritage I was recently required in *Brown v Weidig* [2023] NSWSC 281 to make a decision about disposal of his body. For the most part, however, I have been spared such cases.

CONCLUSION

98 From the perspective of an Equity Judge there is truth in the proverb that "It takes a village to raise a child"; a commonplace saying but profoundly true.

99 The dignity the Court seeks to afford a child or young person in the adoption process ultimately depends upon a capacity (in all participants in the judicial process) for empathy - in balance with formal procedures that underpin the solemnity of an adoption order designed to promote the safety and security of the child or young person, in a stable family environment, in a community in which he or she can comfortably "belong".

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POSTSCRIPT

100 In an acknowledgement, and celebration, of the richness of modern Australian society I here record (with her consent) my daughter-in-law's description of her Aboriginal cultural heritage:

> "I am Darug. Descended from Yarramundi through his daughter Maria (born c. 1805 in Richmond) who married (1824) English convict Robert Lock. Their marriage was the first legally recognised marriage between an Aboriginal woman and an English man.
>
> I am also descended from Johnny Cox (South Creek Clan) and Betty Cox (Cattai Clan). Their surname was given to them on their marriage (1819).
>
> I am also descended from Mildred Saunders (origin unknown), a half Aboriginal woman. Her son Ephraim (1855-1951) married (1878) a woman named Martha (1846-1926) who is reported to have been the 'last full blood Aboriginal of the Hawkesbury tribe'. Ephraim and Martha's son Alfred married (1902) Edith Lock, great-granddaughter of Robert and Maria Lock and Johnny and Betty Cox.
>
> Maria was one of the first children to be taken to the Native Institution at Parramatta."

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ADDENDUM (16 November 2023)

101 Historically, Aboriginal communities have been resistant to participation in modern statutory systems of adoption ("legal adoptions") that serve the general community. At heart, their resistance reflects both a profound distrust of government and the legal system and the non-linear kinship relationships of

Aboriginal communities that do not align with the linear relationships of the general community.

102 Upon reflection, with the benefit of proceedings at the Adoption Conference, I wonder whether an accommodation between Aboriginal kinship relationships and "legal adoptions" might be found in a practice of encouraging adoptive parents, birth parents and adoptees to adopt a protocol (of a more general nature than an adoption plan), approved by an Aboriginal community, setting out guidelines of what is expected of each participant in the adoption process pending an adoptee's attainment of the age of majority. Such a protocol might address both financial management questions (such as whether a separate bank account might be maintained for an adoptee) and guardianship questions (about a consultative approach to management of the person of an adoptee).