COLLEGE OF LAW
ADVANCED WILLS AND ESTATES DAY,
16 September 2015

QUO VADIS : Wills and estates, law and practice, in contemporary NSW

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INTRODUCTION

1. In terms, the precise topic allocated to me by the College of Law for this address is: "A judicial review of significant wills and estates cases in the last 12 months in NSW".

2. In addressing that topic I allow to myself the same liberality of definition as is enjoyed by historians who, directed to write about a particular century, blur their boundaries by writing about a "long" century that begins a substantial time before, and ends a substantial time after, their designated period. My focus is on "the last 12 months", give or take something more.

THE NATURE OF ESTATE LITIGATION

3. In the administration of estates there is not always a clear demarcation between "substantive" and "adjectival" law such as may be found in adversarial proceedings, between competent parties, contesting a common law claim of right. The Court generally needs to keep in mind the perspective, and interests, of a person who (through death or incapacity) is not present before the Court, and the possibility that the interests of others not represented before the Court may need to be taken into account.

4. In other papers published on the website of the Supreme Court I have endeavoured to draw to attention general features of the work of the Court in the administration of estates. Whatever form a particular case takes, it generally requires the Court to engage in a process of management of people, property and relationships. Whatever the historical foundations of the particular jurisdiction the Court is called upon to exercise, the Court's work is generally "purposive" in the sense that decision-making is governed by the purpose for which the jurisdiction exists. Historical distinctions between the protective, probate and family provision jurisdictions have become blurred as "death" has become a process rather than merely an event. That process may begin as early as when, in anticipation of death or incapacity, a person executes an enduring power of attorney, with or without appointment of an enduring guardian. It may end only when the possibility of family provision litigation comes to an end.

THE PURPOSIVE CHARACTER OF THE COURT'S JURISDICTION

5. Conceptually, each branch of the Court's jurisdiction has at its centre the ideal of an autonomous individual, living (and dying) in community. Questions of capacity and incapacity are judged against the standard of such an individual, as are derivative claims of those who claim a material interest in an estate. At different stages of the life cycle

different importance is, or may be, attached to the relative entitlements of "the individual" and "the community".

6. The **protective** jurisdiction of the Court focuses upon the welfare and interests of a person incapable of self-management, testing everything against whether what is done or left undone is or is not for the interests, and benefit, of the person in need of protection, taking a broad view of what may benefit that person, subordinating all other interests to his or hers: *CJ v AKJ* [2015] NSWSC 498 at [27]-[30]; *Guardianship Act* 1987 NSW, section 4; *NSW Trustee and Guardian Act* 2009 NSW, section 39.

7. 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 testator's testamentary intentions, and to see that beneficiaries get what is due to them: *In the goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakis* [2014] NSWSC 786 at [211]. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries.

8. The **family provision** jurisdiction also 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. The normative judgement required of the Court, implicit in the word "ought", was once unequivocally judged against the standard of a "just and wise testator" (an expression associated with *In re Allen* [1922] NZLR 218 at 220-221, *Bosch v Perpetual Trustee Co.* [1938] AC 463 at 479 and *The Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20); but, more recently, it has been located in shifting sands by reference to "community values" about what is right and appropriate: *Andrew v Andrew* (2012) 81 NSWLR 656. The two concepts are generally able to be reconciled so as to operate *in tandem*; but (at least in theory) they start at different ends of the spectrum connecting "the individual" and "the community".

9. Importance attaches to identification of the purposes served by the law in estate administration because: (a) the purpose served by the law guides sound decision-making, supplying answers to questions about whether, why, what and how something can, and should, be done; and (b) it enables principled, productive decisions to be made without the process of decision-making becoming bogged down in misdirected, conflicting, rule-based claims of entitlement to which litigants, with little or no encouragement, routinely resort.

SEMINAL CASES ESTABLISH GUIDELINES FOR QUOTIDIAN CASE LAW

10. No judgment published over the past year (however many months be counted in that year) has displaced the critical importance of a collection of seminal cases that continue to inform current law and practice. Even if not cited in a particular judgment they are rarely absent from contemplation.

