

COLLEGE OF LAW

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ADMINISTRATION OF ESTATES – DECONSTRUCTION AND SYNTHESIS IN CHANGING TIMES: Purposeful Management of Property, People and Relationships

by

Justice Geoff Lindsay

**Probate and Protective List Judge
Supreme Court of NSW**

I. INTRODUCTION

1. This paper has been prepared in the hope of encouraging discussion about important topics and a renewal of academic interest in them. By reference to past and present experience, it explores the nature, purpose and scope of the jurisdiction of the Supreme Court of NSW (as an exemplar of the jurisdiction of the Supreme Court of each Australian state and territory) over the person and (more especially, in the administration of estates) the property of those within our community who, by reason of death or other functional incapacity, are unable to manage their own affairs.
2. Our understanding of the “probate” and “protective” jurisdictions of the Court has been heavily influenced by administrative arrangements, rules and practices that NSW inherited from the English legal system. That inheritance has served us well, but it is essentially “action based” (articulated in terms of types of court action taken, and orders made, in routine settings), not explained by reference to abstract principles.

3. Before an age of reform came upon England in or about the 19th century, probate law was tethered to church courts (which continued to administer it in an increasingly secular age) and the protective jurisdiction served the interests of the Crown, whose delegates continued to administer it in an increasingly democratic age.
4. The context in which the Court's probate and protective jurisdictions fall to be exercised is different. Each head of jurisdiction is, as always, essentially purposive in character. It serves a purpose. However, historical, administrative arrangements for the exercise of the probate and protective jurisdictions have fallen away: for us, with their necessary adaptation to local conditions, *and* the necessity to accommodate an increasingly secular, democratic age. Nevertheless, we have clung to ancient forms, with piecemeal, albeit extensive, changes over time.
5. The pace of social and technological change invites us now to locate the Court's jurisdiction, and recalibrate the law and its administration, by reference to functional purposes served by Australian law.
6. We need to consider whether Australian law, and forms of action, can be explained and analysed in terms of abstract *principles* rather than the availability of particular *remedies*. What was done for the law of contract in the 19th century, when actions in assumpsit, covenant, debt and detinue coalesced in the law of contract (GC Lindsay, "Understanding Contract Law through Australian Legal History: Whatever Happened to Assumpsit in NSW?" (2012) 86 ALJ 589) remains to be done for the probate and protective jurisdictions. Changing perceptions of death and incapacity provide imperatives for a review of the "Why" and "How" we do things.
7. In the eyes of the law death is now, more than ever it was, a *process* that may commence before, and extend beyond, *physical* death.
8. Australian law serves a community in which a high value is placed upon the freedom of each individual, living in community, under the rule of law. Within limits that may vary over time, between generations, it endeavours: (a) to allow each person freedom, so far as he or she is able, to manage his or her own affairs; and (b) to protect those who, by reason of death or incapacity, are in need of protection in management of their affairs.
9. Death sets a limit to each person's capacity for self-management; but, the human condition being what it is, everybody must, at some time in their lives, experience an incapacity for self-management, and many may need the protection of public institutions in management of their person or property.
10. The probate and protective jurisdictions of the Court are an important, integral part of the function of government in the broadest sense.

Working in association with parliament and the executive, the judiciary is often called upon to supervise the process, and to adjudicate disputes arising in the process, of managing the affairs of those who (by reason of incapacity of one sort or another) are in need of protection.

11. The day has gone (if it ever existed so simply) when each person, personally and independently of others, managed his or her own affairs until death, accepting mortality and consigning the body to the elements, leaving a formal will (or trusting to intestacy laws) to govern the passing of property between generations.
12. At several points, the process has changed. People are living longer, mostly in good health but often with disability bearing upon their capacity for self-management. More people have more wealth to manage and to pass on. With higher education standards, and more substantial (public and private) infrastructure to assist in management of the person and property of individuals living in a welfare state, expectations of a good life and a managed death have grown.
13. The law has endeavoured to accommodate social and economic change by enhancing the autonomy of each individual and systematising the means by which those in need of protection can be protected, balancing competing claims of community.
14. It is easier now, than formerly, to have an informal testamentary instrument admitted to probate (*Succession Act 2006 NSW*, s8) or to have a will rectified (by an order under s27 of the Act) to give effect to a testator's intentions. People are encouraged to plan for the risks of disability by granting an enduring power of attorney (under the *Powers of Attorney Act 2003 NSW*); appointing an enduring guardian (under the *Guardianship Act 1987 NSW*); and (as contemplated by *Hunter and New England Area Health Service v A by his tutor T* (2009) 74 NSWLR 88) preparing an advance care directive in anticipation of death, during incapacity, and for the guidance and protection of carers.
15. By legislation and judge-made law still in an early stage of evolution, the traditional concept that "there is no property in a dead body" is giving way to quasi-testamentary arrangements for post-mortem donations of organs and body tissue, including sperm and ova: *Human Tissue Act 1983 NSW*; *Assisted Reproductive Technology Act 2007 NSW*; *Doodeward v Spence* (1908) 6 CLR 406 at 412-414 and 421-422; *Jocelyn Edwards; re the Estate of the Late Mark Edwards* (2011) 81 NSWLR 198; *Re H, AE* [2012] SASC 146; *Re H, AE (No 2)* [2012] SASC 177; *Ex parte C v Minister for Health (WA)* WASC 3; *Clark v Macourt* [2013] HCA 56; 88 ALJR 190; 304 ALR 220.
16. At the same time the Court (assisted by statutory tribunals exercising analogous jurisdiction under the supervision of the Court) has enhanced powers for the protection of those persons, incapable of self-

management, in need of protection. Its jurisdiction includes the making and supervision of guardianship and financial management orders (including orders made under the *NSW Trustee and Guardian Act 2009* NSW or the *Guardianship Act 1987*) and the supervision of enduring powers of attorney and enduring guardians.

17. One major, relatively recent innovation is empowerment of the Court (by virtue of the *Succession Act 2006* NSW ss18-26) to “make” a “statutory will” for an individual lacking testamentary capacity: *Re Fenwick; Application of JR Fenwick; Re “Charles”* (2009) 76 NSWLR 22 at [154]-[188]; *Secretary, Department of Family and Community Services v K* [2014] NSWSC 1065; *GAU v GAV* [2014] QCA 308.
18. Another significant, relatively recent innovation is empowerment of the Court (now, by s54 of the *NSW Trustee and Guardian Act 2009* NSW) to declare that a person is a “missing person” and to order that his or her estate, or part of it, be subject to management under the Act: *Gell v Gell* (2005) 63 NSWLR 547. It allows the property of the missing, often suspected of being dead but unable (*via Probate and Administration Act 1898*, s40A) to be presumed dead, to be applied, *inter alia*, in maintenance of family and dependents (s59) in advance of probate proceedings.
19. With these developments, the jurisdiction of the Court to grant family provision relief (under chapter 3 of the *Succession Act 2006* NSW) has continued to grow in practical importance, both in approval of family settlements in anticipation of death and, after death, in relief granted to those left without adequate provision.
20. The jurisdiction of the Court continues to include, but now transcends, the probate and protective jurisdictions as understood when conferred on the Court at the time of its establishment in the 19th century. A symbol of the breakdown of historical divisions between those different types of jurisdiction is the modern concept of a “statutory will”. It does not fit neatly in one jurisdictional category or the other. It calls attention to a need to review the terms in which we think about the operation of the Court’s probate and protective jurisdictions.
19. The Court has eschewed any suggestion that it can “make a will” for a deceased person in family provision proceedings. That remains a limit on the Court’s family provision jurisdiction. Nevertheless, now, it can be called upon to make a statutory will for any person lacking testamentary capacity. Whether to authorise the making of a statutory will in the lifetime of an incapacitated person *or* to leave parties to a family provision application after the person’s demise is one of the questions entrusted to judicial discretion: *Re Fenwick; Application of JRF Fenwick; Re “Charles”* (2009) 76 NSWLR 22 at [197]-[199]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [65]-[66] and [69]-[72].

21. In this area of the law distinctions between substantive law principles and adjectival law (between “rights and obligations” on the one hand and, on the other, “practice, procedure, evidence and remedies”) are not always easy to recognise or maintain. Much the same may be said about “rights” based jurisprudence when, in the crucible of practice, it meets social justice “obligations’ owed to those ostensibly possessed of “rights”. They all tend to merge because the subject matter of both the probate *and* protective jurisdictions is ultimately *management* of the affairs of persons unable, by reason of death or incapacity, to manage their affairs.
22. In both theory and practice the law is best understood, and applied, by reference to the purpose or purposes, served by the law in the making of decisions, large and small, on behalf of those who need the intervention of the court in management of their affairs, before or after death.
23. Each generation of lawyers, in any legal system, is bound to make the law it administers intelligible to the community it serves: by an application of reason to the solution of currently perceived problems, informed by common assumptions, constrained by available resources, explained in contemporary language.
24. A full appreciation of the law and practice of administration of estates (particularly deceased, protected and trust estates) in NSW requires a demonstration of the correctness of this proposition as a precursor to engagement with current law and practice.
25. It may be that the expression “administration of estates” is as good a generic description as any other of the current convergence of the probate and protective jurisdictions of the Supreme Court of NSW relating to the property (as distinct from the person) of individuals who, by reason of death or incapacity, are in need of the Court’s protection.
26. A rise in prominence of the descriptor “Elder Law” may be evidence of a consciousness of a need for new labels to describe changes that have taken place in this area of legal practice. However, “Elder Law” fails to do full justice to the nature of those changes. They can affect individuals of any age. Fuelled by large awards of personal injury compensation, claims for probate or protective relief are commonly made to the Court on behalf of young children. Applications for protected estate management orders are common, applications for statutory wills increasingly so.
27. Ultimately, the width and nature of the probate and protective jurisdictions, affecting the person and property of diverse individuals, may compel acceptance of compound descriptors: “probate and protective”, “financial management and guardianship”, “management of the estate and the person” are just a few of those available.

28. There is a broad similarity in the character of both branches of the Court's jurisdiction, probate and protective. Both involve a public interest element arising from the practical absence of a person (the deceased in probate proceedings, a person incapable of managing his or her own affairs in protective proceedings) on whose behalf property is to be administered. The public has an interest in ensuring that deceased estates, and those of the living in need of protection, are duly administered. Respect must be accorded to the (known, reasonably ascertainable or presumed) views of those whose affairs are under administration. An unqualified adversarial model of litigation, between persons present and competent to advance their own interests, may not serve the purposes served by the Court's probate and protective jurisdictions. To the extent that it does not do so it must give way to procedures that are inquisitorial or, at least, attended by informalities that may be objectionable, for example, in the conduct of a trial of common law action in which competing claims of right are tested by an adversarial contest. Proceedings in the Court's probate and protective jurisdictions are, by their nature, more likely to involve an exercise of discretionary judgement. Any exercise of such a discretion is generally governed by the purpose of the particular jurisdiction being exercised. Such a discretion is not at large. It must be exercised judicially.

