

**THE BLUE MOUNTAINS LAW SOCIETY  
2018 SUCCESSION CONFERENCE**

**7-9 September 2018**

**AN AUSTRALIAN HISTORY OF THE LAW OF SUCCESSION  
From Status to Contract to a Managed Society**

**by**

**Justice Geoff Lindsay**

**Probate and Protective List Judge  
Equity Division, Supreme Court of NSW**

**INTRODUCTION**

- 1 The object of this paper is to provide, from a variety of perspectives, insight into the historical origins, and conceptual connections, of the law of succession in New South Wales, together with a selection of source materials for review. The story is told through a variety of authoritative, convergent voices, some lost to memory in a utilitarian age indifferent to historical methods of thought. Readers are encouraged to delve more deeply into extracted texts.
- 2 This is not intended to be a study of “history” for the sake of “history”; but an historical guide to how, and why, “the law of succession” operates today – and an encouragement to others to pursue the topic with a critical mindset.
- 3 The law of succession is not just a statute bearing that name, or even a collection of statutes. Nor is it an area of law limited in ambit to the law of wills, intestacy law and the probate jurisdiction of the Supreme Court of New South Wales. In theory, and practice, it is closely related to other areas of law, including the law of property and the law governing persons incapable of managing their own affairs. Death is often preceded by incapacity. Estate

planners must bear both in mind. Just as nature abhors a vacuum, property goes in search of a new owner, or so it seems.

- 4 The law of succession is an important component of a legal system in which Australians expect their affairs, and those of their family, to be managed in anticipation of, and during, experience of incapacity for self-management and beyond.
- 5 Administration of the law – expressed as rights and obligations attaching to membership of a community served by the law – is informed by the purpose, or purposes, the law serves. A study of legal history provides opportunities for critical review of those purposes, and the law in theory and practice. It exposes cultural connections and crosscurrents which invite, and resist, generalisations about jurisprudence.
- 6 As a repository of jurisdiction governing several intersecting branches of the law of succession, the Supreme Court must be mindful of the purposive nature of its work.
- 7 Expressed negatively, the Court cannot allow its processes to be abused by proceedings instituted or maintained for a purpose other than a purpose for which the proceedings are designed: *Williams v Spautz* (1992) 174 CLR 509 at 518 *et seq.*
- 8 Expressed positively, in the context of the law of succession:
  - (a) The protective jurisdiction exists for the explicit purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. The Court, focuses, almost single-mindedly, upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or left undone is or is not in the interests, and for the benefit, of the person in

need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.

- (b) The probate jurisdiction looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.
- (c) The family provision jurisdiction, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (for relief out of a deceased estate or notional estate) in whose favour an order for provision "ought" to be made.

9 Each of these branches of the Court's jurisdiction has a close affinity with the general equity jurisdiction of the Court, which supplements the law (generally thought of in terms of "rules") by the application of "principles" (sometimes associated with Aristotle's concept of "equity" as practical wisdom or prudential reasoning) designed to fill gaps in the law or to address injustice arising from a strict application of the law. It too is essentially purposive in character insofar as the Court is moved to grant, or withhold, discretionary relief (to restrain conduct or to compel the performance of a duty) for the purpose of preventing conduct which, according to its precepts, is unconscionable.

10 In the law of succession, which is a fertile ground for fiduciary relationships because property is routinely required to be held by one person (a fiduciary) on behalf of another (a beneficiary, or principal), a primary contribution of

equity jurisprudence is articulation of principles, and the provision of remedies, designed to hold a a fiduciary to account for a breach of standards of conduct required of a fiduciary.

- 11 Those standards are inherent in the idea that a fiduciary is bound to act for and in the interests of the beneficiary, and not otherwise, in the performance of his, her or its functions as a fiduciary. Accordingly, a fiduciary is bound: (a) not to take, receive or retain an unauthorised profit or gain from his, her or its fiduciary office; and (b) not to place himself, herself or itself in a position of conflict between his, her or its duty to the principal and his, her or its own interests.
- 12 Recognition of the purposive character of the work of the Court is important to an understanding of why, and how, the Court, manages its business. The purposive character of the law informs its application even when it is expressed in terms of “rules” and “exceptions” capable of articulation without reference to purpose.
- 13 The purposive character of the jurisdiction exercised by the Court in probate, protective and family provision cases is directed towards service of affected individuals living, and dying, in the community served by the law.
- 14 It is important to remember this because, as a study of Anglo-Australian legal history demonstrates, it was not always so. In mediaeval times, under English law which is part of the cultural memory of Australian lawyers, the institutions which proclaimed and administered the law (principally, the king and the church) did so, in large measure, for the purpose of profit to themselves, at the expense of individuals whose person and property were subject to management, or influence, by those institutions.
- 15 Lest too harsh a view be taken of ancient institutions, allowance must be made for the fact that the environment in which they performed services for the public did not include the fiscal infrastructure of modern government. An incidental benefit of the development of a system of general taxation is that

public institutions have less need of funding their business by appropriating the property of their citizenry incapacitated by age, infirmity or death.

- 16 NSW was colonised by the British at a time when English institutions were refocusing law and practice upon service of individuals affected by the law, at the same time reforming administration of the law and developing government infrastructure to serve the general public.

