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PROFOUNDLY DIFFERENT WAYS OF THINKING: Management of Persons, Property and Relationships Disputes v Adjudication of Competing Claims of Right

by

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INTRODUCTION

1 This paper draws together themes addressed, and developed, arising from an assessment that developments in NSW's law of succession (broadly defined) cannot be properly understood without placement in a context:

(a) that views the law and legal practice through the prism of a judge exercising the jurisdiction of the Supreme Court of New South Wales in accordance with the purposes for which the jurisdiction exists;

(b) that is broader than a single category of the jurisdiction of the Court, such as the probate jurisdiction, but requires an understanding of routine interaction between several categories of jurisdiction (principally, the protective, probate, family provision and equity jurisdictions);

(c) that is not constrained, although informed, by a dominant binary mode of thought amongst lawyers which privileges a contrast between the "common law" and "equity" jurisdictions (as illustrated by Justice Mark Leeming's insightful book, *Common*

Law, Equity and Statute: A Complex Entangled System (Federation Press, Sydney, 2023)); and

(d) that allows for the dynamics of an exercise of "succession law" jurisdiction in a system of court administration centred upon a "case management" philosophy.

2 A need to think more broadly than the dominant paradigm of "law v equity", and to think beyond jurisdictional boundaries, arises in large measure because of several developments in Australian law and society since the 1980s.

3 Perhaps the most fundamental development has been evolution in the concept of a family as formal arrangements attending a marriage and the raising of children have been adapted to accommodate comparable informal ("*de facto*") relationships so that, when relationships break down in a society that has become more transactional, the nature of the law's response has become more managerial in the regulation of property disputes, care for children and the provision of social welfare benefits.

4 A second development is the way modern families, in particular, plan for a person's incapacity for self-management in anticipation of death, allowing for the possibility of a need for institutional care for a period of uncertain duration.

5 A third development is the privatisation of management regimes for people incapable of self-management, through the creation of "enduring agency" arrangements for management of a person's estate (property) and person.

6 A fourth development, reflecting the third, is the now common practice of a person at a single sitting executing a will, an enduring power of attorney and an enduring guardianship appointment, instruments which can (in practice, if not in law) be deployed in a manner that does not serve the interests of the "principal" who executed them, creating a fertile field for what has become known as "elder abuse".

7 A fifth development is the expansion, in both "law and fact", of the Court's family provision jurisdiction, representing a substantial qualification of the assumption of "testamentary freedom" underpinning the concept of a will and, perhaps, changing the nature of a will in some cases.

8 A sixth development is empowerment of the Court to authorise the making of a "statutory will" for a person who lacks testamentary capacity, supplementing the means by which the affairs of a person incapable of managing his or her own affairs can be managed by another through an exercise of judicial power.

9 A seventh development is the introduction and normalisation of an *administrative* process (through the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT)) for the appointment of a "financial manager" and a "guardian" as an alternative to the Court's inherent jurisdiction to appoint a committee of the estate and a committee of the person.

10 These developments, collectively, illustrate aspects of a legal system that services a society in which the affairs of those living, and dying, in community are liable, from cradle to grave and beyond, to be managed by others than themselves.

THREE THESES

11 This paper advances three theses about how the law of succession operates in practice with ways of thinking that are different from those found in textbooks which treat "substantive law" rules or principles in the abstract without regard to the adjectival (procedural) context in which they must operate.

Managerial and Adjudicative Decisions

12 The first thesis is that there are profoundly different ways of thinking about the administration of justice by the Supreme Court of New South Wales (and equivalent Courts in other territorial jurisdictions) which, in civil proceedings, reflect different prisms for:

(a) the conduct of proceedings which essentially require decision-making about the management of persons, property and relationships; and

(b) the conduct of proceedings which essentially require the determination of competing claims of right.

13 Viewed through a prism that privileges a binary contrast between "the common law" and "equity" in analysis of the jurisdiction of the Supreme Court a managerial way of thinking characteristically reflects an exercise of equity jurisdiction and a competing rights narrative characteristically reflects an exercise of common law jurisdiction.