II. HISTORICAL ORIGINS OF THE SUPREME COURT'S PROBATE AND PROTECTIVE JURISDICTIONS

29. The correctness of the proposition that each generation of lawyers is bound to make the law it administers intelligible to the community it serves can be demonstrated by the course of the law, and practice, in NSW relating to an exercise of the Supreme Court's probate and protective jurisdictions, taking the 1820s as the point of commencement. The Court, as now established, was constituted by British (Imperial) legislative instruments dated 1823, carried into effect when, on 17 May 1824, the Court first convened under Chief Justice Francis Forbes.
30. Although the colony of NSW was founded by the British in 1788 and its reception of English law could be justified by reference to principles summarised by Sir William Blackstone (*Commentaries on the Laws of England*, 1st ed, 1765-1769, Vol. 1, pp 106-108; AC Castles, *An Australian Legal History*, Law Book Co, Sydney, 1982, ch 1), uncertainty attended the date of reception (in part, because of the Colony's unique character as a penal establishment (WJV Windeyer, *Lectures on Legal History*, Law Book Co, 2nd Edition, revised, 1957, pp 303-305). That and the influence of Jeremy Bentham (*A Plea for a Constitution*, 1803, extracted in *Historical Records of Australia*, Series IV, Vol. 1, pp 883-900) tended towards the enactment of legislation by the Imperial Parliament in aid of greater certainty. The Supreme Court, as now established, was constituted by "The Third Charter of Justice" (letters patent dated 13 October 1823, now found in HRA Series IV,

Vol. 1, pp 509-520) promulgated pursuant to 4 Geo. IV c 96, colloquially known as “The [Imperial] *New South Wales Act*” of 1823. Section 24 of the Imperial Statute 9 Geo. IV c 83 (named the *Australian Courts Act*, 1828 by the *Short Titles Act*, 1896 (UK)), which extended the operation of the *New South Wales Act*, fixed 25 July 1828 as the date for reception of English law, so far as applicable, in the Colony.

31. The difference between the respective dates of commencement of the *New South Wales Act* and the *Australian Courts Act* is worthy of notice, in passing, but nothing of consequence presently turns upon it. The object of a statutory date of reception was principally to fix a date after which British Acts not expressly made applicable to NSW would have no effect in the Colony. The *New South Wales Act* established the Legislative Council of NSW as well as the Colony’s Supreme Court. Forbes’ view was that the institution of a local legislature was, in principle, the date when English statutes ceased to bind the Colony. Accordingly, he proposed that 19 July 1823 (the date of commencement of the *New South Wales Act*) should be fixed as the relevant date: HRA Series IV, Vol. 1, pp 649 and 747. However, when the operation of the *New South Wales Act* was extended by the *Australian Courts Act*, the date of commencement of that Act (namely, 25 July 1828) was fixed as the relevant date so as to bring into force Sir Robert Peel’s Acts for the reform of English criminal law: Windeyer, *Lectures on Legal History*, pp 304-305.
32. The reception by NSW of the unenacted law of England was not, in practice, governed by the same bright line sought in relation to English statutes. In essence, the unenacted law was no more than a set of principles: Castles, *An Australian Legal History*, p 495. With development of the British Empire in the 19th century a “doctrine of precedent” was found to bind colonial courts to English law: Lindsay, “Building a Nation: The Doctrine of Precedent in Australian Legal History” (JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law*, Federation Press, Sydney, 2013, Vol. 1, ch 11). Towards the end of the century, the Privy Council confidently recorded that, as a colony developed, many rules and principles of English law which were unsuitable to the colony in its infancy would be gradually attracted to it (subject to legislative modification): *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292.
33. The jurisdiction of the Supreme Court of NSW at the time of its establishment was defined by reference to the jurisdiction of the English Courts of Common Law, the equity jurisdiction of the Lord Chancellor of England and sundry other English authorities.
34. It must be remembered that it was only later in the 19th century, culminating in the *Judicature Acts* of 1872 and 1875 (UK), that the administration of justice in England was vested in a single court (the High Court of Justice) comparable to that of the Supreme Court of NSW. Although the Supreme Court administered different branches of

its jurisdiction separately until the commencement of the *Supreme Court Act 1970* NSW on 1 July 1972, largely in emulation of the structure for the administration of justice in England before 1875, the various heads of jurisdiction vested in separate entities in England were, on establishment of the NSW Court, vested in it as a single institution.

35. The jurisdiction of the Supreme Court of NSW we now think of as “equity jurisdiction”, administered (for the sake of convenience) in a “Probate List” and a “Protective List” of the “Equity Division” of the Court, has different roots in Anglo-Australian legal history.
36. The Court’s jurisdiction is informed, but not necessarily confined, by English history. The *Supreme Court Act 1970* NSW, by s22, continued the Supreme Court as formerly established. By a chain of legislation, that takes us back to the *New South Wales Act 1823* (Imp). By s 23, the *Supreme Court Act 1970* provides that the Court has all jurisdiction which may be necessary for the administration of justice in NSW. That enables us, if need be, to rise above technicalities that might be thought to impede the work of the Court courtesy of our inheritance of English law and practice.
37. The historical office of the Lord Chancellor of England and his Court, the Court of Chancery, are centre stage in orthodox definitions of the Supreme Court’s equity jurisdiction; but not quite so as regards the probate and protective jurisdictions of the Court.
38. English probate law was, before the *Court of Probate Act 1857* (UK) commenced operation, the province of English ecclesiastical law, administered by separate courts. Historically, church courts (ie, courts administered by the Church of England) exercised jurisdiction over a range of topics, now regarded as secular, peculiarly related to the work of the church. That work focussed, *inter alia*, on death, the province of probate law.
39. The protective jurisdiction (over infants, idiots and lunatics, as protected persons were then principally classified) was, in England, reserved to the Crown as part of the royal prerogative. The jurisdiction over infants was, by convention, exercised by the Court of Chancery on a delegation by the Crown. The jurisdiction over idiots and lunatics was delegated by the Crown, not to the Court of Chancery or to the Office of Lord Chancellor, but by a separate, personal delegation, usually (but not necessarily) granted to the occupant of the office of Lord Chancellor personally: Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London, 1820), ch 9, pp 155-160. The royal prerogative over infants, idiots and lunatics was said to be grounded in the monarch as *parens patriae*, the parent (father) of the nation.

40. Notwithstanding the different foundations of the English probate and protective jurisdictions, the Court of Chancery (under the Lord Chancellor) did, by an exercise of equitable jurisdiction, supervise the administration of deceased and protected estates, and the conduct of the fiduciary officers (including executors, administrators, trustees, receivers and committees of the estate) involved in their administration. Of particular importance were the Chancery Court's procedures to compel fiduciaries to account for their dealings with estate property.
41. Underpinned by the historical origins of the different branches of the Supreme Court's jurisdiction, changes in the law administered by the Court, its administrative practices and in the terminology of law and practice have generally reflected social change in the community served by the Court.
42. By s9 of the *New South Wales Act*, the Court was declared to be a "Court of Equity", with the equitable jurisdiction of the Lord Chancellor. The jurisdiction of the Court was confirmed, with the addition of the Chancellor's common law jurisdiction, by s11 of the *Australian Courts Act*. The general equity jurisdiction of the Court remains grounded in that historically exercised by the Lord Chancellor.
43. By s10 of the *New South Wales Act*, the Court was declared to be a "Court of Ecclesiastical Jurisdiction", with jurisdiction to be conferred by the Third Charter of Justice, then anticipated. Probate jurisdiction was conferred on the Court, by clauses 14-17 of the Charter, by reference to probate jurisdiction exercised by the Ecclesiastical Court, within the Church of England Diocese of London, called the Consistory Court. Although, in England, probate law's ecclesiastical connection was abandoned by the *Court of Probate Act 1857* (UK), NSW did not follow suit until enactment of the *Probate Act 1890* NSW. Only at that time did the Supreme Court's ecclesiastical jurisdiction become formally known as the probate jurisdiction: JM Bennett, *A History of the Supreme Court of NSW* (Law Book Co, Sydney, 1974), pp 133 and 141.
44. The *New South Wales Act* was silent on the subject of the protective jurisdiction over infants, idiots and lunatics. The view may have been taken that a statutory warrant was unnecessary because the jurisdiction belonged to the Crown as a royal prerogative and it was open to the Crown, by letters patent, to confer that jurisdiction on the Supreme Court without legislative authority: Bennett, *A History of the Supreme Court of New South Wales*, p 126. In any event, the Supreme Court's protective jurisdiction was conferred by clause 18 of the Third Charter of Justice.
45. That clause has been taken to have been effective in conferring on the Court the same jurisdiction as was, at the time of promulgation of the Charter, exercised by the Lord Chancellor: *In re WN (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552 at 565-567. The terms

upon which the jurisdiction was conferred on the Court, as an institution, do not have the same degree of impermanence as attended a specific, personal grant of authority to administer the jurisdiction of the Crown as was, from time to time, conferred on specific office holders in England: Cf, Chantal Stebbings, "Re Earl of Sefton (1898)", in C & P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, Oxford 2012), c 15, p 468 note 82.

46. Only in the 20th century did the "lunacy jurisdiction" over lunatics, idiots and persons of unsound mind (to paraphrase language common at the time of publication of Shelford's *A Practical Treatise of the Law Concerning Lunatics, Idiots and Persons of Unsound Mind*, in London, in 1833) become known as the protective jurisdiction of the Supreme Court: *Mental Health Act 1958 NSW*, s6. "Mental illness" is a 20th century expression: Bennett, *A History of the Supreme Court of NSW*, p 125. When the *Mental Health Act 1958 NSW* repealed its predecessor (the *Lunacy Act 1898 NSW*) it included, in s5, a direction that legislative references to lunatics, etc. be taken as references to the mentally ill or incapable persons, etc. according to context: Philip Powell, *Forbes Lecture : The origins and development of the protective jurisdiction of the Supreme Court of NSW* (Forbes Society, Sydney, 2004), pp23-26.
47. When he became the Court's Protective Judge, Powell J drew attention to the terms of provisions in the *Mental Health Act 1958 NSW* (and, earlier, the *Lunacy Act 1898 NSW*) for the appointment of a manager of the estate of a person incapable of managing his affairs. Although others had managed to do otherwise, his Honour construed those provisions as requiring the Court specifically to find *both* mental illness *and* an incapacity for self-management to justify an appointment: *Forbes Lecture*, pp 27-28. Following representations made by his Honour to government (*Forbes Lecture*, pp 31-32) the *Protected Estates Act 1983 NSW*, ss13 and 22 (reflected, now, in the *NSW Trustee and Guardian Act 2009 NSW*, s41) removed any reference to mental illness and conditioned the making of a management order only on a finding of incapacity for self-management.
48. In taking that course, the NSW Parliament, in effect, made the Court's legislative warrant for the appointment of a manager conform, in substance, to its inherent jurisdiction, originally conferred by the *Charter of Justice*, as administered by Lord Eldon and contemporary Lord Chancellors: *PB v BB* [2013] NSWSC 1223 at [38]-[58].
49. From the outset of his tenure as Lord Chancellor (1801-1806 and 1807-1827) Lord Eldon accepted, as a recent development of English jurisprudence, that his "lunacy" jurisdiction extended to protection of a person who, though not a lunatic, was as much in need of protection as a lunatic because incapable of managing his or her own affairs.

