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Australian Succession Law in National Perspective

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**CONCEPTS, PATTERNS AND PROBLEMS IN PROBATE LITIGATION :
A PERSPECTIVE OF ESTATE ADMINISTRATION**

by

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INTRODUCTION

- 1 This paper invites reflection on principles that inform the practice of law in areas that focus upon the law of probate, but frequently form a penumbra that, before death, engages the protective jurisdiction of Australian Supreme Courts and, after death, the Courts' family provision jurisdiction.
- 2 This area of legal practice defies a single label. A common denominator is the administration (management) of an estate (property); but the protective jurisdiction extends to "the person" as well as "the estate". It is sometimes described as "elder law"; but more than a few cases (especially those associated with personal injury litigation) concern minors or young adults. Historically, it has different jurisdictional foundations, united by an active engagement with the Courts' equity jurisdiction.
- 3 What we now call "probate jurisdiction" was once known as a subset of "ecclesiastical law", administered by church courts, in England. What we now call "protective jurisdiction" was once known, in one branch, as "lunacy

jurisdiction” and, in another branch, as “infancy or wardship jurisdiction” of the Lord Chancellor of England: see *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258-259 and the Canadian case referred to by the High Court, *E (Mrs) v E (Re Eve)* [1986] 2 SCR 388 at 407 *et seq*; 31 DLR (4th) 1 at 13 *et seq*. The “family provision” (or “testator’s family maintenance”) jurisdiction is based on local statutes that *post-date* Australia’s reception of English law.

- 4 The law administered in each type of jurisdiction under consideration is essentially “action-based”, and is generally elaborated in terms of an “action”. That is to say, the law is often, if not generally, discussed by reference to available remedies, and procedures leading to the grant of a remedy, rather than in terms of underlying, abstract principles. The law under consideration is, in this respect, not unlike the law of contract (once elaborated by reference to the common law actions of assumpsit, covenant, debt and detinue) before reformulated by academic textbook writers in or about and following 1870, or the law of torts (with actions in trespass and trespass on the case).
- 5 Over several decades Australian universities appear to have lost interest in the teaching, and development, of the law relating to estate administration in its broadest sense. Succession law is not a compulsory subject in undergraduate courses leading to the conferral of a degree in law, although universities generally offer the subject as an elective from time to time. The protective jurisdiction is generally not taught at all. The family provision jurisdiction might be studied as an element of succession law or family law, but, generally, not otherwise.
- 6 Despite this, the law relating to estate administration remains a dynamic area of legal practice, with a plenitude of interesting problems awaiting solution. It is a bread and butter area of law for many legal practices. With an ageing population, increasing wealth and a community increasingly accustomed to professional management of social problems, there is a fresh focus on the law. Few families will not have direct, or indirect, experience of an enduring power of

attorney, an instrument for the appointment of an enduring guardian and a perceived necessity for a will as a routine part of estate planning.

- 7 One of the major challenges confronting the law is how to ensure that fiduciary obligations associated with informal estate administration arrangements are recognised and, by workable systems for accounts to be taken, enforced. This challenge arises in circumstances in which government (in the broad sense) has long encouraged families to embrace private arrangements for management of the person or estate of incapacitated family members, eschewing public managers: in the NSW context, see *M v M* [2013] NSWSC 1495 at [24]-[48]; *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [30]-[32]. Dissipation of estates by private “managers” or “guardians” is a problem.
- 8 Another challenge, not yet fully explored in case law, is whether the concept of “undue influence” recognized in probate law (limited as it is to coercion) needs to be expanded, or whether (as the High Court hinted in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475) it can be supplemented by an exercise of equity jurisdiction, a question explored in *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[207].
- 9 The extent to which historical jurisdictional categories no longer define our understanding of the law relating to estate administration is, perhaps, best illustrated by the operation of the law in the context of those who (by reason of incapacity) are unable to manage their own affairs.
- 10 Two illustrations suffice. Both arise from the fact that, even absent a financial management order made on an exercise of protective jurisdiction, statutes now countenance transactions (made on behalf of a person incapable of self-management) not countenanced under the general law: in one case, by an agent; in the other by the Court.