14 However, a binary contrast between the common law and equity jurisdictions of the Court is inadequate to address problems that arise in a succession law context. Practice as a "wills and estates" lawyer requires an understanding of several categories of the Court's jurisdiction and how they relate to one another in a Judicature Act system of court administration (in which any judge can exercise every branch of the Court's jurisdiction in a single proceeding) overlaid by a case management philosophy (which requires the Court to manage the conduct of proceedings, not merely passively determine disputes presented by parties) directed to a "resolution of the real issues in proceedings" and, as far as possible, completely and finally determining "all matters in controversy" so that a "multiplicity of legal proceedings" can be avoided.

15 The central organising principle for the conduct of proceedings in the Court is no longer the concept of a "trial" of "an action" on a set day (traditionally, characteristically, a trial by jury presided over by a judge). It has been displaced by the concept of a "managed" case in which a judge (sitting alone) may adjourn proceedings from time to time in the conduct of a hearing spread over several days and interspersed with "directions hearings".

16 **Managerial decision-making** is perhaps most evident in proceedings which involve an exercise of what, for want of a better term, might be described as the "welfare jurisdictions" of the Court.

17 What the welfare jurisdictions have in common is that:

(a) 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 and whose "welfare" may be a paramount consideration or, at least, has to be taken into account by a judge independently of partisan contentions;

(b) there is a strong public interest element in the administration of justice because not all affected parties are "wholly present "before the Court and decisions made by the Court may affect property entitlements vis-a vis "the whole world";

(c) the Court cannot necessarily proceed to the hearing or determination of a case presented by parties who present themselves to the Court without the service of notice of the proceedings on persons who may have a material interest in the outcome of the proceedings and should be afforded an opportunity to choose whether they intervene in the proceedings;

(d) questions of management may require evaluative judgements about risk management looking forward to an uncertain future;

(e) a managerial decision is generally given effect by an order which is discretionary in nature even if the Court's discretion is customarily exercised in a particular way;

(f) a managerial decision is patently governed by the purpose for which the jurisdiction exercised by the Court exists; and

(g) an adversarial form of advocacy must be tempered by the need of a judge to consider the interests of a person who is vulnerable or "not fully present" before the Court, with the consequence that proceedings may have a tendency to be inquisitorial (rather than adversarial) in nature.

18 The welfare jurisdictions to which a person might in the course of an ordinary life be subject are the protective, probate and family provision jurisdictions, informed by the equity jurisdiction. A minority of persons might also be affected by the Court's adoptions jurisdiction. The family provision and adoptions jurisdiction are statutory in origin. The adoptions jurisdiction is informed by the Court's "infancy" (or parens patriae) jurisdiction, a subset of its protective jurisdiction. The Court's family provision jurisdiction is informed by, and intertwined with, the Court's probate jurisdiction.

19 The protective, probate and equity jurisdictions were conferred on the Court at the time the Court was established, between 1823-1828, by the *New South Wales Act* 1823 (Imp), the *Third Charter of Justice* 1823 promulgated pursuant to that Act and the *Australian Courts Act* 1828 (Imp). That legislation was conferred by reference to English courts and officeholders whose jurisdiction under the general law conferred upon them *an authority to decide* questions in performance of *a function associated with the administration of justice*. The customs according to which they performed their various functions generated what we now see as rules or principles of substantive law, as well as modes of practice and procedure which we now see as adjectival law.

20 An analysis of the different heads of jurisdiction conferred on the Court at the time of its establishment cannot usefully be confined to identification of the English courts and officeholders whose jurisdiction was appropriated without: (a) an acknowledgement that that jurisdiction was functional (that is, served a particular function defined by the nature of its business); and (b) an

understanding that the identification of particular English courts and officeholders in the Court's foundational documents was merely a convenient way of conferring on the Court authority to perform the same functions in a new setting.

21 The possibility of any procedural gaps that might lie hidden in the historical conferral of jurisdiction on the Court by reference to several institutional sources has been addressed by section 23 of the *Supreme Court Act* 1970 NSW which provides that "[the Supreme] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

22 The Court is not constrained, but informed, by the several categories of jurisdiction identified in the study of Australian legal history.

23 A contrast between the different ways of thinking about the administration of justice in managerial proceedings and adjudicative proceedings looks to the substance of judicial decision-making, not merely its form.