50. That extended jurisdiction was firmly established by the time the *Australian Courts Act*, 1828 was enacted, as Lord Lyndhurst recognised in *In Re Holmes* (1827) 4 Russ182 at 183; 38 ER 774 at 774-775. Sometimes it was described simply by reference to “an incapacity for self-management”. At other times it was described by reference to “unsoundness of mind”, coupled with an incapacity for self-management.
51. That branch of the protective jurisdiction then known as “the lunacy jurisdiction” was treated as comprising a tripartite division, reflected in Shelford’s *A Practical Treatise of the Law Concerning Lunatics, Idiots and Persons of Unsound Mind* (1833).
52. English statute law, from 1853, for a time moved away from the broader perspective of Lord Eldon because, under new administrative arrangements, it directed inquiries to whether an alleged lunatic was “of unsound mind and incapable of managing himself or his affairs” at the time of inquiry: HS Theobald, *The Law Relating to Lunatics* (Stevens & Sons, London, 1924), pp 5-6.
53. Since that time, from time to time, as Powell J demonstrated, there has been a tendency in some quarters to require *something more* than an incapacity for self-management (the modern equivalent of a perceived need for there to be an “unsound mind”) to ground an exercise of the Court’s protective jurisdiction. Some have seen it as a limitation on the Court’s jurisdiction.
54. Unless explained in functional terms, a requirement that there be an “unsound mind” is an unnecessarily restrictive approach, limited by a nebulous medico-legal term that serves only to divert legal practice, away from the functional purpose for which the protective jurisdiction exists, towards unsustainable technical distinctions.
55. If, as Lord Eldon and his contemporaries held, and the High Court of Australia has confirmed, the purpose of the protective jurisdiction is: to take care of those who are not able to take care of themselves (*Wellesley v Duke of Beaufort* (1827) 2 Russ1 at 20; 38 ER 236 at 243; *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258); to protect a person incapable of managing his or her own affairs (*Gibson v Jeyes* (1801) 6 Ves Jun 266 at 273; 31 ER 1044 at 1047; *Ex parte Cranmer* (1806) 12 Ves Jun 445 at 453-454; 33 ER 168 at 171) in a proper and provident manner, because he or she is liable to be robbed by anyone (*Ridgeway v Darwin* (1882) 8 Ves Jun 66 at 66-67; 32 ER 275 at 276; *In Re Holmes* (1827) 4 Russ 182; 38 ER 774), giving rise to a necessity of taking care of him or her (*Sherwood v Sanderson* (1815) 19 Ves Jun 280 at 289; 34 ER 521 at 524), the jurisdiction is not readily confined by reference to “unsoundness of mind” or any similar expression.

56. The focus must be on the capacity or otherwise of a person, functionally, to manage his or her own affairs. To qualify a finding of incapacity by reference to “unsoundness of mind”, as if a meaningful medical concept, is a distraction for lawyers, pretending to be doctors, inviting doubtful distinctions liable to be superseded by changes in medical science from time to time.
57. That is not to say that an “unsoundness of mind”, or some similarly expressed qualification, has been wholly misconceived or without utility. It points to a practical need for “something more” than incapacity for self-management if the appointment of a protected estate manager is, in practice, to be required or justified.
58. Analysed in functional terms, without deployment of a putative medico-legal concept such as “unsoundness of mind”, that “something more” is a need for systematic protection to deal with a systemic incapacity for self-management. If a vulnerable person is taken advantage of in a single transaction, equity can respond according to established doctrine. If he or she is, prospectively, lacking incapacity for self-management to such an extent that he or she is “liable to be robbed by anyone” (to borrow Lord Eldon’s expression), the Court’s protective jurisdiction has a purposeful, practical role to play.
59. Confirmation of this is found in recognition that the appointment of a protected estate manager is not founded on a finding of incapacity for self-management alone, but on whether there is a practical necessity for, and utility in, such an appointment: *Tomlinson, Broadhurst, Ex parte* (1812) 1 Ves & Bea 57; 35 ER 22; *AC v OC (a minor)* [2014] NSWSC 53 at [46]-[48]; *Re W and L (parameters of protected estate management orders)* [2014] NSWSC 1106; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42].
60. The central focus *now* is squarely on the *functionality* of management capacity of the person said to be incapable of managing his or her affairs, not: (a) his or her status as a person who may, or may not, lack “mental capacity” or be “mentally ill”; or (b) particular reasons for an incapacity for self-management: *Re R* [2014] NSWSC 181 at [84]-[94].
61. Legal terminology must be responsive to social conditions.

III. COMMON ASSUMPTIONS AFFECTING ADMINISTRATION OF ESTATES (DECEASED AND PROTECTED)

62. The probate and protective jurisdictions of the Supreme Court are essentially “purposive” in that, upon an exercise of those jurisdictions, judicial decisions have to be made by reference to a purpose served by the jurisdiction being exercised.

63. A fundamental assumption underlying both types of jurisdiction is that legal analysis should begin, and end, by embracing the perspective of an individual person whose autonomy must be respected. In probate law that assumption finds reflection in discussion of freedom of testamentary disposition, testamentary capacity and knowledge and approval of an alleged testamentary instrument. On an exercise of protective jurisdiction, it is reflected in principles (variously expressed) to the effect that the welfare and interests of a person in need of protection should be given paramount consideration, with respect for his or her dignity and as little restriction of his or her freedom as possible.
64. However, even if expressed in absolute terms (as is often the case) this fundamental assumption is not unqualified. It is not uncommonly in tension with a need to view the autonomous individual “in community”, an expression which may be taken to include, but not be limited to, members of the family (however defined) of the individual concerned.
65. This “communal” element of the Court’s decision-making paradigm might be seen as a separate, competing fundamental assumption of legal analysis but, on close inspection, it is an integral feature of the concept of an autonomous individual. However defined, even a basic concept of “property” depends for meaning on the existence of a community of persons in relation to whom rights and obligations concerning a thing may be measured.
66. In probate law, the concept of “the autonomous individual in community” is reflected in the classic test of testamentary capacity found in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565:
- “It is essential to the exercise of [testamentary power] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”
67. Immediately preceding this extract of the judgment is a description of a “due exercise” of testamentary power as one “involving moral responsibility, the possession of the intellectual and moral faculties common to our nature” as “an indispensable condition”.
68. Of particular significance here is use of language that includes reference to “moral responsibility” and “claims” to which a testator “ought” to give effect. This language is predicated on the existence of

community, and relationships between a testator and other members of the testator's community.

69. On an exercise of protective jurisdiction, similar (albeit perhaps negative) sentiments can be found in discussion of the incapacity for self-management requisite for the appointment of a protected estate manager.
70. In the seminal case of *Ridgeway v Darwin* (1802) 8 Ves. Jun. 65 at 66; 32 ER 275 at 276 Lord Eldon spoke of a party being “unable to act with any proper and provident management; liable to be robbed by anyone; under that imbecility of mind, not strictly insanity, but as to the mischief calling for as much protection as actual insanity”.
71. In dealing with the case before him he wrote: “No one can look at this case without seeing, that every person about this lady is satisfied, that some care should be thrown round her. If clearly it is fit to protect her against executing powers of attorney, that she should not decide, where her person, or with what trustees her property ought to be, all agreeing, that she should not choose the persons, who are to have the care of her property, it is fit for me [as Lord Chancellor] to put a controul upon those, who may be proper persons to have the controul of her property”.
72. The concept of “community” upon an exercise of protective jurisdiction is also found in decision making about the identity of a protected estate manager to be primarily responsible for management of a protected person's estate. Although the welfare and interests of the protected person have paramountcy, the views (if not interests) of his or her family are routinely consulted: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 240C-241C and 242B-243E; *M v M* [2013] NSWSC 1495 at [50] (d)-(e); *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 at 101-103; 35 ER 878 at 879, extracted in *W v H* [2014] NSWSC 1696 at [40]; *NSW Trustee and Guardian Act 2009* NSW, ss39(c)-(f), 59(c), 65(1)(b), 72(1), 73(1) and 76(1).
73. The fundamental assumption(s) that, in the administration of an estate (upon an exercise of probate or protective jurisdiction), the Court adopts the perspective of an autonomous individual in community not uncommonly requires the Court to manage tension between the autonomous individual and his or her community.
74. Wherever practicable, this may be done by the Court superintending an orderly process for any tension between the individual and community to work itself out. However, not uncommonly the Court is called upon to exercise an independent judgement about what should be done in a particular case.
75. The Court's decision making processes, upon an exercise of probate or protective jurisdiction, generally incorporate, at an early stage,

consideration of whether any (and, if so, what) steps have been taken, or remain to be taken, to identify persons who have, or may have, an interest (legal or otherwise) in any decision open to be made: *Osborne v Smith* (1960) 105 CLR 153 at 158-159; *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [134]-[144] and [258]; and *W v H* [2014] NSWSC 1696 at [72]. A process of prudential, orderly, sound decision making affecting the welfare or interests of an “absent” person (whether deceased or incapacitated) involves both an element of inquiry about material facts and a concern to build an estoppel against people who, if not allowed an opportunity to be heard, may disrupt administration of an estate.

