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**THE ROLE OF “PURPOSE” IN ESTATES LITIGATION:
WHY WE DO WHAT MUST BE DONE**

by

Justice Geoff Lindsay
Probate and Protective List Judge,
Equity Division, Supreme Court of NSW

- 1 The concept of “purpose” pervades Australian law.
- 2 That is certainly true of the law of succession and, more generally, the law governing the administration of estates, in which discourse tends to focus on the availability of “remedies” rather than “principles” governing the availability of remedies. In analytical terms probate law, especially, remains, essentially, action-based. Estate administration law, generally, is often discussed, by all branches of the legal profession, in terms of a “right of action” in court proceedings governed by purpose-driven heads of jurisdiction.
- 3 The purposive character of law can more readily be overlooked in analyses of “substantive law” (than it can be in analyses of “adjectival law”) because, in a discussion about abstract principles, there is a tendency to focus on “rights” and “duties” unrelated to the litigation process rather than questions of court procedure, the means by which “rights” and “duties” can be enforced.

- 4 The purposive character of the law tends, also, to be overlooked when the focus for attention is upon “rules” and “exceptions”. Lawyers tend to elevate “rules” and “exceptions”, and to take refuge in formalities, as concepts that must not only inform, but also govern, decision-making. “Rules” and “exceptions” are closely aligned with claims of right, and much advocacy gravitates towards emphatic claims of right rather than nuanced proposals for the definition, and solution, of problems.
- 5 Unless “rules” are made the servant, rather than the master, of any jurisdiction exercised by a court – unless the purpose for which the court’s jurisdiction exists is kept constantly in mind – they can give rise to a constant need for refinement, with “rules”, qualified by “exceptions”, giving rise to more “rules” *ad nauseam*. Often, the more rules one has, the more rules one needs to deal with factual complexity.
- 6 The same tendency of mind sometimes manifests itself in characterisation of particular “rules” as jurisdictional limits which, on closer examination, are more accurately characterised as rules of practice, or guidelines, for the making of a discretionary decision.
- 7 This is true of probate law, for example, in circumstances in which an executor to whom a grant of probate has been made claims a “right” to remain in office – to resist an application for revocation of the grant – despite delays, or departures from good practice, in the administration of an estate under the executor’s stewardship. Although the Court will not lightly interfere with a will-maker’s personal selection of an executor, a person named as executor in a will cannot, without substantial qualification, be regarded as having *a right* to occupy that office: *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Mavrideros v Mack* (1998) 45 NSWLR 80 at 101-102; *Estate Wight; Wight v Robinson* [2013] NSWSC 1229 at [19] and *Parsons v Davison* [2016] NSWSC 1491.

- 8 The purposive character of the law may be more transparent in the realm of “adjectival law” than it generally is in the realm of “substantive law”. Witness, for example, the current (commendable) preoccupation of the Court, and those who practise in it, with “the overriding purpose” embodied in section 56 of the *Civil Procedure Act 2005 NSW*. Section 56(1), it will be recalled, provides that “[the] overriding purpose of [the *Civil Procedure Act 2005*] and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.” That provision is often called in aid of an application, or an order, for technical, procedural rules to be cut through.
- 9 Sometimes the concept of “purpose” is encountered in the negative. Lawyers not commonly find speaking in the negative more congenial than asserting a positive. At any rate, a prime example of a negative expression of “purpose” in the law is the concept of “abuse of process” as a ground for court proceedings to be summarily dismissed or stayed. Summary disposal orders can be made if proceedings are commenced, or maintained, for an “improper purpose”. That concept, in its turn, requires recognition of the (proper) purpose for which proceedings have been designed: *Williams v Spautz* (1992) 174 CLR 509 at 518-529.
- 10 Everybody engaged in proceedings involving the administration of an estate – speaking, here, of the estate of a person who is, or may be, unable, because of death or incapacity, to administer his or her own estate – must remain mindful of purposes served by the Court’s jurisdiction(s).
- 11 Although the Court’s protective, probate and family provision jurisdiction(s) can be conceptualised as comprising three separate branches of jurisdiction, in a modern setting they must increasingly be seen as interrelated in concept (if not in operation), aided (as always) by the Court’s general equity jurisdiction.