### **Foundational Concepts**

- 17 In his classic text, *A Concise History of the Common Law* (5<sup>th</sup> edition, 1956), at pages 711, 743 and 746, Professor TFT Plucknett described “the law of succession” as “an attempt to express the family in terms of property”.
- 18 Succession law, as known to Australian lawyers, is an amalgam of procedural and substantive law for the management of property either side of death. In every generation it takes colour from the society it serves, and that society’s understanding of what constitutes “proper preparation for death”, “property” and “family”.
- 19 The concept of “family” is often an expression, if not a function, of community. Familial bonds may be coextensive with communal bonds. They can cross communal boundaries. In any society, “family” and “community” are closely related concepts.
- 20 The civil law concept of community of ownership arising from marriage, or “family property”, has no place in Anglo-Australian common law (*Smith v Smith* [2017] NSWSC 408 at [53]-[56]): It has been rejected by the courts: *Hepworth v Hepworth* (1963) 110 CLR 309 at 317-318; *Bryson v Bryant* (1992) 29 NSWLR 188 at 195-196. Academic commentary has accepted that there is no legal concept of “family property” as such in Australian law: Rosalind Atherton (Croucher) in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Oxford, 1995), chapter 11. The Australian Law Reform Commission has recommended against the introduction of such a regime in Australia, preferring to maintain (with statutory

modifications, embracing discretionary powers, where required) the system of “separate property during marriage” characteristic of English law: ALRC, *Matrimonial Property*, report number 39 (1987), recommendation 24 and paragraphs 53 and 508 *et seq.*

- 21 With an emphasis on individual autonomy, the tendency of Australian law is towards *transactional* rather than *relational* analysis of the rights and obligations of marriage partners.
- 22 This is illustrated by Part 2 (sections 4-13) of the *Married Persons (Equality of Status) Act* 1996 NSW, a contemporary update of the *Married Persons (Property and Torts) Act* 1901 NSW which it repealed and replaced. Section 4 proclaims that a married person has legal capacity as if not married, and a legal personality that is independent, separate and distinct from his or her spouse. Ancillary sections countenance legal action of various types by one spouse against another, and disclaim concepts of agency by marriage.
- 23 The move towards transactional analysis of rights and obligations of marriage partners has been accompanied by a broader move in the same direction, with a trend away from rigid, formal constraints and towards situational decision-making by courts and tribunals (usually, but not necessarily, in a dispute resolution environment). Examples of this can be found in the increasing deployment of “informal wills” and family provision litigation.
- 24 In his conclusion to chapter 5 of *Ancient Law* (1861) – entitled “Primitive Society and Ancient Law” – HS Maine famously wrote that “the movement of progressive [that is, non-static] societies has hitherto been a movement *from Status to Contract*.” Australian experience is consistent with such a movement, but has moved beyond it.
- 25 As Maine perceived it, movement “from status to contract” is a movement from a society in which reciprocal rights and obligations are determined by status within a family (by nature, a collective of persons) to a more

individualistic society in which rights and obligations arise from agreements negotiated between individuals.

- 26 Maine's aphorism – a “movement from status to contract” – found particular resonance in the mid-19<sup>th</sup> century, a period sometimes identified as the heyday of “freedom of contract” – moreover, one caught up in enthusiasm for evolutionary theory unleashed by Charles Darwin's recent publication of *On the Origin of the Species* (1859).
- 27 PS Atiyah's classic, *The Rise and Fall of Freedom of Contract*, published in 1979, characterised 1770-1870 as the age of freedom of contract, and 1870-1970 as a period of decline for freedom of contract.
- 28 In a biographical note on Maine published in AWB Simpson's *Biographical Dictionary of the Common Law* (London, 1984), at pages 343-345, Peter Stein described as “irrepressible” the “movement back towards status in the last century”. As Regius Professor of Civil Law at Queen's College, Cambridge, Professor Stein had a predisposition towards a Roman law perspective of English law but, as a generalisation, his expression of opinion was widely shared in 1984.
- 29 Generalised statements of this character are inevitable in broad based discussions of social order; but any clarity they convey has a propensity to be clouded by inconvenient crosscurrents and the facts of particular cases.
- 30 Consciously or otherwise, each generation must mediate tensions between individual and collective rights and obligations and, within a free community, accommodate diversity in choices made about a proper balance between the individual and the collective; between the individual and “the family”, however conceived.
- 31 Australian law's focus on the perspective of the individual *vis-a-vis* collective concepts has not tipped the balance against the collective so much as re-oriented individuals within new concepts of community. Perceptions of “the

family” atomised into no more than a loose collection of individuals cannot be dismissed as fanciful; but they need to be weighed against changing concepts of family.

- 32 A broad spectrum of changes to the prevailing social order has accompanied perceptions, and experience, of family. Chief amongst these in Australian experience have been changing attitudes to sexual mores, marriage, divorce, illegitimacy, gender roles in the workforce, the necessity for (and access to) superannuation, social welfare entitlements, commercialisation (accompanied by institutionalisation) of social services and deployment of “enduring” guardians and attorneys as private managers of person and property.
- 33 To adapt Maine, marriage has evolved from a sacrament to contract: John Witte Jnr, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Kentucky, 1997).
- 34 Last year’s amendment of the *Marriage Act* 1961 Cth, to provide for the registration of a same-sex relationship as a “marriage”, is consistent with such a trend. It is consistent, also, with a perceived need, in a wealthy country, to provide an all-embracing, comprehensive public regime for the regulation of domestic relationships affecting personal welfare and property interests, and for the orderly resolution of disputes in that context. That is so even if, as some complain, it leaves socially important concepts of family and religiosity to adapt as they will. Amendment of the *Commonwealth Marriage Act* necessitated detailed, consequential amendments to state legislation, including the *Succession Act* 2006 NSW.
- 35 Throughout the 19th century, on any view a formative time in Australian constitutional history, English law and society – with colonial NSW in their slipstream – experienced a drift towards secularism (Owen Chadwick, *The Secularisation of the European Mind in the Nineteenth Century* (Cambridge, 1975)) influenced, in part, by utilitarian philosophy championed by Jeremy Bentham. In a century characterised by programmes of law reform, emphasis was laid upon the “utility” (“usefulness”) of institutions and laws, and an



increasing perception of a need for public regulation. “What useful purpose is served by the law?” is a question never far from the surface in such an environment - an environment which, in the 20th century, became increasingly preoccupied with demands for “efficiency” (and “equity”) in the allocation of resources.