76. The task of the Court, in supervision of the due administration of an estate, is to facilitate a purposeful management of property, people and relationships. That is so, whether the estate is a deceased estate, a protected estate or (having regard to the definition of a “managed person” in s 38 of the *NSW Trustee and Guardian Act 2009*) an otherwise “managed estate”.
77. When called upon to make a decision affecting the estate of a person who (by reason of death or incapacity) is not present and able to advance his or her own views, the Court must strive to make an objective judgement, taking into account all circumstances (including those subjective to the absent person) material to the decision to be made, applying criteria established by law.
78. Whatever the terms of the criteria to be applied, the focus of the Court on “all material circumstances”, reinforced by the Equity tradition’s practice of focussing attention on the time at which an order of the Court is to be made, means that the Court may have available to it a broader range of factors, and evidence, to take into account than a deceased or protected person may have had in mind had he or she made a decision without the Court’s intervention.
79. Any decision of the Court must, ultimately, depend upon context, including the terms of applicable legislation. However, formal statements of criteria to be addressed not uncommonly take refuge in broad normative language that requires an evaluative judgement to be made by reference to “all material facts” and a check list of factors to be taken into account. Common examples are found in the *Succession Act 2009* NSW governing the making of a “statutory will” for a person lacking testamentary capacity (with use of the word “appropriate” in s22(c)) and the availability of family provision relief (with use of the words “adequate” and “proper” in s59(1)(c), the word “ought” in s59(2) and use of the word “prudent” and the expression “fair and reasonable” in s95).
80. Terminology of this nature may defy abstract definition. Nevertheless, courts endeavour to give it practical content, and to guide themselves towards an objective exercise of judgement, by various means,

including by reference to principles designed to give effect to a protected person's probable judgement (*Ex parte Whitbread* (1816) 2 Mer 99; 35 ER 878); considerations of wisdom and justice, informed by knowledge of all the circumstances of the case (*Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19-20); contemporary community standards (*Andrew v Andrew* (2012) 81 NSWLR 656); the presumed intention of an incapacitated person (*Re Fenwick* (2009) 76 NSWLR 22 at [170]-[176]); and attribution of paramountcy to the welfare and interests of such a person (*GAU v GAV* [2014] QCA 308 at [48]; *Secretary, Department of Family and Community Services v K* [2014] NSWSC 1065 at [60]-[61] and [75]-[81]).

81. However inadequate may be the efforts of a judge to make a correct decision, adopting the perspective of an individual in community, the existence and terms of principles of this character pay homage to another fundamental assumption underlying an exercise of probate or protective jurisdiction: namely, that any judge exercising the jurisdiction of the Court will conscientiously endeavour to act judicially in pursuit of the purposes served by the jurisdiction being exercised.

IV. THE PURPOSIVE CHARACTER OF THE SUPREME COURT'S PROBATE AND PROTECTIVE JURISDICTIONS

IV.1 The Law of Succession

82. Although the expression "probate law" could be confined to the proof or otherwise of wills and codicils it is generally used interchangeably with "the law of succession": embracing law and practice relating to wills, probate, intestacy and the administration of deceased estates generally. Legislation governing the availability of family provision relief may be left to one side for the present, because of the independent importance attaching to it as an incident of the modern law of probate, but it is commonly comprehended by a reference to the law of succession. Colloquially, "probate" proceedings are generally understood to concern an application for a grant, or for an order revoking a grant, of representation in relation to a deceased estate in contradistinction to "family provision proceedings" which have a distinct dynamic of their own.
83. At a high level of abstraction, the governing purpose of the law of succession (wills, probate, intestacies and the administration of deceased estates) is the due and proper administration of a particular estate, having regard to any duly expressed testamentary intention of the deceased and the respective interests of parties beneficially entitled to the estate: *In the Goods of Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [2011]. Put colloquially, 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.

84. The interest of a beneficiary before completion of executorial duties is an entitlement to due administration, rather than an interest in particular assets of the estate: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 71C-F, upholding *Livingstone v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 at 435, 451 and 459. Once the character of a legal personal representative (an executor appointed by a will or an administrator appointed by the Court) 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; Wight v Robinson* [2013] NSWSC 1229 at [17]-[22].
85. In supervision of the administration of a trust (eg, in removal of a trustee) the principal duty of the Court is to see that the trusts upon which property is held are properly executed: *Letterstedt v Broers* (1884) 9 App Cas 371 at 386. Subject to the terms of the particular trust, a (if not the) paramount consideration is the welfare of the beneficiaries of the trust, including the safety of the trust estate: *Letterstedt v Broers* (1884) 9 App Cas 371 at 386-387; *Miller v Cameron* (1936) 54 CLR 572 at 575, 579 and 580-581.

IV.2 The Protective Jurisdiction

86. A similar, but more focussed purposive approach informs an exercise of the protective jurisdiction of the Court, as well as the analogous jurisdiction exercised by statutory courts and tribunals (particularly, the Children's Court of NSW, the Guardianship Division of the Civil and Administrative Tribunal of NSW (NCAT) and the Mental Health Review Tribunal). Whereas the focus of probate jurisdiction is, more or less, divided between a deceased person and beneficiaries, the protective jurisdiction is focussed exclusively on a person in need of protection.
87. An explicit illustration of this is found in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D and 241G-242A where Kirby P cited *Letterstedt v Broers* and *Miller v Cameron* in support of a proposition that the "abiding rule" in the exercise of powers under the *Protected Estates Act* 1983 NSW (the immediate predecessor of those provisions of the *NSW Trustee and Guardian Act* 2009 NSW now providing for the Court to appoint a protected estate manager) is in the best interests of *the protected person*.
88. Kirby P described this "rule" as "common to all trust and quasi-trust relationships". More specifically, he described the duty of the Protective Commissioner (a predecessor of the NSW Trustee and Guardian) under the *Protected Estates Act* as reflective of "the primary rule governing a general trustee or company or bankrupt's receiver,

namely to be guided always by the welfare of the beneficiary as the dominant consideration.”

89. The protective jurisdiction of the Court is generally recognised as having two broad branches, with historically different origins in delegations of authority by the Crown as *parens patriae* and a convergent development. One relates to minors: in the quaint terminology of the law, those people suffering the disability of infancy. The other relates to persons unable to manage their own affairs, including, in old legal language, lunatics and idiots. Both branches of the jurisdiction are governed by the “welfare” or “paramountcy” principle that the welfare of a person under the Court’s protection is the paramount consideration upon an exercise of the protective jurisdiction.
90. The principle is sometimes articulated by reference to the “welfare *and* interests” of the protected person, by reference simply to his or her “welfare” *or* “interests”, or by reference to what is “in his or her interests *and* for his or her benefit”. The latter of these formulae is probably the most analytically precise of all, but all tend to be used interchangeably in descriptions of protective jurisdiction.
91. A requirement that whatever is done, or not done, for or on behalf of a person in need of protection be tested by reference to whether it is in the *interests* of the protected person *and* for his or her *benefit* provides, not only a criterion for decision-making, but also a standard against which the correctness of a decision about the welfare and interests of a protected person can be judged.
92. In the realm of decision-making about people, generally, who are incapable of managing their affairs one often finds an echo of the following statement of principle found in HS Theobald, *The Law Relating to Lunacy* (Stevens & Sons, London, 1824) at p 380:

“The [protective] jurisdiction is parental and protective. It exists for the benefit of [the protected person], but it takes a large and liberal view of what that benefit is, and will do on behalf of [a protected person] not only what may directly benefit him [or her], but what, if he [or she] were sane, he [or she] would as a right-minded and honourable [person] desire to do.”
93. This statement of principle applies equally to an exercise of protective jurisdiction over a minor, subject (as always) to context. In each case one must have regard to the level of maturity and understanding of the minor under the Court’s protection, recognising also that, although the Court’s jurisdiction is aptly described as “parental”, the jurisdiction is not confined to the scope of a parent’s power over a child: *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 237-238 and 258-259.

94. Confirmation of the operation of the welfare principle in both branches of the Court's protective jurisdiction can be found:
- a) historically, in the judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ.1; 38 ER 236 and, on appeal to the House of Lords, in *Wellesley v Wellesley* (1828) 2 Bli.N.S.124; 4 ER 1078; and
 - b) in the judgment of the High Court of Australia in *Marion's Case* (1992) 175 CLR 218 at 258, adopting the historical account of the protective jurisdiction in the judgment of La Forest J in *E (Mrs) v E* (known as *Re Eve*) [1986] 2 SCR 388 at 407 *et seq*; 31 DLR (4th) 1 at 13 *et seq*.
95. The welfare principle also informs statements of general principle, or objectives, found, *inter alia*, in:
- a) the *NSW Trustee and Guardian Act* 2009 NSW, s39, governing work of the Supreme Court, the Mental Health Review Tribunal and the NSW Trustee and Guardian.
 - b) the *Guardianship Act* 1987 NSW, s4, governing work of NCAT's Guardianship Division.
 - c) the *Mental Health Act* 2007 NSW, s68 (read with ss3, 105 and 195 of the Act; the *Mental Health (Forensic Provisions) Act* 1990 NSW, ss40 and 74; and the *NSW Trustee and Guardian Act* 2009 s39) affecting, *inter alia*, work of the Mental Health Review Tribunal; and
 - d) the *Children and Young Persons (Care and Protection) Act* 1998 NSW, ss7-10, as regards the Children's Court of NSW.
96. The welfare principle is generally expounded in terms that suggest that it has a paramountcy in all cases involving the person or estate of a person in need of protection. However, implicitly in all cases, and sometimes explicitly in cases relating to those suffering mental health problems, the welfare of a person in need of protection may, of necessity, be subordinated to a need to protect the safety of members of the public: *A (by his Tutor Brett Collins) v Mental Health Review Tribunal (No. 4)* [2014] NSWSC 31 at [140]-[153] and [163]-[166].

V. THE SIGNIFICANCE OF THE PURPOSIVE CHARACTER OF THE COURT'S JURISDICTION

V.1 Context is important

97. The purposive character of the Court's probate and protective jurisdiction governs not only substantive decisions, but also procedural (adjectival) decisions, to be made in the exercise of such jurisdiction.
98. Each decision should advance the purpose of the particular jurisdiction being exercised, and not be inconsistent with that purpose.
99. Differences in the character of the jurisdiction being exercised may carry consequences for the conduct of proceedings in the probate and protective jurisdictions.
100. Probate litigation is "interest litigation" in that, to commence or 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*; *The Estate of Gertsch* (1993) 35 NSWLR 631 at 634B-C; *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [211]-[217]. The central focus of the probate jurisdiction is on *rights to property*, governed by a law of succession that endeavours to respect decisions made by an autonomous property owner in anticipation of death, and post-death claims of family and community, the due administration of which is entrusted to judicial officers bound to act in accordance with the traditions of their office.
101. Although prudence may dictate that an exercise of the Court's protective jurisdiction involve service of notice of proceedings on a protected person's family, or prospective beneficiaries of his or her deceased estate, the Court's entire focus is on the welfare and interests of the protected person, not the collateral interests of others: *Ex parte Whitbread* (1816) 2 Mer 99 at 101-103; 35 ER 878 at 879.
102. When all interested parties are before the Court, or represented, in probate proceedings there is greater scope for adversarial procedures than can be justified in protective proceedings.
103. Within the protective arena, differences in the character of the *parens patriae* jurisdiction relating to children and the *parens patriae* jurisdiction relating to others in need of protection may also carry consequences for decision making.
104. In all cases, of whatever type, the Court generally endeavours to take into account whatever views may be expressed by the particular protected person whose estate or person is the subject of the proceedings.