11. In the realm of the **protective** jurisdiction, those cases include the following:

a) In relation to the nature and scope of the Court's inherent jurisdiction: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 258-259, citing *E (Mrs)* v *Eve (also known as Re Eve)* [1986] 2 SCR 388 at 407-437; 31 DLR (4th) 1 at 13-36, *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243 and *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 131; 4 ER 1078 at 1081.

b) In relation to incapacity under the general law: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438.

c) In relation to the duty of a guardian or protected estate manager to account: *Countess of Bective v Federal Commissioner of Taxation* (1932) 41 CLR 417 at 420-423 and *Clay v Clay* (2001) 202 CLR 410 at 428-433.

d) In relation to the identity of a protected estate manager: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 237F-243F.

e) In relation to the inherent jurisdiction to appoint a "guardian" (a committee of the person) and to make access orders: *RH v CAH* [1984] 1 NSWLR 694.

12. In the realm of **probate** jurisdiction seminal cases include the following :

f) In relation to parties and notice of proceedings: *Osborne v Smith* (1960) 105 CLR 153 at158-159, citing *Wytcherley v Andrews* (1871) LR 2 P & D 327, in turn based upon *Newell and King v Weeks* (1814) 2 Phil Ecc 244 at 233-234; 161 ER 1126 at 1129-1130.

g) In relation to testamentary capacity: *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565, affirmed in a multitude of Australian cases, including *Bailey v Bailey* (1924) 34 CLR 558 at 570, *Timbury v Coffey* (1941) 66 CLR 277, *Worth v Clasohm* (1952) 86 CLR 439 and *Re Eger; Heilprin v Egar* (Powell J, 4 February 1985) BC 8500997 at 72-74 and *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707.

h) In relation to "the suspicious circumstances rule": *Barry v Butlin* (1838) 2 Moo PC 480 at 482-485; 12 ER 1089 at 1090-1091, *Fulton v Andrew* (1875) LR 7 HL 448 at 461 and 471-472; *Brown v Fisher* (1890) 63 LT 465 and *Tyrell v Painton* [1894] P 151 at 156 and 159-160, affirmed in *Nock v Austin* (1918) 25 CLR 519 at 524-524 and 528 and *Tobin v Ezekiel* (2012) 83 NSWLR 757 at 770[43]-774[55];

i) In relation to revocation of a grant in aid of due administration of an estate: *Bates v Messner* (1967) 67 SR (NSW) 187; 86 WN (NSW) (Pt 2) 35; *Mavrideros v Mack* (1998) 45 NSWLR 80.

13. In the realm of **family provision** jurisdiction seminal cases include, most significantly, *Singer v Berghouse* (1994) 181 CLR 201 and *Andrew v Andrew* (2012) 81 NSWLR 656; but the primacy of the legislative powers conferred on the Court by Chapter 3 of the

Succession Act, and the need for the Court to form evaluative judgments based on particular facts, limit the role of case law precedents.

14. In the **Equity** jurisdiction, at the intersection between the probate jurisdiction and the general law, the seminal cases remain:

    j) In relation to a contract to make a will: *Horton v Jones* (1935) 53 CLR 475.

    k) In relation to mutual wills: *Birmingham v Renfrew* (1937) 57 CLR 666 at 683; *Barnes v Barnes* (2003) 214 CLR 169.

    l) In relation to general principles relating to estoppel: *Giumelli v Giumelli* (1999) 196 CLR 101; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483.

15. These foundational cases generally lay down principles that are sufficiently flexible to allow the justice of a particular case to be accommodated. They are not themselves beyond development; but, as the law presently stands, they provide parameters for decision that are readily adaptable to particular cases.

16. All judges of the Equity Division of the Court are, from time to time, allocated cases involving an exercise of the Court's protective, probate or family provision jurisdiction(s). The judges who exercise the Court's jurisdiction in these areas are not confined to those who routinely manage the Protective, Probate and Family Provision Lists.

17. The cases here noticed as "recent cases" are but a selection of cases illustrating the manner in which the Court's jurisdiction has been exercised in recent times.

RECENT CASES IN THE PROTECTIVE JURISDICTION

18. Recent cases of note involving an exercise of the Court's protective jurisdiction may be conveniently grouped together in seven categories.

19. First, there are cases relating to an appeal from the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) pursuant to clauses 12(1)(b) and 14 of Schedule 6 to the *Civil and Administrative Tribunal Act* 2013 NSW: *P v NSW Trustee and Guardian* [2015] NSWSC 579 and *IR v AR* [2015] NSWSC 1187.

20. Secondly, there is a string of cases, commencing with a judgment of White J in *Re R* [2014] NSWSC 1810 at [84]-[94], in which the Court has liberalised the approach to determining whether a person is incapable of managing his or her own affairs. A so-called "objective" test formulated by Powell J in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, by reference to "the ordinary affairs of man", is no longer seen as determinative of the question of incapacity for self-management.