- 11 First, rightly or wrongly, enduring attorney and guardianship instruments have been used by many Australians, in anticipation of death, as an informal means of effecting a transmission of property between generations.
- 12 Secondly, statutory wills do not fit neatly into historical categories of “probate” and “protective” law; Courts are authorized, by statute, to make a will for a person lacking testamentary capacity.
- 13 Cases involving the law relating to estate administration lend themselves to analysis in terms of the “purpose” served by the jurisdiction exercised by the Courts (or, increasingly, by administrative tribunals) and to empirical assessment of outcomes. They are, essentially, cases about “management” of property.
- 14 Although the law of estate administration can, and must, be articulated, and administered, by reference to “rules”, an efficient operation of such rules generally requires their application to be informed by the purposive character of the underlying jurisdiction, and tested against outcomes. An adjudication of this type of case that is unmindful of outcomes can frustrate, rather than serve, the jurisdiction exercised.

ASSUMPTIONS ABOUT “NATIONAL” LAW

- 15 This paper proceeds upon an assumption that, in all its diversity, Australian society is sufficiently homogenised that the problems, and solutions, addressed by the paper are commonly encountered in all Australian States and Territories in one form or another.
- 16 It does not proceed upon an assumption that there is, or should be, a single “national law of succession”, by whatever name known.
- 17 On the contrary, it assumes that, ultimately, all law is local (because it aims to serve the interests of justice, inherently centred upon individuals in particular cases) in the sense that, in both formal and informal terms, the law must serve

the due administration of justice in each community in which it is called into service.

18 The reference, here, to “formal” law may be taken to refer to legislation and case law, whether substantive or adjectival, commonly found expressed in the form of *a rule or a principle* said to define, or govern, rights, obligations or conduct. The reference to “informal” law provides a nod to the reality that, in practice, solutions to everyday problems might be found in the way the law is administered, not its formal content, and legal *practice* may in some cases be more important than formal law.

19 The paper also assumes that:

(a) the law in the area under discussion is essentially functional in character;

(b) as such, there are common, general principles that inform its exposition, operation and development; and

(c) there is, and should be, a constant process of “harmonisation” of Australian law (to use a fashionable description), across territorial boundaries, that requires, and promotes, an ongoing conversation about “the law” and its due administration.

20 The infrastructure through which the law is administered (including courts, statutory tribunals and agencies of executive government), and the statutory framework within which such an infrastructure is located, may differ – and should be able to accommodate differences – over time and across territorial boundaries. Nevertheless, general principles can be discerned, and ought to be exposed for debate, in the administration of estates and related areas of the law.

21 A common denominator in the cases under consideration in this paper is that, not uncommonly, litigation in which the person whose estate is the subject of

proceedings is (by reason of death or incapacity) “absent”, so that there may be public interest factors that take the proceedings outside the model of a purely “adversarial” contest between autonomous parties actively engaged in the protection, or advancement, of their own interests.

- 22 It should not be forgotten that in those cases that involve an exercise of protective jurisdiction – typically, before the death of a person whose property is the subject of consideration – a case concerning the management of an “estate” might be intertwined with a need to manage “the person” of that person (for example, by the appointment of a guardian); in each perspective, a person incapable of management his or her own affairs.

A PROVINCE OF MODERN EQUITY: MANGEMENT OF LIFE, DEATH AND ESTATE ADMINISTRATION

- 23 The purposive character of the law relating to estate administration, historical origins of the law and present challenges are canvassed in my paper of this title recently published as Chapter 1 of a special issue of the *Australian Bar Review* edited by Hugh Morrison and Mary-Ann de Mestre, see (2016) 43 *Aust Bar Rev* 9-33.

- 24 As suggested there, from a legal perspective “death” has become a process, no longer merely an event. The process begins when, in anticipation of incapacity preceding death, an enduring power of attorney or an enduring appointment of a guardian is executed. It ends when, for practical purposes, the prospect of future family provision claims is closed out.

- 25 A practising lawyer is required to be familiar with the fact, and nature, of the process even if expert knowledge of each stage of the process is disclaimed.

THE OBJECTIVE PARAMETERS OF AN ESTATE ADMINISTRATION CASE: WHAT TO LOOK FOR

- 26 In estate administration proceedings an initial, key step in any decision -making, problem-solving process is generally to identify:

- (a) the central personality (the deceased or a person at risk because of incapacity for self-management) through whose lens the world must be viewed.
- (b) the nature and value of the “estate” (property) to which that key personality is, may be, or has been, entitled.
- (c) the existence or otherwise of any and all legal instruments that may govern, or affect, the disposition or management of such property: eg, a Will, statutory “intestacy provisions”, an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.
- (d) the full range of persons whose “interests” may be affected by any decisions to be made:
 - (i) Probate litigation is “interest litigation” in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *Bull v Fulton* (1942) 66 CLR 295 at 337, citing *Bascombe v Harrison* (1849) 2 Rob Ecc 118 at 121-122; 163 ER 1262 at 1263-1264; *Estate Kouvakas* [2014] NSWSC 786 at [212]; *Re Gardiner* [2016] VSC 541 at [13], [23] and [26]; *Re Przychodski* [2016] VSC 781 at [17].
 - (ii) Family provision litigation is generally an adjunct to, or substitute for, probate litigation; its effective determination requires all competing interests and persons eligible to apply for relief to be identified and, generally, to be given notice of the proceedings.