- 12 That is because of (a): the current, widespread use (and, one might suspect, abuse) of enduring powers of attorney and an increasing community familiarity with protected estate management orders (financial management orders) in management of the affairs of persons incapable of management of their own affairs; (b) the availability of jurisdiction in the Court to authorise the making of a will on behalf of a person lacking testamentary capacity; (c) an increasing number of family provision claims consequent upon the death of a family member; and (d) community expectations.
- 13 Jurisdictional, conceptual boundaries inherited from English law and institutions (in particular, the “lunacy jurisdiction” now known as the protective jurisdiction, and the “ecclesiastical jurisdiction” now known as the probate jurisdiction) no longer explain much of what modern lawyers do. “Elder law”, as a concept, has appropriated much of what is done, and much that an earlier generation would have been content simply to ascribe to the intervention of equity. Family provision jurisdiction, unknown before the 20th century, has developed as a specialty in its own right. The 19th century paradigm of testamentary freedom residing in an individual, as if Robinson Crusoe, has given way to the paradigm of an individual living in community, constrained, at the risk of curial intervention, to make testamentary provision for others as he, or she, “ought”.
- 14 In estate administration law, “death” has become a process, rather than an event. Its reach extends from the execution of an enduring power of attorney (presently governed by the *Powers of Attorney Act 2005 NSW*) to “closure”, if there can ever be closure, of the possibility of a claim for family provision relief being made (under chapter 3 of the *Succession Act 2006 NSW*) against the deceased’s estate. Increasingly, post-death equity litigation (invoking equity jurisdiction as a head of jurisdiction closely related to the protective, probate and family provision jurisdictions) may be required to recoup for the

deceased's estate funds misappropriated during his or her lifetime by improper use of an enduring power of attorney. The course of a person's decline into death often needs to be plotted in identifying his or her estate, not only transactions that might support a designation of property as notional estate in family provision proceedings.

- 15 A common feature of protective, probate and family provision cases, in particular, is that they all, in one form or another, involve administration (that is, management) of an estate (that is, property). From the Court's perspective, they all require decisions to be made about the management of persons, property and relationships. They exemplify a society accustomed to having the whole process of dying, death and succession to property, closely managed. Australians increasingly live lives that are managed.
- 16 In identifying the "purpose" governing each branch of the Court's jurisdiction one also identifies "why" things are done, or not done, upon an exercise of that jurisdiction. When the reason "why" is identified, problems relating to "what" things should be done, "when" they should be done and "how" they should be done become more amenable to solution than when problems are identified merely by reference to "rules" and "exceptions" that generally operate at a lower level of abstraction.
- 17 It should not escape attention that modern legislative reforms often take the form of conferral of a discretionary power on a decision-maker, coupled with a prescription of guidelines that embody a statement of purposes. The clearest illustration of that, in the current context, can be found in section 4 of the *Guardianship Act* 1987 NSW and its analogue, section 39 of the NSW *Trustee and Guardian Act* 2009 NSW, governing statutory-based decision-making on an exercise of protective jurisdiction. Sections 59-60 of the *Succession Act* 2006 NSW are not far behind in the metes and bounds they set for the determination of family provision claims.

- 18 Probate law is more piecemeal in expression of its purpose. It is, nevertheless, predicated upon the Court's possession of broad discretionary powers governed by the functional necessity of facilitating the administration of deceased estates. Parliament has less need of the modern model of legislation in a case in which the Court has an established general law jurisdiction and powers similar to those conferred on the Court are not also conferred on a statutory tribunal.
- 19 The **protective** jurisdiction of the Court (in both its "inherent" and its statutory guise) is the most overtly purposive branch of the Court's jurisdiction relating to estate management. That is because the jurisdiction exists for the explicit 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, citing *inter alia*, *Re Eve* [1986] 2 SCR 388 at 407 *et seq*; 31 DLR (4th) 1 at 13 *et seq*. 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 for the interests, and 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: *CJ v AKJ* [2015] NSWSC 498 at [27]-[30]; *Guardianship Act 1987 NSW*, section 4; *NSW Trustee and Guardian Act 2009 NSW*, section 39.
- 20 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] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakis* [2014] NSWSC 786 at [211]; *Parsons v Davison* [2016] NSWSC 1491 at [8]-[9].

- 21 The probate and protective jurisdictions share an affinity in the absence of a fully competent person (the incapable person or the deceased) whose property is the central subject of consideration. They differ to the extent that the protective jurisdiction focuses, essentially if not exclusively, on the interests of the incapable person (a living, “absent” person) whereas the probate jurisdiction is classically centred upon a dead person, and recognised to involve “interest litigation” in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person (other than the deceased, necessarily “absent”) must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Estate Kouvakis* [2014] NSWSC 786 at [212].
- 22 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: *Estate Wight* [2013] NSWSC 1229 at [10]-[22]; *Riccardi v Riccardi* [2013] NSWSC 1655; (2013) 11 ASTLR 198 at [9]. The focus of attention in protective proceedings never shifts (or, at least, never should) from the person in need of protection.
- 23 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.
- 24 Each branch of the Court’s jurisdiction is exercised in a manner that is fundamentally informed by the purpose it serves.
- 25 Recognition that this is so is important, not only in the day-to-day work of the administration of estates or the conduct of court proceedings relating to them, but also in adapting modern practice to the modern technological age. Adaptation to new rules and procedures is likely to be facilitated if there is a

common understanding of the systemic “purpose”, the reason “why”, underlying administrative procedures.