21. The expression "(in)capable of managing his or her affairs" in current legislation bears its ordinary meaning. The utility of any "test" formulated to elaborate that meaning depends on whether (and, if so, to what extent) it is, in a particular case, revealing of reasoning justifying a finding that a person is, or is not (as the case may be), capable of managing his or her affairs, having regard to the protective purpose of the jurisdiction being exercised

and the principle that the welfare and interests of the person in need of protection are the paramount consideration: *CJ v AKJ* [2015] NSWSC 498 at [40].

22. The general law does not prescribe a fixed standard of "capacity" required for the transaction of business; the level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person's capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438.

23. A similar approach was adopted by the Court of Appeal in *Murphy v Doman* (2003) 58 NSWLR 51 at 58 in determining whether a litigant in person was capable of managing court proceedings without a tutor.

24. In *CJ v AKJ* [2015] 498, *P v NSW Trustee and Guardian* [2015] NSWSC 579 and *H v H* [2015] NSWSC 837, capacity for self-management was considered by reference to subjective considerations similar to the approach associated with *Gibbons v Wright* in a general law context.

25. Thirdly, the significance and flexibility of the Court's inherent jurisdiction were on display in *IR v AR* [2015] NSWSC 1187 and *Secretary, Department of Family and Community Services; Re "Lee"* [2015] NSWSC 1276.

26. Fourthly, there are cases in which the Court has approved family settlements in advance of the death of a protected person: *L v L* [2014] NSWSC1686, *W v H* [2014] NSWSC 1696, *JPT v DST* [2014] NSWSC 1735 and *Re RB, a protected estate family settlement* [2015] NSWSC 70.

27. Fifthly, there are cases in which the Court has allowed a private protected estate manager (not being a licensed trustee company) to be paid remuneration out of a protected estate *via* a procedure authorising the NSW Trustee to approve the remuneration: *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245; *Re Managed Estate Remuneration Orders* [2014] NSWSC 383; *Re Application of Martin Fowler* [2015] NSWSC 466.

28. Sixthly, there are cases that, *inter alia*, bear upon the relationship between an exercise of protective jurisdiction and common law compensation proceedings: *Re W and L (Parameters of protected estate management orders)* [2014] NSWSC 1106; *Re K, and incapable person in receipt of interim damages awards* [2014] NSWSC 1286; and *Re application for partial management orders* [2014] NSWSC 1468; *H v H* [2015] NSWSC 837.

29. Seventhly, cases that consider the operation of the protective jurisdiction in the context of a minor include *AC v OC* (a minor) [2014] NSWSC 53 and *Re "Lee"* [2015] NSWSC 1735.

30. In the absence of any contemporary textbook on the law and practice of the protective jurisdiction, and still less academic study of that law and practice, recent judgments have attempted to explain how and why the jurisdiction operates as it does, within the current legislative and administrative framework and allowing for significant changes in both since *Holt v Protective Commissioner* (1993) 31 NSWLR 227.

31. One feature of current practice that is perhaps not sufficiently manifest in published judgments is:

    (a) the ubiquity of enduring powers of attorney (and enduring guardianship appointments);

    (b) their effectiveness in the lives of many families; but

    (c) the prohibitive costs and angst that can be occasioned by disputes about the validity and deployment of enduring powers of attorney, in particular;

    (d) the importance of realising that, where enduring powers of attorney fail to allow for the orderly management of an estate because of disharmony within a family or the unsuitability of an attorney, serious and early consideration may need to be given to the making of protected estate management orders having the effect of superseding the powers of attorney regime; and

    (e) in practice, families that have become dysfunctional in management of the estate or person incapable of self management may need an opportunity, with professional guidance, to work through the practical implications and alternative models of protected estate management.

32. In the current legislative and administrative context, much of the day to day work involved in exercise of the State's protective function is undertaken by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT). The Court's jurisdiction is generally available in cases of need, but, on the whole, it is reserved for cases of a nature that can be characterised as exceptional, outside the scope of NCAT's routine business, or in need of the larger powers of the Court.

33. In a similar vein, it must be noted, that the work of NCAT and the Court in protective cases often involves, and sometimes needs, constructive engagement by everybody with the NSW Trustee and the Public Guardian.

34. These features of the protective jurisdiction need to be borne in mind if parties are to be spared the high costs of litigation and given a fair opportunity of a non-adversarial solution to common problems.

RECENT CASES IN THE PROBATE JURISDICTION

35. Seven categories of recent probate cases might usefully be brought to attention, recognising that they are but a fraction of the activity that routinely engages the probate jurisdiction.