105. However, proceedings concerning children *prima facie* require that their parents be allowed an opportunity to be heard (*J v Lieschke* (1987) 162 CLR 447 at 456-459; *Re June (No. 2)* [2013] NSWSC 1111 at [166]-[175]) even though (as confirmed by the majority in *Marion's Case* (1992) 175 CLR 218) the Court's *parens patriae* jurisdiction is more extensive than parental power over a child and may override decisions of a parent. Moreover, if a child's only incapacity is the formal, legal disability of infancy, and if he or she has sufficient maturity to express an informed view about his or her affairs, any expression of view by him or her may be determinative of what the Court should do in exercise of protective jurisdiction: *Marion's Case* at 175 CLR 237-238 and 239.
106. Although the views of an adult under the protection of the Court can, and should, be taken into account, and not everybody incapable of managing his or her own affairs lacks mental capacity, it remains true that the process of ascertaining, and taking into account, the views of a child may present different challenges from those attending an adult protected person. Thus, for example, the prevailing view is that a judge should exercise extreme caution before attempting a personal interrogation of a child (*CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [117] and [121]), although adults are not uncommonly engaged in giving evidence or making statements from the bar table.

V.2 Procedural forms, their adaptation or dispensation

107. The purposive character of the probate and protective jurisdiction necessarily affects (and, as necessary, rises above) procedure in particular cases in which such jurisdiction is exercised.
108. Technicalities attending a grant, or an order for revocation, of probate or letters of administration must yield to the dictates of due administration of a deceased estate: eg, *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [211]-[217] and [288].
109. The welfare principle, at the heart of protective jurisdiction, mandates that an exercise of the jurisdiction not be bogged down with any technicalities: *Re Francis and Benny* [2005] NSWSC 1207 at [17]; *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239B-E; Theobald, *The Law Relating to Lunacy* (1924), pp 59-60 and 362-363; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [5]-[11]. A change in procedure for exercising the Court's jurisdiction does not, of itself, constrain the Court in exercise of the jurisdiction: *In re WM (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552 at 561 and 569. The Court's protective jurisdiction is not displaced by a legislation absent a clear legislative intention that it be displaced: *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345 at 348, 351

and 363-364; *Johnson v Director General of Social Welfare (Victoria)* (1976) 135 CLR 92 at 97 and 100; *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 at 301 [26]-[27]. Insofar as legislation has been enacted as overlaying the Court's inherent jurisdiction, the Court's statutory jurisdiction has generally been construed as operating along similar lines: *Re M and the Protected Estates Act 1983* [2003] NSWSC 344 at [7]; *PB v BB* [2013] NSWSC 1223 at [57].

V.3 Types, and characterisation, of probate and protective orders

Orders are Generally Provisional, whether Final or Interlocutory

110. The purpose-driven nature of orders made in exercise of probate or protective jurisdiction means that most, if not all, orders made in exercise of that jurisdiction are provisional, effective whilstever they serve the purpose of the particular jurisdiction and open to review if and when that purpose requires.
111. However they may be classified (as final or interlocutory) for the purpose of determining whether leave to appeal should be granted, there is something of the interlocutory about all orders made in exercise of probate or protective jurisdiction. This is true even of a grant of probate in solemn form, for example, because a new will may be found, or a person who was entitled to notice of proceedings but was not given it may emerge: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [247]-[252], [258], [260], [274], [293]-[298] and [305]-[312]. All orders are susceptible to an order that they be set aside or stayed in the interests of due administration of the particular estate.
112. Whether an order is "final" or "interlocutory" for the purpose of a determination whether leave to appeal is required as a prerequisite of appellate challenge to the order is governed by the purpose of that distinction within the administration of the Court's appellate jurisdiction. Not everything decided in probate or protective proceedings has that degree of finality in the determination of legal rights necessary to constitute a "final" judgment, in this context, within the meaning of *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440 and 443; *Licul v Corney* (1976) 180 CLR 213 at 220 and 225; and *Carr v Finance Corporation of Australia Limited [No. 1]* (1981) 147 CLR 247 at 248 and 253-254. In the realm of probate and protective jurisdiction litigation the form of an order under challenge is not determinative; one must consult the substantive legal effect of the particular order: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [257].

Functional classification of Orders

113. Functionally, in practice one commonly encounters three classes of orders made in exercise of the probate or protective jurisdictions of the Court.
114. The first class is comprised of orders that formally, and deliberately, engage or disengage the probate or protective jurisdictions, confirming that a particular estate has been brought under, or released from, the control of the Court.
115. In probate cases this class of order is represented by a grant of probate intended to give effect to a will or a grant for administration of an intestate estate. It may also be represented by an order for revocation of a grant, absent an associated re-grant, where (to take an uncommon, but informative, example) a person presumed dead is found to be alive.
116. Upon an exercise of protective jurisdiction in relation to a person thought to be incapable of self-management, comparable forms of order are, now, a declaration that the person is incapable of managing his or her affairs and an order for revocation of management orders. The declaration takes the place of the historical jury verdicts of lunacy, idiocy and unsoundness of mind.
117. Upon an exercise of protective jurisdiction over an infant, the historical equivalent was an order that a particular minor be made a ward of the Court. Such an order is no longer considered necessary where jurisdiction over the person of a minor is exercised : *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345 at 348, 359 and 367. Where jurisdiction over the estate of a minor is exercised, the Court's general jurisdiction over those incapable of managing their own affairs is available (*PMcl v KMMcl* (1987) 10 NSWLR 243 at 244G-245B; *AC v OC (a minor)* [2014] NSWSC 53) and may be preferred because of the regulatory regime that supports management of a protected estate.
118. The importance of the first class of order is that it marks a boundary between an exercise of probate or protective jurisdiction (on the one hand) and (on the other) the Court's other, more general heads of jurisdiction. The maintenance of such a boundary is important to preservation of the civil liberties of both individuals who may be in need of protection and those who transact business with them. For example, Equity's general jurisdiction to grant relief against a *particular* unconscionable dealing must be distinguished from the systemic protection available to (with, incidentally, control over) a person incapable of self-management *generally*.

119. The second class of orders commonly encountered comprises orders in which administration or management of a particular estate is entrusted to, or removed from, a particular person or entity. The expressions “administration” and “management” may, here, generally be taken to be synonyms.
120. This class of order focusses attention on the identity of a person “appointed” to administer or manage an estate. The word “appointed” must be used in inverted commas because, in the probate jurisdiction, legal theory instructs us that, although an administrator derives title from the Court’s order, an executor derives title from the will of the deceased, confirmed by the Court’s order: *Gertsh v Roberts*; *The Estate of Gertsh* (1993) 35 NSWLR 631 at 635B; *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [233].
121. An appointment of an estate administrator or manager may be embodied in an order falling within the description of the first class. Orders that a will be admitted to probate and that a grant of probate or administration be made to a named person may, for example, be expressed compendiously as a single order that probate of the will be granted to that person.
122. A balance must often be struck between actual or presumed preferences of the person whose estate is under the control of the Court and the practicalities of ensuring that an estate is duly administered or managed. Upon an exercise of probate jurisdiction respect must be given to any statement of the deceased’s preferences or, in default of such a statement, those likely to be entitled to the estate, duly administered: *Estate Wight*; *Wight v Robinson* [2013] NSWSC 1229 at [16]-[20]. Upon an exercise of protective jurisdiction over the estate of an incapable person, respect must be given to any statement of the protected person’s preferences and those of his or her family: *Holt v Protective Commissioner* (1993) NSWLR 227 at 238C-239B, 240D and 241D-243E; *M v M* [2013] NSWSC 1495 at [50](d)-(e).
123. Thirdly, there is a class of orders, distinctly interim or interlocutory in nature, that may be made before any order of the first class is made but, equally, may be made as falling within the second class.
124. Upon an exercise of probate jurisdiction a distinctive expression of this form of order are special grants of administration (Mason and Handler, *Succession Law and Practice (NSW)* (Lexis Nexis, Butterworths), para [118.4] and RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in NSW* (LBC, 1996), paras [40.74]-[40.86]), commonly classified as follows:
- a) administration *pendente lite* (granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending).

- b) administration *ad litem* (granted to provide a person to represent an estate in litigation).
 - c) administration *ad colligenda bona defuncti* (granted for the protection of an estate's assets pending delay in making a general grant).
125. A more general form of order, found in either probate or protective cases, is an order for the appointment of a receiver and manager (pursuant to the Court's general equity jurisdiction or a statutory provision such as the *Supreme Court Act 1970 NSW*, s67): *JMK v RDC and PTO v WDO* [2013] NSWSC 1362 at [55]-[56] and [68] (5).
126. In *Ex-parte Warren* (1805) 8 Ves Jun 622; 32 ER 985 at 986 Lord Eldon regarded as immaterial whether a person appointed to manage the estate of a lunatic was called "Committee" or "Receiver". The essence of each office is estate management. In practice, though, appointment of a receiver and manager is generally a signal that an interim form of management is required pending the determination of a larger issue (eg, whether a person is, or is not, in fact capable of managing his or her own affairs).

The Educative Example of Orders for General Administration

127. Classification of the Court's orders by reference to these three classes is intended to be an aid to understanding of the Court's *practice* rather than a formulation of legal categories. This point is made because, from time to time, an exercise of the Court's jurisdiction has been impeded by a purported elevation of *administrative practice* into *legal rules*.
128. A classic, historical example of this relates to the procedural device of an order for general administration of an estate (usually a deceased or trust estate) by the Court, now (as illustrated by *McLean v Burns Philp Trustee Co Pty Limited* (1985) 2 NSWLR 623) largely fallen into disuse.
129. A convenient summary of the procedure is found in Sir Frederick Jordan's *Administration of the Estates of Deceased Persons* (Sydney Law School, 3rd ed, 1948) at pp 42-44 (reprinted in *Select Legal Papers* (Legal Books, Sydney, 1983), here reproduced with editorial adjustments:

"ADMINISTRATION BY THE COURT

In ordinary circumstances, the estate of a deceased person is administered by the personal representatives; but difficulties may arise which may make it necessary that the estate should be administered, wholly or partly, by or under the direction of the Court.