36 An explicit illustration of the influence of Bentham on legal thought, in NSW no less than in England, is found in explanation of the law of intestacy in the standard NSW practice text of Roland Hastings and George Weir, *Probate Law and Practice* (Law Book Co, Sydney, 2<sup>nd</sup> ed, 1948) at pages 740-741 by reference to Bentham (here extracted with footnotes omitted):

“[1] The State, whilst preferring that a will be made, prescribes a general scheme operating at law.

[2] Bentham [Civil Code, Part II, chapter iii] sets out the main objects of a scheme of intestate succession:

- (i) provision for the next generation;
- (ii) the satisfaction of reasonable expectation;
- (iii) observation of the principle of equality; and
- (iv) the perpetuation, in large measure, of the common law”.

37 With the growth of (government and non-government) bureaucracy associated with the modern welfare state, accompanied by the development of “administrative law” as a separate field of study in Anglo-Australian law, modern society appears to have moved beyond Maine’s norm of a social order in which reciprocal rights and duties arise, essentially, from the free agreement of individuals. Implicitly or otherwise, freedom of choice (abundant ‘though it might sometimes seem) is constrained by institutional imperatives, including market forces beyond the influence of most individuals.

38 An emphasis on consensus (or, at least, consultative decision-making) remains prominent; but it is located in a legal system, and an administrative structure, which call for inter-personal rights and obligations to be managed, at least to some extent, by others than ourselves. From cradle to grave, we live in a *managed* society.

- 39 In that society: whether the product of misadventure or age, incapacity for self-management is regarded as a normal incident of life. There is an expectation that everybody's affairs will be managed in an orderly way – by public, if not private initiative – as death approaches or incapacity intervenes. That expectation extends beyond death as estate administration is subject to family provision claims and, in limited cases, the possibility of the State's intestacy scheme being varied by discretionary "distribution orders" affecting "multiple spouses" or an Indigenous estate.
- 40 An impediment to exposition of any "history of succession law" is its complexity. Viewed at a macro level, broad themes are necessarily encountered as succession law and practice accommodate, and stimulate, changes in society. At a micro level, a necessity for attention to detail can call into question any picture painted by a broader brush.
- 41 This much might be noted. Maine's *Ancient Law* is widely regarded as a foundation for modern historical jurisprudence in jurisdictions under the sway of English legal traditions. It sits on the border of law and sociology. Significantly, in his study of the law in action, Maine commenced with the law of succession. He ranked it as of the first importance. Only after his exposition of ancient and modern ideas respecting wills and succession did he turn to the history of property, contract, delict and crime.
- 42 This is an inversion of the way legal history has since, often been examined. Often the order of priorities in the exposition of legal history proceeds from institutions, to crime, tort, contract and property - only incidentally treating the law of succession. See, for example, WJV Windeyer, *Lectures on Legal History* (2<sup>nd</sup> revised edition, Sydney, 1957); AC Castles, *An Australian Legal History* (Sydney, 1982). The order of priorities might shift, but the law of succession is generally treated well down the list (eg, TFT Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> edition, 1956)) or as a component of other topics (eg, JH Baker, *An Introduction to English Legal History* (4th edition, 2002)).

- 43 Maine's insight about the importance of the law of succession commends as equally important a study of its history as a means of understanding its reach and operation.
- 44 For better or worse, the complexity of any "history of the law of succession" demands that attention be given to foundational concepts, lest a framework for understanding the law, and how it operates in practice, is sacrificed to meaningless detail.
- 45 A "history of the law of succession" cannot help but be a roving conversation around intersecting topics if it is to rise above the one dimensional. It manifests a tendency to meander, back and forth, through time and space; uninhibited by demands for a linear narrative, but driven by a need to understand foundational concepts and shifts in their practical expression.

### **The Australian Paradigm : The Ideal of the Autonomous Individual Living, and Dying, in Community**

- 46 The paradigm assumption of the contemporary Australian law of succession is that, under the Australian law (whether encountered upon an exercise of the protective, probate, family provision or general equity jurisdictions of the Supreme Court of NSW or otherwise), *the focus of attention is the ideal of an autonomous individual living, and dying, in community*. Such a person is able to enjoy, and dispose of, property on his or her own account, within community constraints, if any. To the extent that a person lacks autonomy, a function of the law is to protect him or her against his or her vulnerability, doing for him or her what he or she is thought likely to have done if competent.
- 47 At different times and in different places, and at different stages of any person's life, there may be a different emphasis on the rights, obligations and expectations of the individual *vis-a-vis* those of his or her community. There is generally a tension between the perspectives of the individual and his or her community: not uncommonly, a search for accommodation within formal legal

parameters. In any event, the perspective of each – individual and community – needs to be kept in view.