24 Managerial decision-making is generally associated with categories of jurisdiction routinely exercised in the Supreme Court by judges of the Equity Division ("equity judges") who, as with their predecessors, are accustomed to hear and determine proceedings without a jury.

25 An illustration of managerial thinking upon an exercise of equitable jurisdiction is the Court's supervisory jurisdiction over trust administration, which is purposive (in its dedication to the fulfilment of the ascertainable purpose that constitutes a trust as a matter of law); administrative in character, both procedurally and substantively; protective of the interests of settlors, trustees and beneficiaries, if not also third parties relying upon the due administration of a trust; and, from a beneficiary's perspective, governed by the principle that the Court acts "in the best interests of the beneficiaries" of a trust: Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (Oxford University Press, Oxford, 2018), paragraphs [1.16]-[1.22] and [10.42]-[10.51].

26 By contrast with managerial proceedings, **adjudicative proceedings** are those which, historically, were apt to be determined by a judge sitting with a jury in the conduct of an adversarial trial, characteristically, a “common law judge”, the prototype of the judges who today sit in the Common Law Division of the Court.

27 The Court’s core common law jurisdiction was conferred upon it in 1823-1828 by reference to the jurisdiction then exercised by the English Courts of Common Law: the Court of King’s Bench, the Court of Common Pleas and the Court of Exchequer. That jurisdiction included, in addition to criminal law jurisdiction, the jurisdiction to award a money judgment in debt or for damages and (as a reflection of a once feudal society) a jurisdiction for the recovery of land.

28 The distinguishing feature of adjudicative proceedings is that (leaving aside proceedings in which an incapacitated person requires a tutor) there is an adversarial contest between parties who are present and able to prosecute and oppose a claim of right which, generally, ends with a binary judgment (verdict for the plaintiff or verdict for the defendant, guilty or not guilty) unattended by an exercise of discretion by the decision-maker or the imposition of conditions.

29 The jurisdiction of the Court in these cases is governed by the purpose for which the jurisdiction exists (no less than other heads of jurisdiction) but the governing purpose of the jurisdiction is often, in practice, obscured by the language of an adversarial claim of right.

30 Different ways of thinking in managerial and adjudicative proceedings in broad terms reflect differences between an exercise of equity jurisdiction and an exercise of common law jurisdiction, but not completely. The different ways of thinking identified in this paper are not prisoners of historical rivalries between the common law and equity jurisdictions. An illustration of why this must be so is the development of the modern concept of “administrative law” from the Court of King’s Bench’s deployment of prerogative writs upon an exercise of a discretionary jurisdiction in the supervision of subordinate bodies.

A Function to Serve

31 The second thesis of this paper is that coherence in the law of succession (broadly defined), which lies deep within the Court's welfare jurisdictions, is best advanced by viewing the "law" not merely as a collection of rules or principles but through the prism of a judge charged with a function to serve rather than merely an authority to decide. This perspective highlights a necessity to pay close attention to the purposive nature of each category of jurisdiction engaged.

Patterns of Conduct

32 The third thesis of the paper is that a productive way to view the law of succession is by identification of "patterns of conduct" that routinely attract commonly available remedies. In the realm of an exercise of protective jurisdiction, management of the affairs of a person incapable of self-management commonly call for a "financial manager" or "guardian" (by whatever name known), effectively displacing an enduring attorney and an enduring guardian.

33 In the realm of an exercise of probate law, the grounds of challenge to the validity of a will come to mind.

34 In the administration of a deceased estate (for the purpose of an exercise of probate or family provision jurisdiction) one commonly sees distinct patterns of conduct alleged:

(a) in a case *against an estate*, on a claim for proprietary estoppel by encouragement; and

(b) in a case where *an estate seeks a remedy* in the recovery of property or for equitable compensation, overlapping allegations of undue influence, unconscionable conduct (a catching bargain) and a breach of fiduciary obligations.

THE PURPOSIVE NATURE OF THE COURT'S "WELFARE" ("SUCCESSION LAW") JURISDICTIONS

35 The *protective* jurisdiction exists for the purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (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 not done 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.