Under the old practice, the personal representative or any beneficiary or creditor was entitled, as of course, to have the estate of a deceased person administered by the Court, and for that purpose to obtain a decree for general administration: *Ewing v Orr Ewing* (9 AC 34 at 41-42, 46-8); *In re Blake* 2 Ch D 913 at 916. And if it were desired to obtain the direction of the Court upon any question of construction or administration, however small, it was necessary to obtain a decree for general administration and throw the whole estate into Chancery for the purpose; because, in general, the Court would not decide any such question until the administration accounts had been taken: *Gaskell v Holmes* 3 Ha. 438 at 447; *In re Wilson* 38 Ch D 457 at 460; *In re Blake* 29 Ch D 913 at 916; A Birrell, *The duties and liabilities of trustees* (Macmillan & Co, London, 1897), pp 79-84; DM Kerly, *An historical search of the equitable jurisdiction of the Court of Chancery* (Cambridge University Press, 1890), p 278; HW Seton, *Forms of Judgments and Orders* (Stevens & Sons, London, 7th ed, 1912), vol. 2, p 1419. ...

[In 1880 NSW enacted provisions, now found in Part 54 of the *Uniform Civil Procedure Rules* 2005 NSW, for partial administration orders. In 1900 legislation was enacted enabling the Court to promulgate rules allowing for equitable relief to be applied for by way of an originating summons, similar to that for which UCPR Part 6 now provides.]

Since this legislation, a decree or order for general administration will not be made if the matters in issue can be disposed of without such a decree: *In re Wilson* 28 Ch D 457; *In re Blake* 29 Ch D 913; *Heydon v Gell* 21 NSW Eq 265; and the Court will not even embark upon particular inquiries if they would be unnecessary or improper: *Norman v Corrigan* 16 SR (NSW) 225 at 231; *De Quetteville v De Quetteville* 19 TLR 109; cf, *Sanders v Sanders* 15 SR (NSW) 21; eg, if the only possible result would be that the whole fund would be spent in costs: *In re Customs and Excise* [1917] 2 Ch 18 at 26-27; cf, *Meredith v Davis* 33 SR (NSW) 334. It is, however, still sometimes useful to obtain a decree for general administration, eg, where the affairs of the estate are very involved, or where it is necessary to prevent creditors from suing at law: *In re Barrett* 43 Ch D 70 at 74; WW Kerr, *A Treatise on the law and practice of injunctions* (1st ed), pp 107-8; cf, *In re King* [1907] 1 Ch 72 at 80; *Collins v O'Reilly* 41 SR (NSW) 281. If a general decree is made the estate must be administered under the direction of the Court: *In re Furness* 43 Ch 415; but an order may be made limiting the inquiries to be prosecuted under it. ...

The purpose of an administration suit is to determine matters arising within the estate, including the payment of creditors: *Perpetual Trustee Co v Aldritt* 42 SR (NSW) 246. It is not permissible in such a suit to impeach the validity of the trust instrument (*Wallis v AG* [1903] AC 173 at 186), or to determine whether property which is claimed adversely to the estate belongs to the estate or to the claimant (*Evans v Evans* 10 SR (NSW) 594; except by consent, eg, *Stock v McAvoy* LR 15 Eq 55), or to set up an equity against a person who has sued the executor at law (*Boag v Ross* 22 SR 242 at 247; Kerr, *Injunctions*, 1st ed, p 113).

[In 1862 NSW enacted legislation, amended in 1926, now found in s63 of the *Trustee Act* 1925 NSW, providing for judicial advice to be sought by a summary procedure: *Macedonian Orthodox Community Church St Petka Incorporated v Bishop Petar* (2008) 237 CLR 66; *Re Estate Late Chow Cho-Poon; Application for Judicial Advice* [2013] NSWSC 844.]”

130. The effect of an order for general administration of an estate is that the personal representative or trustee is not at liberty to sell, deal with or distribute the assets of the estate under administration without obtaining the sanction of the Court: *In re Furness (Deceased); Wilson v Kenmare* [1943] Ch 415 at 419.
131. The history of Equity procedure since the early 1800s has been attended by concerns about costs and delays, coupled with legislative expedients for summary processes of decision-making. The origins of court rules for partial administration orders (now UCPR Part 54) and a statutory procedure for judicial advice applications (now *Trustee Act* 1925, s63) exemplify this: *Macedonian Orthodox Community Church of St Petka Incorporated v Bishop Peta* (2008) 237 CLR 66; *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [167]-[183]. So too do those relating to summary procedures for approval of executor’s commission (*Probate and Administration Act*, 1898 NSW, s86): *Nissen v Grunden* (1912) 14 CLR 297 at 305; *Re Estate Gowing* [2014] NSWSC 247; 17 BPR [98635] at [21]-[23].
132. The inexpediency of an order for general administration appears to have been, not so much that any step in administration of an estate requires the Court’s authorisation, but that, as a matter of practice (as reflected in the form of such an order), the process of general administration generally commenced with a process of taking accounts: see, for example, *In re Furness* at [1943] Ch 416; *Seton*, 7th ed, vol. 2, p 1410 *et seq.*
133. An examination of the cases cited by Sir Frederick Jordan (especially, *Gaskell v Holmes* (1844) 3 Ha 438 at 447-448; 67 ER 453 at 456-457, referring back, *inter alia*, to *Mitford v Reynolds* (1842) 1 Phill 185 at 188; 41 ER 602 at 603) suggests that the procedural course of insisting that accounts be taken before consideration of any question about management of an estate derives from a *practice* decision made by Lord Cottenham in a particular case, having regard to considerations of convenience in a particular case. The practice was not grounded in the Court’s jurisdiction. It turned upon the desirability of ascertaining the nature and extent of the property under administration and the identity of persons interested in the property.
134. On such practical concerns (still of practical concern) equity procedure allowed itself, unnecessarily, to ossify. Even today, when formal procedures for the taking of accounts tend to be dealt with summarily, the process of taking accounts can be both cumbersome and expensive.

135. In allowing procedures for the general administration of an estate to become bogged down in complexity, equity practitioners allowed Equity's traditional concern to decide all questions in dispute, without a multiplicity of proceedings, to overreach itself: *Duke of Bedford v Ellis* [1901] AC 1 at 8, citing Lord Eldon in *Adair v New River Co.* (1885) 11 Ves 429; 32 ER 1153 and *Cockburn v Thompson* (1809) 16 Ves Jun 321; 33 ER 1005.
136. Nevertheless, the traditional flexibility of equity procedures, *vis á vis* those of the common law, lie at the heart of the administration of estates and, ultimately, the concept of property. Central to this flexibility is the ability of the Court to insist that a party holding, or dealing with, property on behalf of another (including legal personal representatives, trustees and estate managers of all descriptions) account for it and their dealings with it.
137. Ultimately, the standard and level of accounting required by the Court, in the exercise of both the probate and protective jurisdictions, depends upon what is necessary to give effect to the purpose served by the particular jurisdiction exercised: eg, *Re Estate Gowing* [2014] NSWSC 247; 17 BPR [98635] at [40]-[44] and [67]-[73]; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 432 [46]-433 [48]; *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [74]-[85].
138. Although learning about the nature of, and necessity for, a general administration order is no longer part of everyday legal practice in NSW (*Re Estate Gowing* [2014] NSWSC 247; 17 BPR [98635] at [21]-[23]) the concerns underlying that procedural device remain in constant contemplation in different guises.
139. In most, if not all, cases relating to administration of an estate the Court will, if only in passing, inquire about the size and nature of the estate; the present state, and future course, of administration of the estate; the identity of persons who may, now or in the future, be interested in the estate; whether representative orders of any description are required; the utility of addressing any question tendered for decision or of orders sought; and the necessity or otherwise of interlocutory orders, by way of injunction or otherwise, to preserve the *status quo* or, at least, to maintain the integrity of the Court's decision-making procedures.
140. Whereas, under old Equity practice, administration proceedings commenced with the making of a general administration order that stayed administration of an estate until these concerns were addressed, modern practice, in the administration of deceased estates and trusts, proceeds on an assumption that administration of the estate can, and should generally, proceed until the Court, or a person responsible for the day to day administration of the estate, decides otherwise.

141. This generally works well enough in the administration of deceased estates and trusts because: (a) the ground rules for administration of an estate are laid down by an instrument such as a will or trust deed or, in the case of an intestacy, by legislation; (b) although not all interested parties may be before the Court, the availability of beneficiaries to challenge decisions made in the administration of an estate serves the interests of due administration of an estate; (c) the liability of a fiduciary to account for estate dealings serves as a restraint on maladministration; and (d) at least in the administration of deceased estates, a requirement that accounts be passed serves the same purpose.
142. The same dynamic does not, generally, apply in administration of a protected estate. Unlike administration of a deceased estate, administration of a protected estate involves protection of the interests of a living person (whose welfare is paramount) and, generally, the absence of any other person with a justiciable, competing interest in the estate.
143. Administration of a protected estate necessarily involves (as recognised in *PB v BB* [2013] NSWSC 1223 at [10] and *M v M* [2013] NSWSC 1495 at [10] *et seq*) and always has involved (as acknowledged in Theobald, *The Law Relating to Lunacy* (1924), p 61-63 and L Shelford, *A Practical Treatise on the law concerning lunatics, idiots and persons of unsound mind* (Sweet & Stevens, London, 1833), pp 25-26 and 148), administrative support from a public agency, whether a part of court administration or executive government.
144. Furthermore, albeit with greater administrative efficiency, one sees today in the ordinary course of administration of a protected estate essential elements of a general administration order.
145. The effect of a management order is to suspend the power of a managed person to deal with his or her estate so far as it is subject to management under the *NSW Trustee and Guardian Act* 2009 NSW (s71(1); *David by her tutor The Protective Commissioner v David* (1993) 30 NSWLR 417), subject to the power of the Court or, to a lesser extent, the NSW Trustee to allow otherwise. Although it is open to the Court under s40 of the *NSW Trustee and Guardian Act* (and to the Guardianship Division of NCAT under s 25E of the *Guardianship Act* 1987 NSW) to exclude part of an estate from the operation of a management order, prudent estate management generally requires that, subject to interlocutory dispensations, the whole of an estate be subject to management so as to preserve the powers of the Court and the NSW Trustee to insist upon a proper accounting for an estate: *Re Application for Partial Management Orders* [2014] NSWSC 1468. The “usual orders” accompanying a management order include (as indicated in UCPR r 57.7(2)(c)) a direction that a protected estate manager not to do anything in reliance on its, his or her appointment as a manager until the NSW Trustee has authorised the person to assume management of the estate. This enables the NSW Trustee, in a

practical sense, to become duly seized of its monitoring functions under chapter 4 of the *NSW Trustee and Guardian Act*. At or before the time of authorisation of a manager to assume management of an estate, the NSW Trustee ensures that it is appraised of the size and composition of the estate; that the manager has a plan, approved by the NSW Trustee, for management of the estate; and that, if appropriate, security for due management of the estate is provided.