- 48 The concepts of “property”, “succession” to property and associated ideas (including property “ownership”, “title” and “possession”) are functions of life, and death, in community. An individual may “own” property, possess or enjoy it – but, on a final analysis, only with the acquiescence, if not active support, of his or her community.
- 49 Divine law aside, Robinson Crusoe had no need of concepts of “property”, “law” or “property law” when living in isolation. At the other extreme, “private property” cannot be enjoyed by anybody to the exclusion of others unless the others respect, at least, social boundaries implicit in a claim of ownership.

#### **The Nature of “Succession Law” : Called into Existence by Purposeful Need**

- 50 “Succession” to property can occur without formal processes of law. In every society, in every age, it is likely to occur, at least to some extent, depending on the nature and value of property in search of a new owner. Property law’s accommodation of title acquired by possession facilitates this: F Pollock, *An Essay on Possession in the Common Law* (Oxford, 1888); S Green and J Randall, *The Tort of Conversion* (Oxford, 2009).
- 51 The relativity of title to property, and the acquisition of title by possession, are not the only specific intersections between the law of property and succession law worthy of notice. Another is the right of survivorship inherent in co-ownership by joint tenants, and the absence of that right in co-ownership by tenants in common: BA Helmore, *The Law of Property in NSW* (Sydney, 2<sup>nd</sup> edition, 1966), chapter 28.
- 52 “Succession law”, as a distinct formal construct, is called into being by a need to manage property, and disputes about property, in anticipation, or in consequence, of death.

#### **Anglo-Australian Legal History**

- 53 NSW law and practice has its origins in English law and practice.
- 54 From a NSW perspective, the seminal Australian cases governing an exercise of the probate and protective jurisdictions of the Supreme Court of New South Wales are the following (each of which applies precedential reasoning, a form of historical method, acquired from close association with the English legal system):
- (a) *Nissen v Grunden* (1912) 14 CLR 297 (dealing with the nature of the office of an executor and trustee of a deceased estate and their “entitlement” to remuneration).
  - (b) *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 and *Clay v Clay* (2001) 202 CLR 410 (which deal with the obligation to account of a guardian or protected estate manager).
  - (c) *Gibbons v Wright* (1954) 91 CLR 423 (dealing with the subjective, relative nature of incapacity to transact business).
  - (d) *Osborne v Smith* (1960) 105 CLR 153 (dealing with the circumstances in which a person, not formally a party to probate proceedings, might be bound by determination of the proceedings).
  - (e) *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 (dealing with the nature of *parens patriae* jurisdiction).
  - (f) *Protective Commissioner v D* (2004) 60 NSWLR 513 (dealing with the circumstances in which an *ex gratia* payment can be made out of the estate of an incapable person).
  - (g) *Nobarani v Mariconte* [2018] HCA 36 at [16] and [49] (confirming that a probate suit is “interest litigation”).

- 55 Each of these cases is explicitly grounded upon English law and practice developed over preceding centuries.
- 56 An historical account of English law and practice generally hinges on relationships between church and state and, within the state, competition between courts of common law and equity, amongst others.
- 57 In the formative years of the English legal system (perhaps grounded in Anglo-Saxon England, but generally located in the two centuries following the Norman Conquest of 1066), the prevailing social order – with a heavy emphasis on personal obligations of fealty owed to a lord or overlord of one type or another – can conveniently be described as “feudal” even if any definition of the term is contestable. “Feudalism” is a form of social order associated with times also described as “medieval” (another contestable term) located somewhere between the fall of Rome in 476 and the “renaissance” (yet another contestable term), broadly coincident with the “Reformation” of the early 1500s. Luther’s revolt against the Roman Catholic Church in 1517, and “religious wars” which followed in its wake, provide chronological clarity at that point.
- 58 Feudalism carried with it a royal preoccupation with entitlements to land, closely associated with economic, political and military control of society. The Christian Church was preoccupied – then, as now - with the spiritual dimension of life, embracing all aspects of the family, including birth, death and marriage.
- 59 The potential reach of church courts, and their interaction with secular authorities, transports historical inquiry back to the 11<sup>th</sup> and 12th centuries.
- 60 English legal historians customarily pass lightly over the Roman occupation of Britain and genuflect towards Anglo-Saxon society, before commencing their narrative with William the Conqueror’s accession to the English throne in 1066, and grounding the origins of the common law in the reign of Henry I (1100-1135) or, more firmly, in the reign of Henry II (1154-1189).

61 In his extensive treatment of “The Western Legal Tradition”, and what he perceived to be the symbiotic relationship between law and religion, Harold J Berman located the birth of the modern Western State in “The Papal Revolution” (sometimes called the “Investiture” controversy, crisis or struggle) arising out of Pope Gregory VII’s decision in about 1075 to withdraw the papacy from the control of the ruling secular power (the Holy Roman Emperor), and to establish an independent system of church government: H J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard, 1983); Berman, *Faith and Order: The Reconciliation of Law and Religion* (Emory University 1993; Eerdmans Publishing, 2000). Berman’s thesis is that that decision forced secular rulers to follow suit in establishment of parallel forms of government under their control.

62 Sir William Holdsworth described the potential reach of the church courts in England in the following terms, in *A History of English Law* (London, 7th edition, revised, 1956), volume I at page 614:

“In the twelfth century the ecclesiastical courts claimed to exercise a wide jurisdiction. (1) They claimed criminal jurisdiction in all cases in which a clerk was the accused, a jurisdiction over offences against religion, and a wide corrective jurisdiction over clergy and laity alike ‘pro salute animae’. A branch of the latter jurisdiction was the claim to enforce all promises made with oath or pledge of faith. (2) They claimed a jurisdiction over matrimonial and testamentary causes. Under the former head came all questions of marriage, divorce, and legitimacy; under the latter came grants of probate and administration, and the supervision of the executor and administrator. (3) They claimed exclusive cognizance of all matters which were in their nature ecclesiastical, such as ordination, consecration, celebration of service, the status of ecclesiastical persons, ecclesiastical property such as advowsons, land held in frankalmoign, and spiritual dues.