(iii) Protective litigation requires identification of “family” and “carers” who, *in the interests of the person in need of protection*, need to be consulted: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C, 242B-C and 242E-243E; *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 at 101-103; 35 ER 878 at 879.

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration.

(f) whether any (and, if so, what) steps need to be taken to ensure that all “interested persons” are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

27 A sound working rule of practice generally is that, in management of a probate, family provision or protective case bearing upon administration of an estate, prudence dictates that, as soon as may be practicable, all potentially affected property should be identified, with enquiries made as to its security, and all potential claimants on property at issue should be given notice of the proceedings, with an opportunity to intervene.

28 This is a function of the nature of property and the desirability of the title to property being settled in an orderly way without unnecessary exposure to successive claims. The Court does, and the parties should, generally endeavour to “build an estoppel” against those who might contest the Court’s orders: *Estate Kouvakis* [2014] NSWSC 786 at [276]-[283].

THE NATURE OF PROBATE PROCEEDINGS

29 Because probate litigation is “interest litigation”, any person having an interest in the proceedings may apply to become a party by intervening in the proceedings; if such a person, with knowledge of the proceedings, stands by without applying to be joined, he, she or it will be bound by the Court’s

determination of the proceedings: *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

- 30 In practical terms, therefore, probate proceedings involve a concept of “parties” which is more expansive than that encountered in ordinary, civil proceedings. The practice of the Courts of requiring notice of proceedings to be given to all interested parties is directed, not only towards attainment of a just outcome, but also towards achievement of finality in the proceedings, and settlement of title to estate property. An aspiration for “finality” and “settled title” to property is the rationale for a grant of probate in “solemn form” (as distinct from a “common form” grant): *Estate Kouvakis* [2014] NSWSC 786 at [218]-[274]; *Re Toulitch (dec’d)* [2016] QSC 219 at [32]-[38]; *Bechara v Bechara* [2016] NSWSC 513 at [3]-[11].
- 31 Bearing in mind that the object of an exercise of probate jurisdiction is to see that beneficiaries entitled to a deceased estate get what is due to them without undue delay (*In the Goods of William Loveday* [1900] P 154 at 157; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192), probate cases generally require disciplined case management: *Re Gardiner* [2016] VSC 541 at [22]-[31]; *Re Przychodski* [2016] VSC 781 at [14]-[21].
- 32 For example, that may involve a summary order for a caveat to be withdrawn (*Re Gardiner* [2016] VSC 541 at [23] and [31]; *Re Przychodski* [2016] VSC 781 at [14]-[21]); or orders limiting the issues to be litigated to those required for a determination of the validity or otherwise of a will (eg, testamentary capacity, knowledge and approval, fraud, undue influence, “suspicious circumstances”), with collateral claims (often, in reality, claims *against* an estate) summarily dismissed or deferred.
- 33 An illustration of the inter-connectedness of the probate, protective, family provision and general equity jurisdictions of our Supreme Courts in modern times (because it arises in the process of identifying estate property) is the possibility that a prudent executor or administrator of a deceased estate might be required, upon (or before) assumption of office, to enquire whether the

deceased ever executed an instrument purporting to be an enduring power of attorney and, if so, whether the putative attorney ever purportedly transferred property away from ownership of the deceased in an *inter vivos* transaction open to challenge as a breach of fiduciary obligations owed to the deceased.

ASSOCIATED EQUITY PROCEEDINGS: ATTEMPTS TO OUTFLANK A PROBATE SUIT

- 34 A claimant to estate property sometimes seeks to outflank probate proceedings by a contention that the legal personal representative of the deceased (whoever that might be) holds property on trust, not for the deceased's beneficiaries, but for the claimant.
- 35 Claimants in search of a remedy not uncommonly look to principles governing:
- (a) mutual wills: *Birmingham v Renfrew* (1937) 57 CLR 666.
 - (b) a contract to make a will: *Schaefer v Schuhmann* [1972] AC 572; *Barnes v Barnes* (2003) 214 CLR 169.
 - (c) an agreement to make a will, enforceable in estoppel: *Giumelli v Giumelli* (1999) 196 CLR 101; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483.
- 36 A more common – and increasingly common – means of asserting a claim to estate property is *via* a claim to family provision relief, relying upon the standing of a person “eligible” to make a claim and the broad discretionary powers of the Court to grant such relief.