36. First, tying in the protective jurisdiction and illustrating the growing overlap between the protective, probate and family provision jurisdictions, are an increasing number of "statutory wills", governed by Part 2.2, Division 2, sections 18-26 of the *Succession Act* 2006 NSW.

37. The leading cases remain *Re Fenwick* (2009) 76 NSWLR 22 and *Re Will of Jane* [2011] NSWSC 624 at [52]-[100].

38. Although the legislation provides specific criteria that need to be carefully consulted, one needs to be mindful that a person who lacks the capacity to make a will is likely, more generally, to be a person incapable of managing his or her affairs so as to attract an exercise of protective jurisdiction so that anything done, or left undone, should be justified by reference to what is in the interests, and for the benefit, of that person: *Secretary, Department of Family and Community Services v K* [2014] NSWSC 1065, approved in *GAU v GAV* [2014] QCA 308 at [48]. Equally, on the other hand, one needs to be conscious that the mere fact that a person is a "protected" or "managed" person within the meaning of section 38 of the *NSW Trustee and Guardian Act* 2009 NSW does not mean that he or she lacks testamentary capacity: *Perpetual Trustee Company Limited v Fairlie-Cunninghame* (1993) 32 NSWLR 377.

39. Care needs to be taken, when obtaining an order authorising the making of a statutory will, to ensure that the will is signed by the registrar and sealed by the Court pursuant to the *Succession Act* 2006, section 23, before the death of the incapacitated person. Failure to do so may lead to the will not being admitted to probate. However, the critical time (which should be specifically recorded) is the time at which the Court's order authorising the making of the will is made: *Estate of Scott; Re Application for Probate* [2014] NSWSC 465.

40. Secondly, notice should be taken of the increasing reliance upon "informal wills", admitted to probate under section 8 of the *Succession Act*, notwithstanding a failure to comply with formalities prescribed by s 6.

41. When he admitted an audio tape to probate as an informal will (under the statutory predecessor of section 8) Austin J, in *Treacy v Edwards* (2000) 49 NSWLR 739 at 746[30], contemplated that it would only be in "exceptional cases" that an audio or video tape might be admitted to probate. Prudence in will-making counsels caution against deliberate departures from the formalities of will-making prescribed by section 6.

42. However, in a technological age, doubts may reasonably be held about whether audio and video tape wills will continue to be exceptional. The legislation does not dictate that they be so. "Computer wills" (found, untranscribed, on the computer of a deceased person) are becoming increasingly common: *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594; *Estate of Currie* [2015] NSWSC 1098. A "video will", said to be the first admitted to probate in NSW, was the subject of a grant in *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107.

43. *Chan* dealt with questions about law and practice relating to the admission to probate of a "video will" recorded in a language other than English. It also considered the relationship between sections 8 and 10 of the *Succession Act* in circumstances in which a will (a codicil) was recorded by a person who was named in the will as a beneficiary.

44. It canvassed the nature and applicability of "presumptions" of capacity and knowledge and approval arising from a will-making process that was deliberate, albeit not resulting in a will that could attract the description of having been "duly executed". It suggested, at

[19], that these traditional presumptions are more empirical than prescriptive, and best understood as inferences commonly drawn from established facts: *Calverley v Green* (1984) 155 CLR 242 at 264.

45. If that is so, if an informal will is rational on its face, and the process of its creation is equally, patently rational, might not common experience lead an objective observer (in the absence of some other fact) to infer that the will-maker was mentally competent and that he or she knew and approved the contents of the will?

46. If, and as, they become increasingly common, informal wills may challenge not only assumptions about the nature and operation of traditional probate presumptions, but also the distinction between grants of probate in common and solemn form.

47. As a matter of practice, informal wills are routinely admitted to probate in common form. However, if the Probate Rules relating to admission of an informal will to probate (*Supreme Court Rules* 1970 NSW, *Part* 78 *rules* 41-45 and 67) are followed, the pre-requisites for a grant in solemn form might reasonably be said to have been satisfied.

48. This perspective of probate practice invites attention to the nature of the distinction between common form and solemn form grants, the utility of the distinction, and whether the distinction has any (and, if so, what) practical implications for an application for the revocation of a grant.

49. Thirdly, there is *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 which, in greater detail, invites reflection on the existence, meaning and practical implications of the traditional (but not entirely rational) distinction between grants in common and solemn form.

50. Fourthly, recent cases have challenged a common assumption that proof of "probate" undue influence (coercion by another name) is practically impossible: *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 at [263]-[277] and [308]-[314] and *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18 at [162] and [173].