These claims were at no time admitted by the state in their entirety; and in the course of time most of these branches of jurisdiction have been appropriated by the state...”

63 In exposition of the jurisdiction claimed by the ecclesiastical courts in the 12th century, Holdsworth (at 619) added the following insights:

“The ecclesiastical courts exercised a wide disciplinary control over the moral life of the members of the church. The extracts published by Archdeacon Hale from the Act Books of six ecclesiastical courts between the years 1475 and 1640 illustrate the nature of this jurisdiction. The offences dealt with are

varied and numerous. They comprise adultery, procuration, incontinency, incest, defamation, sorcery, witchcraft, misbehaviour in church, neglect to attend church, swearing, profaning the Sabbath, blasphemy, drunkenness, haunting taverns, heretical opinions, profaning the church, usury, ploughing up the church path....”

64 In the period of which Holdsworth here wrote it was no easy thing for an Englishman to escape “membership of the church” or, in consequence, the jurisdiction of English ecclesiastical courts over moral life. The church was universal in its claims.

65 Of the church courts’ jurisdiction over testamentary business and grants of probate, Holdsworth (at page 625) wrote as follows (with footnotes omitted):

“The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and the administrator. All these branches of their jurisdiction could be exercised only over personal estate. This abandonment of jurisdiction to the ecclesiastical courts has tended, more than any other single cause, to accentuate the difference between real and personal property; for even when the ecclesiastical courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors....

The origin of this jurisdiction is difficult to discover. Neither the civil nor the canon law sanctioned it; and we hear nothing of it in England in the twelfth century. Selden says ‘I could never see an express probate in any particular case older than about Henry III’. Testators rather sought the protection of the king or some powerful individual; and the effect might be somewhat similar to that of a grant of probate in later law. But as early as the reign of Henry II it is probable that jurisdiction in cases of disputed wills belonged to the ecclesiastical courts. Glanvil says definitely that this was the law in his day; and amid all the disputes of Henry II’s reign, as to the limits of the jurisdiction of the ecclesiastical courts, no claim to exercise this species of jurisdiction was put forward by the king’s courts. Once admit that the ecclesiastical courts have jurisdiction to decide cases of disputed wills, and a jurisdiction to grant probate will soon follow....”

66 One of many compromises between church and state in old England was that the King’s Courts governed succession to land and the church’s ecclesiastical courts governed succession to personalty. The king was concerned to maintain control of land as a resource essential to economic, political, military and social control. The church was concerned to mediate between the temporal and spiritual spheres of life in management of family wealth. Both king and church stood to benefit financially from discharge of their respective



functions. The king extracted feudal dues (taxes) on inheritance of land, so it suited the Crown to have a fixed regime of rules governing transmission of land on death. The church encouraged the dying to ease their passage to heaven, by charitable gifts administered by the church, so it suited the institution to have a regime of rules which allowed clergy to encourage the dying to make a discretionary financial contribution to their work: F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (CUP, 2<sup>nd</sup> ed, 1968), pages 314, 318-319, 320-321, 325-326, 332, 356..

- 67 In medieval times and for a long time thereafter, the affairs of church and state were closely intertwined in ways beyond the comprehension of modern Australia. “Government” was more or less, in a fashion, administered through the church. Educated clergy served as public servants. The law of trusts emerged through tensions between church and state – a desire to evade feudal taxes led to widespread deployment of the “use” (later rebadged as the “trust”), predicated upon deployment of a corporation or a regenerating stream of “trustees” (often associated with a church organisation in the early days) intent upon continuity of land ownership, and enforcement of obligations of conscience, a product of Christian jurisprudence.
- 68 Much English history is remote from NSW experience, although traces remain. Australians need to be aware of English history – respectful of its contribution to Australian thought – but not captured by it. To assume too great an identity between Australian and English experience of law can be a trap, an invitation to error. From common constitutional origins the different legal systems of England and Australia have sometimes taken different paths to similar, but not identical, outcomes in pursuit of which differences may matter: eg, *Estate Polykarpou*; *Re a charity* [2016] NSWSC 409 at [117] *et seq* (jurisdiction over charitable gifts, absent a trust); *A v A* [2015] NSWSC 1778 at [72]-[75], reversed on other grounds in *IA v TA* [2016] NSWCA 179 (inherent protective jurisdiction; principles governing appointment of a tutor).
- 69 A study of Anglo-Australian legal history can point to ideas that continue to have functional significance. The administration of justice in England through

specialist courts and tribunals, sometimes in competition with each other, permitted the development of principles and practice tailored to solution of particular problems, eschewing unnecessarily abstract ideas. The common law tradition of judge-made law, developed on a case-by-case basis, fostered a variety of cultural perspectives conditioned by the purpose, or purposes, served by the jurisdiction exercised by each decision-maker. The law took, and takes, colour from the nature of questions routinely presented for decision.