36 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, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

37 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 eligible applicants (for relief out of a deceased estate or notional estate) in whose favour an order for provision "ought" to be made.

38 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.

39 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.

CURRENT "COMMON PROBLEMS"

The Importance of Notice of Proceedings

40 A major recurrent problem in management of protective, probate and family provision proceedings is management by the Court of processes for the service of notice of proceedings on persons who have, or may have, a material "interest" in the outcome of the proceedings.

41 A graphic example of this can be found in the recent judgment of Meek J published as *Jurak v Latham* [2023] NSWSC 1318 in which his Honour had to struggle with an application for a family provision order made in respect of an estate which had been the subject of a family provision settlement predicated upon a false assumption that a notice had been served upon all "eligible persons" who should have been allowed an opportunity to participate in the settlement.

42 *Re Estate Di Meglio; Di Meglio v Carle* [2018] NSWSC 1690 provides another example of procedural problems that can arise where an eligible person is a protected person (within the meaning of section 38 of the NSW Trustee and Guardian Act 2009) and insufficient attention has been given to the identity of a person, or persons, authorised to manage the protected estate.

43 The question of whether notice of proceedings should be given in particular proceedings (and, if so, to whom) is closely related to the concept of a “material” interest in the proceedings. The concept of a “material” interest is, in turn, related to the purpose served by an exercise of the Court’s jurisdiction in the proceedings.

44 Each type of jurisdiction has its own dynamic, governed by the nature and purpose of the jurisdiction to be exercised by the Court. Nevertheless, a common feature of each type of case is that the Court, and all who appear before the Court, must turn an eye towards persons who are not named as a party in originating process.

45 In each type of proceeding, a central focus of attention is generally a person who, by reason of incapacity or death is, in one sense or another, absent from an adjudication about what should happen about his or her property. There is, accordingly, a special public interest in such proceedings in ensuring that the perspective of the “absent” person is duly consulted.

46 A failure on the part of the Court, and participants in proceedings before the Court, to turn attention to identification of persons who should be given notice of proceedings can cause the proceedings to miscarry.

47 Each type of proceeding generally, if not universally, involves a determination by the Court which affects property rights. An exercise of protective jurisdiction differs from the other types of case because it may routinely involve orders affecting “the person”, as well as “the estate“ of a person who is, or may be, in need of protection. Nevertheless, in a protective regime in which most cases concerning “the person” are routinely dealt with by the Guardianship Division of the Civil and Administrative Tribunal of NSW (“NCAT“) , most cases in the NSW Supreme Court involving an exercise of protective jurisdiction involve an application for orders affecting the estate (property) of an incapable person.

48 Although succession law cases, across the spectrum, require consideration of whether notice of proceedings should be given to somebody not named as a

party in the proceedings, a sharp line can be drawn between proceedings involving the estate of a living person and proceedings involving a deceased estate.

49 In the former type of proceeding the focus of attention is upon the welfare of the living person. In the latter type of proceeding the focus is upon ascertaining and giving effect to any duly expressed testamentary intentions of the deceased person, subject to due determination of any application for family provision relief.

50 An application for the appointment of a protected estate manager (whether upon an exercise of statutory or inherent jurisdiction) is squarely within an exercise of protective jurisdiction. An application for a statutory will involves an analogous form of jurisdiction. An exercise of either type of jurisdiction requires the Court to measure what is done, or not done, against a consideration of whether it is in the interests, and for the benefit, of the person in need of protection, paying due attention to the known or presumed intentions of that person after due enquiry of family, carers and significant others who might be able to throw light on the person's personal circumstances and preferences. In this context, a person not named as a party to proceedings might be required to be given notice of them, principally to assist the Court to assist the person in need of protection.

51 In proceedings relating to a deceased estate, notice of proceedings is generally required to be given to a person who is not named as a party to proceedings so as to enable such a person to protect his or her interest (if any) in property of the deceased estate, and thereby incidentally assist the Court to ascertain and give effect to a deceased person's testamentary intentions.