146. Whatever the form of orders made, whether in exercise of probate or protective jurisdiction, the Court's processes are attended by a concern to be able to control administration of an estate so as to ensure it is duly administered in accordance with the purpose or purposes, for which the Court's jurisdiction exists.

V.4 The Probate and Protective Jurisdictions are not "consent" jurisdictions

147. Given the public, purposive character of the probate and protective jurisdictions, neither jurisdiction is a "consent jurisdiction" in the sense that an order might, or must, be made merely because a party, or some other person, seeks it, consents to it or acquiesces in it. The Court is bound to exercise an independent judgement because of the public interest element in the decision to be made and the absence, in one sense or another, of all interested parties. By definition, *post-mortem* jurisdiction in probate must be exercised in the absence of the deceased. The protective jurisdiction must cope with the possibility, if not the fact, that the protected person lacks the mental capacity requisite to inform decision-making.
148. Because a grant of probate or administration is a public act, the Court will not make an order for a grant merely because parties have agreed that one should be made: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [271]-[272]. No grant is made, or revoked, as of right: *Estate Kouvakas; Lucas v Konakas* at [292] and [309]-[311].
149. An order for the appointment, removal or replacement of a particular protected estate manager is not made as of right. Nor does a manager of a protected estate have a legal entitlement to be, or to remain, manager of the estate: *M v M* [2013] NSWSC 1495 [50](a) and (k); *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [151]-[153].
150. The Court's protective jurisdiction over infants (generally exercised in relation to an infant's person rather than his or her estate) can, in an appropriate case, override views expressed by an infant or his or her parent or guardian: *Marion's Case* (1992) 175 CLR 218 at 237-239 and 258-259.
151. Although the jurisdiction of the Court in probate and protective cases is not necessarily constrained by views expressed by an interested person, a prudent exercise of the jurisdiction generally endeavours to

ascertain, and take into account if not give effect to, such views. The effectiveness of an exercise of the Court's jurisdiction often depends upon the Court having an opportunity to hear from persons with an interest, or prospective interest, in an estate or those who have lived in community with the deceased or protected person in respect of whose affairs a decision must be made. Although the principles of procedural fairness must give way to the extent that their application would frustrate the purpose for which protective jurisdiction exists (*J v Lieschke* (1987) 162 CLR 447 at 457), the efficacy of an exercise of the jurisdiction is generally unlikely to be enhanced by those principles being disregarded.

V.5 Orders may be withheld, or revoked, if lacking utility

152. In each branch of the probate and protective jurisdictions the purposive character of the Court's jurisdiction is reflected in the Court's insistence that orders may be withheld, or revoked, if lacking in utility – which is to say, if they do not serve a purpose for which the Court's jurisdiction exists.
153. In the probate jurisdiction, an illustration of this is found in the Court's reservation of a right to decline to make an order for revocation of a grant of probate or administration if not satisfied that there is utility in making the order: *Willis v Earl Beachamp* (1886) LR 11 PD 59 at 61, 62, 63, 64 and 65; *In re Goode* (1890) 11 NSW (Equity) 281 at 285, 286, 286-287 and 287-288; *Stanley v Stanley* [2000] NSWSC 1133 at [11] and [33]-[34]; *Richardson v Rearden* [2006] NSWSC 1252 at [19]-[21]; *Tobin v Ezekiel* [2012] NSWCA 285 at [5]-[9]; *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [292]-[293] and [309]-[311].
154. Upon an exercise of protective jurisdiction (whether involving an infant, or an adult incapable of self-management), the mere fact that a person is incapable of managing his or her own affairs is insufficient to compel the Court to make an order for protected estate management, or to sustain the continuation of such an order, absent a need for, or utility in, the existence of a protected estate manager: *Tomlinson, Broadhurst, Ex parte* (1812) 1 Ves & Bea 57; 35 ER 22; *AC v OC (a minor)* [2014] NSWSC 53 at [46]-[48]; *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42].

V.6 Strict application of rules of evidence not required

155. An incident of the Court's protective jurisdiction (whether referable to an infant or any person lacking capacity for self-management) is that the Court will not allow the purpose for which the jurisdiction exists to be subverted by rules of evidence ordinarily applied in adversarial proceedings.

156. In exercising its protective jurisdiction the Court is not necessarily bound by strict rules of evidence, but has a discretion to act on material which is rationally probative, even though excluded by such rules; the Court is able to proceed upon consideration of what is rationally probative of material facts, with due regard to considerations of fairness, *vis á vis* affected parties: Theobald, *The Law Relating to Lunacy* (1924), pp 59-60; *Roberts v Balancio* (1987) 8 NSWLR 436; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [7].
157. Nothing in the *Evidence Act* 1995 NSW compels a contrary approach. Section 9(1) of the Act provides specifically that the Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which the Act applies, except so far as the Act provides otherwise expressly or by necessary intendment. No such intendment can be found restrictive of the Court's protective jurisdiction. The paramountcy principle, fundamental to the operation of the protective jurisdiction, prevails, where it must, over technical rules of evidence.
158. Nevertheless, even if particular provisions of the *Evidence Act* do not, in terms, apply, the operation of the Court's protective jurisdiction might usefully be informed by them as a counsel of good practice or procedural fairness: *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [319]; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [14].
159. Different considerations apply to an exercise of probate jurisdiction because the nature and purpose of probate proceedings is different, and the range of problems to be solved is no less extensive than those encountered on an exercise of protective jurisdiction.
160. Probate litigation is "interest litigation" in that, to commence or to be 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: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [212]. The availability of a will, codicil or (as contemplated by the *Succession Act* 2006 NSW, s8) an informal testamentary instrument, or a statutory regime for the administration of an intestate estate, may influence the nature and degree of evidence required to ground the making of an order.
161. The distinction between a common form grant and a solemn form grant of probate also impacts on decision making. A grant in common form may be made administratively with very little supporting evidence because it is generally regarded as readily revocable. Having regard to the character of probate proceedings as "interest litigation" and the need to bind interests to the Court's decision so far as may be practicable (*Osborne v Smith* (1960) 105 CLR 153 at 158-159), greater formality may attend the determination of an application for a solemn

form grant: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [211]-[317].

162. Because an exercise of probate jurisdiction may require accommodation of competing interests, if all interested parties have notice of proceedings and are allowed a reasonable opportunity to participate in them, there is generally greater scope for an application of adversarial procedures than can be accommodated in protective proceedings. Ultimately, however, the particular facts of a case must be consulted, and due recognition needs to be given to the public interest character of probate proceedings, including the scope for such proceedings to be inquisitorial rather than adversarial in character.

V.7 The operation of principles governing legal professional privilege

163. Since *Baker v Campbell* (1983) 153 CLR 52, legal professional privilege has been regarded in Australia as a civil right, rather than merely a rule of evidence.
164. Its scope and operation is governed by the purpose it serves; namely, service of the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers, both in the provision of advice and the conduct of litigation.
165. Although a shift in the scope of the privilege occurred in *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49 (so that privilege attaches to a communication for the “dominant” purpose of a lawyer providing legal advice or legal services rather than only a communication for the “sole” purpose of a lawyer providing legal advice or legal services), the purposive character of the privilege remains intact.
166. If the privilege is available, it is available as of right unless lost by waiver or loss of confidentiality. The Court is not entitled, as it must in dealing with a claim to public interest immunity, to weigh competing public interest considerations in deciding whether privilege is available: *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64-65; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128, 134, 147 and 163; *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64-65.
167. Nevertheless, because legal professional privilege is purposive in character a communication for, or in furtherance of, an illegal or improper purpose will not attract the privilege: *Attorney General (Northern Territory) v Kearney* (158 CLR 500; *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501.

168. Although these principles have been developed under the general law, they are generally consistent with, and inform provisions of, Part 3.10 of the *Evidence Act 1995 NSW* relating to “client legal privilege”.
169. Upon a consideration of a claim for legal professional privilege in the context of probate or protective proceedings, particular attention must be given to both the rationale of the privilege and the fact that, if available, the privilege is that of a client, not a lawyer.
170. In probate or protective proceedings particular attention also needs to be given to the nature and purposes of the jurisdiction exercised by the Court.
171. *Re Estate of Fuld, Deceased* [1965] P 405 at 409F-411B (followed in *Graham v Kahler; Estate Delfendahl* (Young J, 17 July 1991, unrep) BC 9101779 and *Gordon v Hilton* (Young J, 13 October 1995, unrep) BC 9501693) established that where, on an exercise by the Court of its probate jurisdiction, a question arises as to whether a will was, or was not, duly executed, a witness to execution of the will is regarded as a witness of the Court, with the consequences that:
- a) any party properly before the Court, including the party calling the witness to give evidence in the proceedings, is entitled to cross examine the witness insofar as his or her evidence deals with execution or attestation of the will;
 - b) the Court, if it thinks fit, is entitled to see, and to require the witness to produce, earlier statements that he or she may have made dealing with the question of execution; and
 - c) under the general law, an entitlement to legal professional privilege which might otherwise attach to such documentation does not preclude the Court from making an order that (to the extent that it deals with the subject of attestation and execution of the will) the documentation be produced to the Court for the purpose of assisting the Court in its search for the truth pertaining to due execution, or otherwise, of the will.
172. The “rule in *Re Fuld*” applies in the context of the *Evidence Act 1995 NSW*, and extends to any record of a statement made by a witness dealing with a question of execution or attestation of a testamentary instrument (whether a will, codicil or informal testamentary instrument) under review, not being limited merely to a written statement signed or adopted by the witness personally: *Re Estate Pierobon, Deceased* [2014] NSWSC 387 at [49]-[50] and [62]-[71].
173. Upon an exercise of the Court’s protective jurisdiction, the purposive character of the jurisdiction and the purposive character of legal professional privilege combine to preclude a person concealing from the court the whereabouts of a person in need of protection: *The Queen v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145-146, 151-152,

154-155, 159, 161 and 163, applying *Ramsbotham v Senior* (1869) LR 8 Eq 575 and *Burton v Earl of Darnley* (1869) LR 8 Eq 576n.