- 26 The computer age compels a reassessment of what it is to make a will, with increasing numbers of “electronic wills” being admitted to probate as “informal wills” governed by section 8 of the *Succession Act*. “Computer wills” are not uncommon: eg. *Alan Yazbek v Ghosn Yazbek* [2012] NSWSC 594. In *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 110 a video recording (in a foreign language) was admitted to probate. The Court’s jurisdiction to recognise an informal will must be exercised in a manner that recognises how people live their lives. The day might arrive when (heaven forbid) informal wills (presently governed by section 8) compete with “formal wills” (governed by section 6 of the *Succession Act*) to constitute what is “normal”.
- 27 Be that as it may, the proliferation of “informal wills” may require a general reassessment of the role of “presumptions” (identified in *Bailey v Bailey* (1924) 34 CLR 558 at 570-572, *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704E-707G and elsewhere) in the conduct of probate litigation. By its very nature, an informal will does not attract a traditional “presumption” of capacity or knowledge and approval arising from “due execution”. Such a presumption is, however, essentially empirical rather than prescriptive. It is an aid to the investigation of questions of fact, and to the determination of disputed questions of fact, in a world of imperfect knowledge. It might better be understood as an “inference” commonly drawn from established facts than something in the character of a “rule”. In each case, whether or not the formalities of will-making are observed, the essential question, in deciding whether a particular document should or should not be admitted to probate, is whether it was the last testamentary expression of a free and capable testator: *Woodley-Page v Symons* (1987) 217 ALR 25 at 35.
- 28 The computer age may also require that closer attention be given to the form of a grant of probate. Such a grant is both an order of the Court and an instrument of title to property: *Estate Kouvakis; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233]. Its dual character raises questions about the

appropriate form of relief when an order is made for its revocation; should there be, in every case, revocation of a grant coupled with a fresh grant or is it sufficient to make an order varying the initial order for a grant? : see *Riccardi v Riccardi* [2013] NSWSC 1655, contrasting *Morgan v MacRae* [2001] NSWSC 1017 at [21] on the one hand and, on the other, *Profilio v Profilio* [1999] NSWSC 657 at [33]-[34] and *McKerracher v McKerracher* [2011] NSWSC 1288 at [10]-[14].

- 29 If, and when, most business is transacted *via* an electronic medium (increasingly the case in relation to land titles dealings, for example) a means might need to be found for a publicly, electronically accessible register of grants similar, in operation if not concept, to a land titles register? There is no extant proposal for such a register, and none is here solicited. Should the law take such a path, though, closer attention might need to be given to the distinction between a grant “in common form” and a grant “in solemn form” and to criteria governing their revocation: *cf, Estate Kouvakis* [2014] NSWSC 786 at [249].
- 30 Already, where a common form grant is confirmed in proceedings leading to a grant in solemn form, the Court has recognised that endorsement of the grant as a solemn form grant might be administratively more efficient than a traditional, two-step process involving, first, revocation of the initial grant and, secondly, the issue of a fresh grant: *Estate Cockell; Cole v Paisley* [2016] NSWSC 349 at [85]-[88]. The form of relief granted can be moulded, to meet the facts of the particular case, in a way calculated to serve the purpose of the jurisdiction exercised. A need for efficiency in the administration of estates may override traditional, more cumbersome, paper-based procedures for probate administration.
- 31 The electronic age also impacts on the operation (in probate litigation and, analogously, family provision litigation) of the principle, enunciated in *Osborne v Smith* (1960) 105 CLR 153 at 158-158, about when a person not formally joined in proceedings as a party is bound by their outcome: that is, if given notice of the proceedings and allowed an opportunity to intervene. Optimal

though personal service of notice continues to be, parties tend to gravitate towards email communications as a practical, though irregular, substitute. This is not to be encouraged, but it is a tide not easily held back. A new generation of young lawyers (inseparable from their electronic devices) tends to equate service by email with personal service, whatever the merits of a contrary position.

32 Incidentally, all contested applications for a grant of probate should ordinarily be prepared on the basis that, upon their determination, the presiding judge is in a position to make a grant in solemn form: *Estate Sue* [2016] NSWSC 721 at [114] - [118]. In practice, a most critical component of pre-trial preparation to this standard is the need to ensure that all interested parties are duly served with notice of the proceedings. It is essential to the process of settling property rights in an orderly, fair manner. Failure to rise to the requisite standard of case preparation may preclude the allocation of a hearing date or have costs consequences.

33 For the Court, and all interested persons, problems (both ordinary and novel) that arise for solution in estate administration law are most open to a principled, and practical, solution if the problem solving process has its genesis, and guiding star, in recognition of the foundational role played by the purpose served by the jurisdiction the Court is called upon to exercise. The problem-solving process begins with, and must always be informed by, an understanding the significance of “purpose”. A failure to appreciate that can entrap parties, and, sometimes, the Court, in a bog of seemingly arbitrary rules, exceptions and more rules, *ad nauseam*, with crippling consequences for affected parties in terms of costs, inconvenience and delay

GCL

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