52 In each type of case – whether before or after the death of the person whose perspective is central to an exercise of jurisdiction – the Court may encounter resistance on the part of some litigants to the provision of reasonable notice of the proceedings to others. As officers of the Court, legal practitioners have a

professional obligation to assist the Court to ensure that such resistance does not lead to a miscarriage of justice.

53 All succession lawyers, no less than the Court, must constantly bear in mind the purpose of any jurisdiction invoked.

54 Probate proceedings are conventionally described as “interest proceedings” because the standing of a party to probate proceedings is governed by whether or not the party has, or might have, a property interest in the outcome of the proceedings. It is the existence of the potential for such a property interest that requires potentially interested parties to be given notice of probate proceedings.

55 An eligibility to apply for family provision relief does not constitute an interest in property (eg, to support a caveat over land), but in the due administration of a deceased estate the proper disposition of an application for family provision relief requires that all eligible persons be given notice of the proceedings. Family provision proceedings are, to that extent, analogous to probate proceedings (with which they are commonly associated).

56 Protective proceedings are not “interest proceedings” in any way analogous to characterisation of probate proceedings as “interest proceedings”. Protective proceedings cannot, or at least should not, be conducted otherwise than in the interests, and for the benefit, of a person in need of protection. Other participants in such proceedings (usually family, carers or significant others in the life of an incapable person) do not have a property interest in the outcome of protective proceedings however expectant they may be of incidental gain.

57 However, protective proceedings are in their own way “interest proceedings” in the sense that (in assessing what is in the interests, and for the benefit, of a person in need of protection) the Court generally must inquire about social relationships (“social interests”) in order to take into account the personal circumstances and preferences of the person in need of protection.

58 A decision about whether people within an incapable person's social network should (or should not) be given notice of protective proceedings can be critical to the proper determination of the proceedings.

59 Upon an exercise of protective jurisdiction a seminal authority which encapsulates ideas which continue to inform the due administration of a protected estate is the judgment of Lord Eldon in *Ex parte Whitbread in the matter of Hinde, a lunatic* (1816) 2 MER 99; 35 ER 878.

60 The headnote and judgment are extracted in *W v H* (2014] NSWSC 1696 at [39]-[40], here set out:

> '[39] With emphasis added, the headnote reads as follows:
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> "*Practice of making an allowance* to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, *and founded not on any supposed interest in the property, which cannot exist during the Lunatic's life-time, but upon the principle that the Court will act with reference to the Lunatic and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court*."
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> [40] Lord Eldon's judgment (at 2 Mer 101-103; 35 ER 879) elaborates the specified principle, encased in a precautionary tale about the intersection between human frailty and what is necessary for the due administration of a protected estate (with emphasis here added):
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> "The *Lord Chancellor* [Eldon]. For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund **[102]** which, it is probable, may one day devolve upon themselves. Nevertheless, *the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons.* So, where a large property

devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; *upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars*. So also, *where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, - but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.*

The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes **[103]** *care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.*

The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grandchildren - to brothers and other collateral kindred; and *if we get to the principle, we find that it is not because the parties are next of kin to the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done*.

[No Order was made upon the Petition.]'

61 In the context of probate proceedings the seminal judgment, upon a consideration of the concept of notice of proceedings, is the judgment of the High Court of Australia in *Osborne v Smith* (1960) 105 CLR 153 at 158-159. There Kitto J wrote the following:

> "It was both proper and necessary in the second suit (concerning a deceased estate) to treat as binding upon the appellant the findings as to knowledge and approval which had been made in the first suit. She, it is true, was not a party to the first suit; but there is a well-established principle of probate practice, which grew up in the ecclesiastical courts, that any person having an interest may have himself made a party by intervening, and that if he, knowing what was passing, does not intervene, but is 'content to stand by and let his battle be fought by somebody else in the same interest', he is bound by the result, and is not to be allowed to re-open the case: *Wytcherley v Andrews* (1871) LR2

> P & D 327; *Nani Afori Atta II v Nana Abu Bonsra III* [1958] AC 95. The principle applies in the Supreme Court of NSW in its probate jurisdiction…."

62 This principle is central to a judicial determination that a grant of probate be issued "in solemn form": *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249] *et seq*. A grant in solemn form is binding on the parties to the probate proceedings in which it is granted, on anyone who has been duly served with formal notice of the proceedings and on anyone of full capacity who has an interest in the proceedings, and notice of the proceedings, but chooses not to intervene.