V.8 Procedural Fairness

174. The principles of procedural fairness (both those governing a right to be heard and those governing a right to a hearing unattended by bias or an apprehension of bias) depend largely on context for their application.
175. An exercise of either probate or protective jurisdiction may, ordinarily, require consideration of the identity of persons who should be given notice of proceedings and the extent to which they can, and should, be heard in the course of proceedings.
176. The nature of proceedings, the powers to be exercised and prescribed rules of procedure may affect the extent to which a right to be heard may be recognised or, if recognised, qualified.
177. Different considerations may apply to probate and protective proceedings, as has been noticed in treating the topic of “rules of evidence” above. Of particular significance is the character of probate proceedings as “interest litigation”, a sharp contrast with protective proceedings governed by the paramountcy of the welfare and interests of a particular, living person in need of protection.
178. Another distinguishing feature of probate proceedings is the availability of a caveat procedure. In probate practice, a caveat is a notice to the Court not to allow proceedings to be taken without notice to the caveator: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [242]-[245] and [309]-[311]. The caveat procedure operates in tandem with, and in a manner converse to, the procedure whereby (by reference to the principle described in *Osborne v Smith* (1960) 105 CLR 153 at 158-159) a party to proceedings may formally fix knowledge of them on an interested person by service on that person of a prescribed form of a “citation to see” the proceedings or its modern equivalent, a prescribed form of notice of the proceedings.
179. At the time when the Supreme Court of NSW was established, with jurisdiction defined by reference to business conducted by the Lord Chancellor, administration of the protective jurisdiction in lunacy involved a caveat procedure not unlike that now commonly associated only with the probate jurisdiction. The necessity for it arose, in substantial part, because the steps taken towards appointment of a protected estate manager (then known as a Committee of the Estate) were more protracted than they are now. Under current practice, the Court (or the Guardianship Division of NCAT) generally both declares a person incapable of self-management and appoints a manager at the same time. In earlier times, according to English practice, the Lord Chancellor issued a commission for the conduct of an inquiry if satisfied that there were *prima facie* grounds for the conduct of an

inquiry; a jury determined, upon inquiry, whether the subject of inquiry was a lunatic, etc; and, if a finding of lunacy, etc. was made by the jury, the Lord Chancellor (or a Master in Chancery acting under his direction) made an order for the appointment of a committee after a further inquiry about the identity of a person or persons suitable for appointment as a committee. A person against whom a commission might be sought, anyone on his or her behalf or his or her next of kin could enter a caveat in the office of the Secretary of Lunatics (an administrative officer assisting the Lord Chancellor) against the issue of a commission or the appointment of a committee without notice to the caveator: Shelford, *A practical treatise on the law concerning lunatics, idiots and persons of unsound mind* (London, 1833), pp 101-103, 135-136, 624 and 654-655; GD Collinson, *A Treatise on the law concerning idiots, lunatics and other persons non compotes mentis* (W Reid, London, 1812), vol. 1, p 197; HMR Pope, *A Treatise on the law and practice of lunacy* (Sweet and Maxwell, London, 2nd ed, 1890), pp 60 and 101; J Elmer, *The practice in lunacy under Commissions and Inquisitions etc* (Stevens & Sons, London, 7th ed, 1892), pp 12 and 229.

180. Whether or not the Court is formally on notice that a particular person or persons do or may wish to be heard before a particular order is made, it will not uncommonly make its own inquiries about persons who have or may have a reasonable expectation of receiving notice of proceedings or may be able (because of their perceived relationship with a person whose estate or person is the subject of the Court's jurisdiction) to provide assistance to the Court.
181. The bottom line is, however, that, if and to the extent necessary to exercise its probate or protective jurisdiction, the Court may make orders without notice to any person. In the context of an exercise of probate jurisdiction this may be seen, not uncommonly, in an administrative grant of probate in common form. Upon an exercise of protective jurisdiction, it may be seen (comparatively rarely) in a situation which an order must be made urgently in order to protect the person or estate of a person (whether an infant or a person lacking capacity for self-management) in need of protection. In each case, the purposive character of the Court's jurisdiction permits it to be done.
182. An illustration of this, and its limits, is found in *J v Lieschke* (1987) 162 CLR 447 at 457 per Brennan J:

“If an unqualified application of the principles of natural justice would frustrate the purpose for which [the Court's wardship jurisdiction over an infant] is conferred, the application of those principles would have to be qualified: see *Kioa v West* (1985) 159 CLR 550 at 615 and 633-634. In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child; eg, it may be necessary to keep a welfare report confidential, as in *In re Kay (Infants)* [1965] AC 201 at 219. ... But a desire to promote the welfare of the child does

not exclude application of the principles of natural justice except so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred: see *Re JRL; Ex parte CJL* (1986) 161 CLR 342.”

V.9 Costs orders in probate and protective cases

183. The probate and protective jurisdictions embrace a wide range of business, covering a spectrum of cases requiring (at one end) decisions essentially administrative in character and (at the other end) an adjudication of questions hotly contested. In all, there is a public interest element that lends to probate and protective proceedings an inquisitorial flavour, and tends to deny them unqualified characterisation as adversarial. In each case, the Court’s approach to costs orders must depend on the nature of the particular decision the Court is called upon to make and the particular facts bearing upon that decision.
184. The starting point for consideration of any question of costs is that s98 of the *Civil Procedure Act* 2005 NSW confirms in the Court a wide discretion as to costs and, in adversarial proceedings at least, rule 42.1 of the *Uniform Civil Procedure Rules* 2005 NSW provides that, *prima facie*, costs should ordinarily follow the event.
185. Any predisposition on the part of the Court to order that costs follow the event is: (a) highly qualified upon an exercise of probate jurisdiction; and (b) not shared by those exercising protective jurisdiction unless, as not uncommonly occurs, administrative law relief (in relation to proceedings in a statutory court or tribunal charged with analogous, protective jurisdiction) is also sought, lending to the proceedings an adversarial flavour.
186. An essential difference between probate and protective cases (reflected in the purposive character of each jurisdiction) is that probate proceedings are “interest litigation” and protective proceedings are not.
187. In probate proceedings an estate to be administered is generally held, after the completion of executorial duties, on behalf of beneficiaries who, subject to a governing instrument, have a personal, property interest in estate property; the existence, or prospective existence, of such an interest generally carries with it a motive, power and opportunity to enforce the obligations of an executor, administrator or trustee, or, at least, to obtain orders giving effect to a testator’s intentions. This environment lends itself to adversarial litigation more readily than can be found in protective proceedings.
188. In a protective case, the welfare and interests of a protected person are paramount. Estate property is held by or on behalf of the protected person alone. No other person has, or is entitled to, a competing, adverse interest. A corollary of this is that there is generally no person in whose personal, legal interest it is to enforce the terms of protective

arrangements; a protected person may be dependent upon the efficacy of the Court's procedures, and the goodwill of those who, in discharge of public functions or otherwise, lend their aid to the Court in management of the protected estate.

189. In probate proceedings an order for costs might be justified on the basis that the Court's discretion as to costs is wide and unfettered and it is open to the Court to make such order as appears to it to be appropriate: *Williamson v Spelleken* [1977] Qd R 152.
190. This is similar to the standard criterion for costs orders in the protective jurisdiction: having regard to what, in all the circumstances, is the proper order to be made? See *Re an incapable person D* [1983] 2 NSWLR 590 at 595F; *RH v CAH* [1984] 1 NSWLR 694 at 708E; *M v M* [2013] NSWSC 1495 at [50](n); *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [130].
191. In *CCR v PF (No 2)* (1986) 6 NSWLR 622 at 640 E-F Powell J offered the following explanation for the protective jurisdiction's approach to costs orders:

"Costs are, of course, in the discretion of the court, but that discretion, being a judicial one, must be exercised in accordance with established principle. Although the principle generally to be applied in *inter partes* litigation is that costs follow the event, questions of costs in proceedings in the [protective jurisdiction] have, over the years, come to be regarded as exceptions to that general principle. That this should be so is due to the facts, first, that in the normal case, proceedings in [the Court's Protective List] are taken in the interests of those thought to be incapable of protecting themselves and their property; and, second, that those who would otherwise be concerned to act to protect the mentally ill or the mentally infirm [or, it might be more generally said, any person in need of protection] might be deterred from acting if they were to expose themselves to the risk of costs if their application, even though reasonably made, were unsuccessful. In light of these facts, the principle normally applied in proceedings [in the exercise of protective jurisdiction] is that the Court will make that order which, in all the circumstances, seems proper."

192. Contrast this with a standard formulaic statement (by Powell J) about the Court's approach to costs orders in contested proceedings about the validity of a will. That approach is described by reference to a general principle and exceptions rather than the word "proper" or any derivative:

"In the field of probate litigation, two exceptions to the general principle [that costs follow the event] have come to be recognised, they being:

- a) where the testator has, or those interested in residue have, been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate;

- b) if the circumstances led reasonably to an investigation in regard to the document propounded, the costs may be left to be borne by those who respectively incurred them. ...

To these exceptions to the general principle should, perhaps, be added that, although an executor may be entitled to recover from a party to litigation costs only on a party and party [ie, the ordinary] basis, he, as a fiduciary, retains the right to an indemnity against the estate, and thus may have recourse to the estate for any difference between his costs on a trustee [ie, the indemnity] basis and the costs recovered from a party. ...” : *Re Eger; Helprin v Eger* (Powell J, 4 February 1985, unrep) BC 8500997.

- 193. In each case, be it a probate or a protective case, the Court’s approach is coloured by the purposive character of the jurisdiction being exercised and the facts of the particular case.
- 194. Nevertheless, where proceedings are perceived to have been conducted in an adversarial manner and for personal advantage (rather than for the benefit of the estate or as an incident of its due administration) the Court is more likely than otherwise to make an order that costs follow the event, subject to a fiduciary (a legal personal representative or protected estate manager) having, within reasonable limits, an entitlement to be indemnified out of the estate under administration.

VI. CONCLUSION

- 195. An exploration of the purposes served by the probate and protective jurisdictions of the Court enables:
 - a) the Court to identify, and refine, principles upon which each head of jurisdiction operates in fact;
 - b) all concerned in the administration of protected or deceased estates to organise their affairs with firmer foundations than possible with a focus merely upon available remedies not specifically elaborated by reference to principles governing their deployment; and
 - c) the law, and its administration, to be adapted to new circumstances as they arise, with a minimum of disruptive changes of formal rules.
- 196. The province of the Court’s protective jurisdiction is that of the living. The province of the probate jurisdiction is that of the dead.
- 197. Before death, the *protective* jurisdiction, singlemindedly, protects the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether it 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.

198. 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. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of his executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries.
199. These purpose-driven distinctions between the probate and protective jurisdictions of the Court provide foundations upon which the law relating to the administration of deceased and protected estates has been built, and can be administered in a world of change.
200. Unconstrained by a purposive approach to the law, in jurisdictions in which a pot of money or other property is in view (apparently unattended by a vigilant owner), some litigants tend to cast their cases in terms of opportunistic claims of entitlement, substantive or adjectival.
201. A constant, active focus on the purposive character of the Court's jurisdiction in probate and protective cases aids three objects currently valued in the administration of justice:
 - a) articulation, and consistency in application, of principles governing action;
 - b) minimisation of unnecessarily technical rules grounded, in reality, in conventional practice; and
 - c) the conduct of litigation in an efficient manner designed to determine real issues.

GCL

16/2/2015