THE NATURE OF FAMILY PROVISION PROCEEDINGS

- 37 In NSW, judgments of the Family Provision List Judge (Hallen J) regularly include updated summaries of the principles applicable to claims by particular categories of “eligible person” (identified in section 57(1) of the Succession Act 2006 NSW):

- (a) spouse: *Epov v Epov* [2014] NSWSC 1086.
- (b) de facto spouse: *Sadiq v NSW Trustee and Guardian* [2015] NSWSC 716, affirmed in [2016] NSWCA 59.
- (c) child: *Kohari v NSW Trustee and Guardian* [2016] NSWSC 1372; *Clark v Ro* [2016] NSWSC 1877.
- (d) former spouse: *Geoghegan v Szelid* [2011] NSWSC 1440.
- (e) Dependent grandchild/dependant person living in the same household as the deceased: *Austin v NSW Trustee and Guardian* [2016] NSWSC 1675; *Page v Page* [2016] NSWSC 1218 (and [2016] NSWSC 1323).
- (f) person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death: *Sadiq v NSW Trustee and Guardian* [2015] NSWSC 716, affirmed in [2016] NSWCA 59.

38 Currently, most family provision cases in NSW appear to be claims made by adult “children” of the deceased, followed by the claims made by “spouses” (*de jure* and *de facto*), with comparatively few (but an increasing number of) claims made by grandchildren and former spouses.

39 The preponderance of adult children cases has produced a number of cases involving estranged relationships between a claimant and a deceased: notably, *Andrew v Andrew* (2012) 81 NSWLR 656; *Burke v Burke* [2015] NSWSC 195; and *Underwood v Gaudron* [2015] NSWCA 269.

40 Because of the discretionary nature of the Court's jurisdiction to grant (or withhold) relief, family provision cases tend to be fact-sensitive.

THE NATURE OF PROTECTIVE PROCEEDINGS

- 41 From a NSW perspective, the seminal Australian cases governing an exercise of the Courts' protective jurisdiction are:
- (a) *Marion's case* (1992) 175 CLR 218 at 258-259.
 - (b) *Gibbons v Wright* (1954) 91 CLR 423 at 437-439.
 - (c) *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.
 - (d) *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545.
- 42 None of these cases deals directly with an exercise of the Supreme Court's inherent, protective jurisdiction. *Marion's case* deals with the statutory "welfare" jurisdiction of the Family Court of Australia. *Gibbons v Wright* is a property case. The *Countess of Bective* is a tax case. *Protective Commissioner v D* concerns the statutory power of the Protective Commissioner, a successor to the English Master in Lunacy, a predecessor of the NSW Trustee as presently constituted.
- 43 Nevertheless, all four cases are fundamentally informed by the inherent, protective jurisdiction of our Supreme Courts.
- 44 *Marion's case* identifies the nature, purpose and breadth of the inherent jurisdiction. It does so succinctly and by reference to: (a) a foundational judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and (b) an historical exposition of the jurisdiction found in *Re Eve* [1986] 2 SCR 288 at 407 *et seq*; (1986) 31 DLR (4th) 1 at 13 *et seq*. The jurisdiction exists to take care of those who are not able to take care of themselves.

- 45 *Gibbons v Wright* is a primary authority for the proposition that the law does not prescribe any fixed standard of sanity (or, more broadly, incapacity) as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party have such soundness of mind as to be capable of understanding the general nature of what he or she is doing by his or her participation.
- 46 This reasoning lies at the heart of the idea that there is no single, all-embracing “test” of “incapacity”, and that the utility of any formulation of a “test of incapacity” depends on whether (and, if so, to what extent) it is, in the 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 298 at [27]-[43].
- 47 *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423 (reinforced by *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433) is seminal on the question of liability to account in a protective setting. A “guardian” of the property of an incapable person is a fiduciary (not a trustee in a strict sense) whose liability to account may depend on whether or not he or she has have fulfilled the purpose for which appointed to office: namely, to care for a person unable to take care of him or herself. The mere fact that a guardian has shared a benefit arising from expenditure for the benefit of the incapable person will not, of itself, expose the guardian to a liability to account.
- 48 *Protective Commissioner v D* confirms that the Courts’ protective jurisdiction extends, independently of statute, to authorization of voluntary allowances out of a protected estate (including, if thought fit, allowances out of capital) for the maintenance or benefit of a protected person’s family: *W v H* [2014] NSWSC 1696 at [28]-[51].
- 49 A question of current concern, in an environment in which there is perceived to be widespread abuse of enduring powers of attorney by members of family of