63 Because a grant of probate in solemn form is, in practice if not in theory, harder to have revoked than a grant in common form, it is much preferred as a means of securing the title to estate property of beneficiaries named in a will.

64 The mere fact that a probate suit is contested does not justify the making of a grant in solemn form. A contested proceeding may conclude in a determination that there be no more than a grant in common form if, for example, the Court is not satisfied that all persons who have, or may have, an interest in the subject estate have been duly served with notice of the proceedings.

65 From time to time, lawyers anxious to overcome a deficiency in the due service of notices of proceedings have been known to insist that they are content for the proceedings to conclude with a grant in common form only. This cannot be condoned. The interests of justice, affecting both a testator and his or her true beneficiaries, require conformity with the established practice that a contested probate suit ordinarily should not be listed for hearing, let alone determined, without evidence capable of supporting a solemn form grant.

66 In practice, some practitioners endeavour to fudge their responsibility to ensure that due notice of probate proceedings is given to all interested parties by simply posting a letter or sending an email. Strictly, personal service is required, or an alternative form of proof (eg, by an acknowledgement of service) that all interested persons have been given due notice of the proceedings.

67 Unless close attention is given to questions about the service of notice of proceedings injustices may occur, if only in subjection of an estate to a multiplicity of proceedings or exposure of parties to costs orders consequent upon a failure to comply with the Court's requirements.

The Importance of "The Ultimate Question" in Probate Proceedings

68 The ultimate question in a probate suit in which the validity of the will is in issue is whether a particular instrument constitutes the last will of a free and capable testator. That is a "first order" question.

69 In the conduct of a contested suit that question can be lost as parties are consumed by controversy over "second order" questions commonly reflected in the grounds upon which the validity of a will can be challenged.

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

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

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

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

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

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

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

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

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

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

his or her faculties were materially impaired by a medical condition.

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

(c) The concept of "undue influence" (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, "influence" is "undue" if it overbears the testator's independent judgement. In probate law, "undue influence" is often described as "coercion"; but that word, standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person's undue influence (coercion) is not the instrument of the testator, but of the other.

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

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

evidence may be critical but, in contested proceedings, as in these proceedings, it may not in the final analysis be determinative.

Recurrent "Probate" Problems

76 Recurrent problems in management of a probate suit in which the validity of a will is in issue are the following:

(a) Some parties fail to recognise the formulaic nature of a pleading of a challenge to the validity of a will. Instead of pleading and particularising distinct grounds of challenge they plead a narrative statement of facts which tends to obscure the grounds of their challenge.

(b) Some parties insist on including in the one statement of claim, a claim for a grant of probate or administration, and, without authority to represent the estate of the deceased, a claim in equity for the recovery of property or compensation arising from *inter vivos* dealings of the deceased.

(c) The same parties are generally so obsessed with seeking to have an alleged wrongdoer account to a deceased estate for "misappropriated" funds that they do not address their standing to seek an accounting without a grant of probate or administration and without a full appreciation that, if a general or special grant of administration is made, any decision about whether to seek an accounting from an alleged wrongdoer is properly a decision for the administrator, not them.

(d) Some parties fail to serve notice of the proceedings on all interested persons in a timely way or fudge their obligation to serve due notice by not actively engaging with interested persons but, formalistically, posting a letter that might never arrive or sending an email which might never be received.

(e) Some parties seek to give effect to their settlement of a probate suit by propounding a penultimate will without adducing evidence proving, or tending to prove, that the ultimate will was invalid.

(f) Some parties fail to appreciate the difference between "probate undue influence" and "equity undue influence" and, so, fail to consider questions about the constitution of their proceedings and the relief claimed if the Court should find that "equitable undue influence" is a ground upon which it is open to the Court to interfere with the operation of the will, which (upon an exercise of probate jurisdiction) is valid.

77 The question whether the operation of a will can be challenged on the ground that execution of the will was, in whole or part, procured by undue influence as understood upon an exercise of equity jurisdiction is presently before the Court of Appeal on an appeal from *Alexakis v Masters* (No 2) [2023] NSWSC 509 (16 May 2023).