- 70 The different procedures available in different English tribunals sometimes reflected the functions served by each tribunal. This can, perhaps, be seen most graphically in the different concept of “parties” applied in common law, chancery (equity) and ecclesiastical (probate) proceedings.
- 71 The common law courts approached the question of parties through the prism of a jury trial, in which each adversarial party needed to be before the court. Chancery entertained the idea of representative parties as a means of managing proceedings and, at the same time, binding the absent. Ecclesiastical courts conducted a probate suit on the basis that an interested non-party with notice of the proceedings, who did not take up an opportunity to intervene in the proceedings, was nevertheless bound by the outcome of the proceedings: *Osborne v Smith* (1960) 105 CLR 153 at 158-159. Each approach reflected the purpose served by an exercise of the particular court or tribunal’s jurisdiction. An understanding of the history of such bodies can thus inform a modern day court, entrusted with comparable heads of jurisdiction, in performance of its functions.
- 72 From about the time of “the Reformation” in the early 16<sup>th</sup> century, broad historical trends can be discerned which attract labels such as “the decline of feudalism”, “the rise of secularism” and “the enlightenment”. All such labels need to be treated with respectful reserve. In time, relationships between governor and governed became increasingly remote. Personal obligations of loyalty to an overlord characteristic of a feudal society became less reliable. In the administration of government feudal obligations of service (particularly

military service) were commuted to obligations to pay money. In administration of the church, dependence upon clerical mediation between an individual and God was challenged by protestant insistence upon direct access to God, followed in some quarters by rejection of God in favour of “science”, “nature” or the like.

- 73 This process has attracted various characterisations. What Maine characterised as a movement from status to contract analysed in terms of changing perceptions of family, others speak of as the development of liberal democracy: eg, Larry Siedentop, *Inventing the Individual: the Origins of Western Liberalism* (Allen Lane, 2014; Penguin Books, 2015).
- 74 In the early Tudor period of English history, ecclesiastical courts became less popular as avenues for the determination of civil disputes, losing business to the Court of Kings Bench. Experience of civil war and a need to reconfigure the king’s sources of revenue for the conduct of government led, at the time of the Restoration, to the abolition of military tenures by the [*Military*] *Tenures* [*Abolition*] Act 1660 (Eng), an incidental effect of which was to enlarge the right of testamentary disposition of land conferred (with restrictions affecting land held on “knight service”, a military tenure) by the *Statute of Wills* 1540 (Eng). The development of a market economy and industrialisation in the next 250 years increasingly displaced land ownership as a necessary foundation for wealth.
- 75 The legal system of the Colony of NSW was built, on the foundations of a convict society, during a period of active law reform in England. In the 19th century Anglo-Australian succession law, in particular, was secularised.
- 76 At about the same time as Australia was “discovered” by the English, Sir William Blackstone published an elementary law text that (in a multitude of posthumous editions) was for a century thereafter highly influential, particularly in the United States of America, and, to a lesser extent, in English colonies such as that of NSW: *Commentaries on the Laws of England* (1st ed, 1765-1769; 9th “received” ed, 1783).

77 In the first chapter of Book II of the *Commentaries* (entitled “Of the rights of things”), as recently republished by Oxford University Press under the general editorship of Professor Wilfrid Prest, Blackstone explained the law of succession in terms (quaint as they now seem) focused upon considerations of peace, good order and safety in civil society:

“Property, both in lands and movables, being [as he had postulated], originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it: for then it becomes, naturally speaking, *publici juris* [of public right] once more, and is liable to be again appropriated by the next occupant. ...

The most universal and effective way, of abandoning property, is by the death of the occupant; when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then... the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilised governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again common would occasion. And, farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances, to which no other title can be formed”.

78 As Blackstone appreciated, the character of the law can be closely associated with the character of institutions through which the law is administered.

79 In England, this involved, *inter alia*, the transfer of probate jurisdiction from ecclesiastical courts to a Court of Probate in 1857, and the adoption of a unified system of court administration with the commencement of the *Judicature Acts* of 1873 and 1875.

- 80 The second step was not necessary in NSW because, although the colony chose to administer different types of jurisdiction in separate branches of the Supreme Court of NSW, the Court was from the outset a repository of the several types of jurisdiction drawn together in England only by the *Judicature Acts*. Significantly, however, NSW established the office of a “probate judge” only in 1890, at which time the “ecclesiastical jurisdiction” exercised by the Court was rebadged as “probate jurisdiction”: Hargreaves and Helmore, *An Introduction to the Principles of Land Law (NSW)* (1963), page 147.
- 81 In England, passage of the *Probate Act 1857* (20 & 21 Victoria chapter 77) was accompanied by passage of the *Matrimonial Causes Act 1857* (20 & 21 Victoria chapter 85). At the expense of the ecclesiastical courts, the first Act established the Court of Probate; the second established a Court for Matrimonial Causes, with jurisdiction to grant a divorce. NSW followed suit but slowly. By local legislation, it conferred matrimonial (divorce) jurisdiction on the Supreme Court in 1873, with “probate” jurisdiction following in 1890: JM Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, Sydney, 1974), chapters 8-9.

### **The Nature and Scope of “Succession Law”**

- 82 In many contexts, “the law of succession” might simply be understood as “the law of wills”, “the law of probate” or “the law governing administration of a deceased estate” – perhaps modified by the availability of the jurisdiction of courts to grant family provision relief. In any event, an exposition of “the law of succession” can conveniently be structured around the heads of jurisdiction exercised by the Supreme Court of New South Wales, a central player in administration of succession law, however described.
- 83 Care generally needs to be taken not to adopt too narrow a perspective of the topic. That is because modern jurisprudential concepts do not neatly fit into a single analytical system of thought.
- 84 One needs to be aware of historical categories of thought – often reflective of institutional structures, as well as abstract law – but prepared to rise above

them when occasion demands. A prime example of that is found in the modern concept of a court-authorized will (a “statutory will”) for a person lacking testamentary capacity (*Succession Act 2006 NSW*, section 18): *Re Fenwick* (2009) 76 NSWLR 22 at [110] et seq. A proper understanding of a “statutory will” requires an understanding of the Supreme Court’s protective and probate jurisdictions, not merely one, the other, or principles of statutory interpretation.