persons in need of protection may be: (a) the extent to which (if at all) a delinquent attorney should be held liable to account for breaches of fiduciary obligations as attorney of an incapable member of family; and (b) whether, on the taking of accounts, an allowance can, and should, be made in favour of the delinquent attorney for his or her maintenance out of the protected estate. Put simply, to what extent, if at all, should *Countess of Bective* be qualified by *Protective Commissioner v D* in operation?

- 50 An answer to this type of question may turn on whether, upon an exercise of protective jurisdiction, the Court can, and should, “excuse” a breach of fiduciary obligations: *C v W (No 2)* [2016] NSWSC 945 at [22]-[47]. See also *Re LSC and GC* [2016] NSWSC 1896 at [60].

THE LAW AS “CONVERSATION”: CASES FOR DISCUSSION

“Undue Influence”: Is there scope for interplay between Equity and Probate Jurisdiction?

- 51 In *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475 Gaudron, Gummow and Kirby JJ made the following observations (with footnotes omitted):

“[62] The position taken by courts of probate has been that to show that a testator did not, by reason of undue influence, know and approve of the contents of the instrument propounded as a testamentary instrument, “there must be — to sum it up in a word — coercion”. The traditional view, repeated by Sir Frederick Jordan, has been that a court of equity will not, on the ground of undue influence as developed by the Court of Chancery, set aside a grant made by a court of probate.

[63] The approach taken in the probate jurisdiction appears to be concerned with the existence of a testamentary intention rather than the quality of that intention or the means by which it was produced. It is a concern of this latter nature which finds expression in the treatment by equity of dispositions inter vivos. In the present litigation, with respect to the dispositions made by the will, no party submitted that equity might apply or extend its principles respecting undue influence and dispositions inter vivos, not to attack a grant of probate itself, but to subject property passing under a will to a trust in favour of the residuary beneficiaries or the next of kin.”

- 52 As explained in a “postscript” published at (2016) 43 *Aust Bar Rev* 32-33, this topic was taken up in an interlocutory judgment, published as *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[207], in proceedings since settled.

It was also canvassed in *Re Gardiner* [2016] VSC 541 at [58]-[89] and *Re Przychodski* [2016] VSC 781 at [51]-[54].

53 If the topic is ever to be the subject of an authoritative appellate judgment, it will need to engage the attention of litigants, lawyers and judges in first instance proceedings, with properly constituted proceedings, pleadings, evidence and findings tailored to the topic.

“Distribution Orders” Affecting Intestate Estates: How do we deal with disconnections between fact and law in concepts of “family”?

54 *Re Estate Wilson, Deceased* [2017] NSWSC 1 is the first judgment on the proper construction and operation of Part 4.4 (sections 133-135) of the *Succession Act 2006* NSW, which authorizes the Supreme Court of NSW to make a “distribution order” affecting administration of an Indigenous intestate estate.

55 The NSW legislation, based on a 2007 Report on *Intestacy* by the National Committee for Uniform Succession Laws, has counterparts in the Northern Territory and Tasmania. The Committee’s model legislation has not been taken up by other jurisdictions.

56 The model legislation is problematic, essentially because of uncertainty attaching to the expression “laws, customs, traditions and practices of the Indigenous community or group to which [the] Indigenous intestate belonged”.

57 *Re Estate Wilson* reviews the legislative history, and social imperatives, of the model legislation; provides a determination of the particular case; and, in a “postscript”, invites consideration of whether the concept of a “distribution order” might usefully be extended in its reach beyond Indigenous estates.

58 General rules for the distribution of an intestate estate that are limited by reference to fixed categories of formalised relationships, without reservation of a discretionary power to mould a scheme of distribution to accommodate an intestate’s family pattern, are bound to produce unjust outcomes, at least in

cases that do not attract the operation of the family provision jurisdiction. Examples may be found in claims on the bounty of a deceased asserted by a “step child” or, in a single parent family, where a child dies and an inactive parent claims a share of the estate.

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GCL