78 The question was raised by the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63].

79 In *Boyce v Bunce* [2015] NSWSC 1924 I discussed a range of procedural issues that need to be addressed if the question is to be confronted properly. If an allegation of equitable undue influence is made the nature of any equitable relief claimed needs to be identified, affected parties may need to be joined in the proceedings and consideration may need to be given to whether a successful challenge to the operation of a will revives an earlier will in whole or part.

80 "Probate undue influence" and "equitable undue influence" are directed to different questions.

81 Probate undue influence is directed to whether the execution of a will was the voluntary act of the testator, not the act of another person.

82 The principles governing equitable undue influence (if applied in a probate context) would accept that the execution of a will may have been the voluntary act of the testator and that the testator may have known and approved the contents of the will so as to intend to adopt them. Equitable principles (if applicable) are directed to maintaining standards of conduct by focusing attention on the process by which a testamentary intention was procured: *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,765, informed particularly by *Johnson v Buttress* (1936) 56 CLR 113 at 134-136.

83 Probate lawyers have long accommodated questions about the manner in which a testamentary intention may have been procured by an expansive and sometimes inconsistent approach to the related questions of "knowledge and approval" and (probate) "undue influence" and by loose language (Daniel Yazdani, "Testamentary Undue Influence" (2023) *Australian Bar Review* forthcoming) but their focus is, strictly, upon the existence or otherwise of a testamentary intention. Conceptually, they are not directed to processes leading to the formation of a testamentary intention.

84 Whatever might ultimately be found to be the law, in an age in which "elder abuse" is said to be rife there can reasonably be said to be merit in exploring whether equitable principles governing undue influence can be applied to the execution of a will, at least in those cases involving a relationship that attracts a presumption of undue influence.

Equitable "Forms of Action"

85 In "Succession Law" cases some patterns of conduct commonly attract claims for relief of a routine character.

86 In claims made on behalf of a deceased estate for the recovery of property or equitable compensation (commonly where an enduring attorney has abused his or her office) identifiable "equities" are commonly pleaded under the labels "undue influence", "unconscionable conduct" and "breach of fiduciary obligations". See Lindsay J, "Equity's Challenge: Maintenance of Standards in Deployment of Enduring Powers of Attorney and Enduring Guardianship

Appointments" (Supreme Court Website, 16 November 2022), paragraphs [157]-[179].

87 In a case where a party claims a proprietary interest against a deceased estate arising from conduct of the deceased, claims for relief are commonly pleaded under the label "proprietary estoppel by encouragement". See Lindsay J, "Evaluation of a Proprietary Estoppel Claim to a Family Farm: Text, Context and Purpose" (Supreme Court Website, Speeches 6 October 2023).

MANAGEMENT OF DEATH AND BURAL

88 The time is fast approaching when the Court might be called upon on a routine basis to be more involved in management of the process of death and burial than previously. That possibility is confirmed by the enactment of the *Voluntary Assisted Dying Act* 2002 NSW, a standard requirement of nursing homes that incoming residents provide them with advance care directives, the application of IVF technology in the collection of sperm from a dead male for posthumous reproduction, and disputes about disposal of a body.

Voluntary Assisted Dying

89 Although a review of the Act is beyond the scope of this paper, notice should be taken of the fact that the *Voluntary Assisted Dying Act* 2022 NSW will come into effect on 28 November 2023 and that it confers on the Court jurisdiction to entertain an application (by a patient, an agent of a patient or another person who has "a sufficient and genuine interest in the rights and interests of a patient in relation to voluntary assisted dying") for review of administrative decisions made under the Act.

90 Sections 109 and 113 of the Act together indicate the nature and scope of the Court's statutory jurisdiction:

> **"109 Application for review of certain decisions by Supreme Court**
>
> (1) An eligible applicant may apply to the Supreme Court for a review of any of the following decisions—

(a) a decision of a patient's coordinating practitioner in a first assessment that the patient—

(i) at the time of making the first request, has or has not been ordinarily resident in New South Wales for a period of at least 12 months, or

(ii) has or does not have decision-making capacity in relation to voluntary assisted dying, or

(iii) is or is not acting voluntarily, or

(iv) is or is not acting because of pressure or duress,

Note—

See the definition of *pressure or duress* in the Dictionary in Schedule 1.