- 85 A further, prominent example is found in society’s experience of enduring powers of attorney (*Powers of Attorney Act 2003 NSW*, replacing provisions of the *Conveyancing Act 1919 NSW* which commenced operation on 1 March 1985), accepting that a succession to property may be effected by an *inter vivos* transaction, coupled with the empirical observation that (rightly or wrongly) families sometimes deploy an enduring power of attorney in a pre-death disposal of the property of a mentally incapable principal.
- 86 A glue which holds together the disparate jurisdictions of the Supreme Court, and endeavours to prescribe and maintain standards of conduct in the general community, is the Court’s general equity jurisdiction.
- 87 Central to an exercise of equitable jurisdiction affecting management (administration) of property (an estate) of one person (variously described as a “principal” or “beneficiary”) by another is characterisation of the other as a “fiduciary” (a quasi agent/trustee) and enforcement of a fiduciary’s liability to account to the principal for performance of obligations of conscience which, in recognised circumstances, are justiciable.
- 88 In practice, in contemporary NSW “the law of succession” is seen as a subsidiary domain of the Supreme Court’s equity jurisdiction. There is no harm in this provided that everybody remains alert to the functional purposes served by the several heads of jurisdiction enjoyed by the Court.
- 89 On a strict, formal analysis (rarely encountered in practice), the terms upon which NSW received English law in the 1820s relieve Australian legal

historians of an obligation to trace the English law of succession to its origins. It is, in theory, enough to have an understanding of English law and practice on or about 25 July 1828, the legislated date of reception of English law in NSW.

- 90 In practice, the tendency of most lawyers – if they delve at all into legal history – is to treat the development of Anglo-Australian law as a continuum that reaches back, or moves forward, beyond any notional point of time at which English law arrived in Australia. Just as significant as the reception by Australia of English law was Australia’s embrace of the cultural traditions, institutional examples and modes of thought of English lawyers.
- 91 The character of succession law as an amalgam of procedural and substantive law finds expression in the terms upon which the Supreme Court of New South Wales was invested with probate, protective and equity jurisdiction, and in the terms upon which, by imperial legislation, the colony of NSW was deemed to receive English law.
- 92 At the time of reception of English law, “NSW” included what later became the colonies of Victoria and Queensland (substantially, the eastern portion of the Australian continent), leaving only what became South Australia and the Northern Territory in the centre, and Western Australia.

## **THE FORMAL ORIGINS OF NSW SUCCESSION LAW**

### **The Constitutional Origins and Development of the Supreme Court of NSW**

- 93 The Supreme Court was constituted in May 1824 by letters patent, known as the *Third Charter of Justice* (1823), promulgated pursuant to the Imperial statute 9 George IV Chapter 83, known colloquially as the *New South Wales Act*, 1823 (Imp).
- 94 Those instruments remain foundational to the Supreme Court’s constitution. When, on 1 July 1972, the Court adopted a *Judicature Act* system of court administration, section 22 of the *Supreme Court Act* 1970 NSW provided that

the Court, "as formerly established as the superior court of record in New South Wales is hereby continued".

- 95 SCA section 22 invites reference back to: (a) the *New South Wales Act*, (b) the *Third Charter of Justice*; (c) the statute 9 George IV Chapter 83 (Imp), known colloquially, and by later command of the *Short Titles Act 1896* (UK), as the *Australian Courts Act 1828* (Imp); and (d) a chain of Imperial Statutes culminating in 5 & 6 Victoria Chapter 76 (the *Australian Constitution Act 1842* (Imp)), pursuant to which the temporary operation of the earlier Imperial legislation (including the *Third Charter of Justice*) was extended indefinitely.
- 96 A quirky feature of the constitutional development of New South Wales is that, according to their terms, the *New South Wales Act* and the *Third Charter of Justice* were intended to have no more than temporary operation.
- 97 That necessitated enactment of the *Australian Courts Act* in 1828. Section 2 of the *Australian Courts Act* extended the operation of the *Third Charter of Justice* indefinitely, but in anticipation that it might be replaced. In fact, the *Third Charter of Justice* has never been replaced; but the *Australian Courts Act* re-enacted grants of jurisdiction found in the *New South Wales Act*, with a subtle difference affecting what is generally known as the Court's equity jurisdiction.
- 98 What we know as "probate" jurisdiction was conferred upon the Court as "ecclesiastical jurisdiction", adopting standards of practice in the Church of England's diocese of London as a template. See the *New South Wales Act*, section 10; the *Third Charter of Justice*, clauses 14-17; and the *Australian Courts Act*, section 12.
- 99 What we now know as "protective" jurisdiction (but which was once known as "lunacy" jurisdiction, coupled with jurisdiction over "infants", collectively described as *parens patriae* jurisdiction and sometimes still known by that designation) was conferred upon the Court by the *Third Charter of Justice*, clause 18, implicitly confirmed by the terms in which the Court's equity



jurisdiction was conferred by section 11 of the *Australian Courts Act*. JM Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, Sydney, 1974), pages 126-127; *Estate Polykarpou; re a Charity* [2016] NSWSC 409 at [175]-[181]; *In re WM (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552; 20 WN (NSW) 124.