51. A separate, but related question, apparently left open by the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474[62]-475[63], is whether a disposition of property in a will might attract the operation of *equitable* principles relating to undue influence notwithstanding a finding that the will could not be held invalid on any application of *probate* principles relating to undue influence.

52. Questions of this character invite a reconsideration of the nature and purpose of standard challenges to the validity of a will; namely: (a) a want of testamentary capacity; (b) a lack of knowledge and approval; and (c) undue influence. The essential question, in deciding whether a particular document should be admitted to probate, might be said to be whether the document was the last will of a free and capable testator (*Woodley-Page v Symons* (1987) 217 ALR 25 at 35), the traditional "grounds" merely being illustrations of aspects of that general question, and reflective of historical rules of court.

53. Fifthly, the question of the "entitlement" of an executor or trustee to remuneration is considered in *Re Estate Gowing*; *Application for Executor's Commission* (2014) 11 ASTLR 128; (2014) 17 BPR 32,763; [2014] NSWSC 247, a judgment which has a

companion in *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245.

54. Sixthly, recent cases have considered the admission to probate of a (video) will in a foreign language (*Re Estate of Chan, Deceased* [2015] NSWSC 1107) and the correct approach to construction of a will in a foreign language (*Gordon Salier v Robert Angius* [2015] NSWSC 853).

55. Seventhly, *Campbell v Campbell* [2015] NSWSC 784 provides a detailed exposition of the law relating to contracts to make a will and mutual wills.

56. The changes that have taken place in the probate jurisdiction over recent decades (including, significantly, the development of informal wills, statutory wills and the family provision jurisdiction, and reorientation of the concept of "family" in the law governing intestacies) have required, and can reasonably be expected to require, a review of traditional, action-based principles relating to succession.

57. The probate jurisdiction needs to be served by principles that permit estates to be managed effectively, and with a minimum of expense, in aid of the purpose for which the jurisdiction exists.

RECENT CASES IN THE FAMILY PROVISION JURISDICTION

58. In the ordinary course of running the Family Provision List the List Judge, Hallen J, has routinely published judgments that summarise principles relating to particular categories of family provision claims. They provide a valuable resource.

59. As an illustration of that resource, the following cases can be noted as containing an exposition of principles relevant to the various categories of "eligible person" identified in the *Succession Act*, section 57(1):

    m) spouse of the deceased (section 57(1)(a)): *Epov v Epov* [2014] NSWSC 1086.

    n) *de facto* of the deceased (section 57(1)(b)): *Sadiq v NSW Trustee and Guardian* [2015] NSWSC 716.

    o) child of the deceased (section 57(1)(c)): *Baird v Harris* [2015] NSWSC 803.

    p) former spouse of the deceased (section 57(1)(d)): *Geoghegan v Szelid* [2011] NSWSC 1440.

    q) dependent grandchild or member of household of the deceased (section 57(1)(e)): *Grover v NSW Trustee and Guardian* [2015] NSWSC 1048.

    r) close personal relationship with the deceased (section 57(1)(f)): *Drury v Smith* [2012] NSWSC 1067.

60. Recent decisions of the Court of Appeal in family provision cases include *Underwood v Gaudron* [2015] NSWCA 269; *Poletti v Jones* [2015] NSWCA 107; *Salmon v Osmond*

[2015] NSWCA 42; *Chapple v Wilcox* [2014] NSWCA 392; *Seeto v Seeto* [2014] NSWCA 295; *Verzar v Verzar* [2014] NSWCA 45; *Phillips v James* [2014] NSWCA 4; and *Phillips v James* (No. 2) [2014] NSWCA 135.

61. As *Underwood v Gaudron* [2015] NSWCA 269 illustrates, there is continuing debate (referenced back to *Singer v Berghouse* (1994) 181 CLR 201 and *Andrew v Andrew* (2012) 81 NSWLR 656) about whether the process of reasoning involved in dealing with a family provision application involves a "two stage approach" or a "three stage approach". At the end of the day, the task remains one of addressing each of the elements of a claim for which Chapter 3 of the *Succession Act* provides, bearing in mind that the Act lends itself to an analysis by reference to specific provisions.

CONCLUSION

62. Exposition of the law by reference to cases demonstrates that the law, in our common law system, develops *via* a process akin to the conduct of a conversation between persons charged with responsibilities for identifying, and solving, practical problems confronting contemporary society.

63. Practising and academic lawyers, no less than judges, are essential participants in any such conversation.

Date: 15 September 2015