(b) a decision of a patient's consulting practitioner in a consulting assessment that the patient—

(i) at the time of making the first request, has or has not been ordinarily resident in New South Wales for a period of at least 12 months, or

(ii) has or does not have decision-making capacity in relation to voluntary assisted dying, or

(iii) is or is not acting voluntarily, or

(iv) is or is not acting because of pressure or duress,

(c) a decision of a patient's coordinating practitioner to make a statement in a final review form certifying that the coordinating practitioner is satisfied the patient—

(i) has or does not have decision-making capacity in relation to voluntary assisted dying, or

(ii) in requesting access to voluntary assisted dying—

(A) is or is not acting voluntarily, or

(B) is or is not acting because of pressure or duress, and

(d) a decision of the [Voluntary Assisted Dying] Board to refuse an application for a voluntary assisted dying substance authority in relation to a patient.

(2) A review of a reviewed decision—

(a) is to be dealt with as a new hearing, and

(b) evidence or information may be given in addition to, or in substitution for, the information given in relation to the reviewed decision.

…

113 Decision of Supreme Court

In deciding a review application made in relation to a patient, the Supreme Court may decide that—

(a) at the time of making the first request, the patient had been ordinarily resident in New South Wales for a period of at least 12 months, or

(b) at the time of making the first request, the patient had not been ordinarily resident in New South Wales for a period of at least 12 months, or

(c) the patient has decision-making capacity in relation to voluntary assisted dying, or

(d) the patient does not have decision-making capacity in relation to voluntary assisted dying, or

(e) the patient is acting voluntarily, or

(f) the patient is not acting because of pressure or duress, or

Note—

See the definition of *pressure or duress* in the Dictionary in Schedule 1.

(g) the patient is not acting voluntarily, or

(h) the patient is acting because of pressure or duress, or

(i) a ground to refuse to issue a voluntary assisted dying substance authority exists, or

(j) a ground to refuse to issue a voluntary assisted dying substance authority does not exist."

91 Section 13 of the Act expressly provides that nothing in the Act affects the inherent jurisdiction of the Court.

Advance Care Directives

92 Although "advance care directives" (operating under general law principles discussed in *Hunter and New England Area Health Service v A by his tutor T* [2009] NSWSC 761; 74 NSWLR 88) appear to be part of an accepted pathway in self-management towards death, they are not commonly the subject of

litigation. Their dual object is to give a person an opportunity, in contemplation of death, to express his or her wishes about options for medical treatment or palliative care and to provide legal protection to a carer for decisions made in the shadow of death.

Posthumous Reproduction

93 *In Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231; 98 NSWLR 208 Fagan J considered the operation of the *Guardianship Act* 1987 NSW, the *Human Tissue Act* 1983 NSW, the *Assisted Reproductive Technology Act* 2007 NSW and the Court's *parens patriae* jurisdiction in the context of an application for a declaration and orders permitting a widow to take possession of sperm that had been extracted from her husband shortly after his death.

94 Recent academic articles include:

(a) Cameron Stewart, Kelton Tremellen and Julian Savulescu, "Posthumous Reproduction and the Law: Tissue Transplantation, Property Rights And The Reproductive Relational Autonomy" (2021) 28 *Journal of Law and Medicine* 663; and

(b) Christopher D Mills, "Australia After Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?" (2020) 27 *Journal of Law and Medicine* 741.

"Disposal of a Dead Body"

95 Although principal authorities about the law relating to disposal of a body remain *Doodeward v Spence* (1908) 6 CLR 406 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680, my own assessment is that the law will move from analyses in terms of "rights" associated with "burial" towards management of the process of disposal of a body: *Brown v Weidig* [2023] NSWSC 281

CONCLUSION

96 An insight into the reasons for, and nature of, managerial decision-making as a way of thinking profoundly different from adjudication of competing claims of right is necessary to an understanding of the substantive law, practice and procedure in the identification, and solution, of succession law problems.

GCL 15/11/23
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