- 100 The Court's equity jurisdiction was conferred, initially, by section 9 of the *New South Wales Act* 1823. It was re-enacted as section 11 of the *Australian Courts Act* in terms that included of a reference to the English Lord Chancellor's common law jurisdiction (a reference which accommodated doubts about whether the *Third Charter of Justice* had validly conferred *parens patriae* jurisdiction on the Court without an express warrant in the *New South Wales Act*).
- 101 For completeness, it should be noted that the Court's common law jurisdiction was conferred by reference to the jurisdiction of the three English Courts of Common Law (Kings Bench, Common Pleas and Exchequer): *New South Wales Act*, section 2, re-enacted as section 3 of the *Australian Courts Act*.
- 102 As important as the historical origins of these heads of jurisdiction remain, they have been, to some extent, superseded by enactment, in 1972, of section 23 of the *Supreme Court Act* 1970: *Re AAA* [2016] NSWSC 805 at [22]-[27]. That section provides that "[the] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".
- 103 SCA section 23 subtly, but profoundly, effected a change in the significance of historical expositions of the jurisdiction of the Supreme Court of New South Wales. It has been implicitly reinforced by subsequent constitutional developments. The *Australia Acts* 1986 (Cth/Imp) terminated Australia's colonial nexus to Britain. In *Kirk v Industrial Court of NSW* (2009) 239 CLR 531 at [55] reaffirmed the Supreme Court as an essential component of Australian constitutional government.

104 In this setting, the primary importance of the historical origins of the Supreme Court, and the several heads of jurisdiction it enjoys, may be thought to be to guide a principled application, and development, of the law. It provides a repository of instructive examples of the law in action.

### **History Conditions Attitudes of Mind**

105 Australians need to be conscious, nevertheless, that English battles between champions of common law and equity jurisprudence – law and practice – in the lead up to, or in the wake of, enactment of the English *Judicature Acts* are not really Australian battles unless Australians choose to make them so. A binary contrast between “law” and “equity” provides a dangerously incomplete image of Anglo-Australian law and practice, as the law and practice governing the probate and protective jurisdictions of the Supreme Court of NSW amply demonstrate. If local lawyers have chosen to administer different types of jurisdiction in separate guises within the Supreme Court that has been a matter of local choice. From birth, the Supreme Court has been a repository of plenary jurisdiction.

106 From the mid 19<sup>th</sup> century, NSW has enjoyed a strong commitment to “equity” as a separate field of study, thought and legal analysis whatever system of court administration be in vogue. That mindset has come under challenge from lawyers with different mindsets – most recently, lawyers enamoured of Europe’s Roman law origins.

107 The cultural traditions of NSW law have been, and can be, enriched by a study of Roman law. The logical structure of Roman law has often exercised a gravitational pull on the development of Anglo-Australian law: historically, in the area of succession law, through its influence on canon law, as administered by English ecclesiastical courts, and through the influence of civilian lawyers and clerics on the development of courts of equity. However, Roman law cannot set the metes and bounds of Anglo-Australian law – administered, and developed, by a “common law tradition” of judge-made, precedential law developed incrementally, experimentally and pragmatically

on a case-by-case basis, eschewing the code-centric “Roman (Civil) law tradition” with which it is often compared.

- 108 An essential element of the study of equity as a separate field of study within the common law tradition is an appreciation of the distinctive character of the probate and protective jurisdictions of the Supreme Court even though both are commonly characterised as components of the Court’s “equity” jurisdiction. An appreciation of distinctions between the Court’s various heads of jurisdiction often accompanies a study of legal history. In any event, it requires historical insight.
- 109 An illustration of how different jurisdictional imperatives may play out in the law of succession can be found in the interplay between probate law and equity’s concept of undue influence, brought to attention in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63] and analysed in *Boyce v Bunce* [2015] NSWSC 1924 at [33]-[60].

### **NSW’s reception of English law**

- 110 Section 24 of the *Australian Courts Act* established that (subject to subsequent legislative modification) “all laws and statutes in force within the realm of England at the time of passing this Act (not being inconsistent herewith or with any charter or letters patent or order in council which may be issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales and Van Diemens Land respectively, so far as the same can be applied within the said colonies....”.
- 111 In an era in which England’s judge-made law was largely “action-based” (that is, articulated in terms of forms of action and available remedies, rather than abstract principles said to drive the availability of a remedy), the principal significance of section 24 may have been to apply to the colonies legislation passed by the Parliament in Westminster in the five years between enactment of the *New South Wales Act 1823* (Imp) and the *Australian Courts Act 1828* (Imp).

- 112 Nothing of primary significance for the law of succession in NSW occupied that that interim, five-year period.
- 113 The big development in the law of probate that occurred at about that time was the English *Wills Act* 1837 (7 William IV and 1 Victoria chapter 26), which was adopted in NSW by 3 Victoria No. 5 in 1839.
- 114 Although statutory schemes for distribution of an intestate estate have been modified from time to time, in displays of generational change, the fundamental shift in approach to intestacies in English law occurred with enactment of the *Statute of Distribution(s)* 1670 (22 and 23 Charles II Chapter 10) , amended by the *Statute of Frauds* 1677 (29 Charles, II Chapter 3).
- 115 In the realm of the protective jurisdiction of the English Lord Chancellor (then more generally described as *parens patriae* jurisdiction), affecting both the lunacy jurisdiction and the infancy jurisdiction of the Lord Chancellor, what was of lasting significance to Australian law occurred no later than 1828.
- 116 In the preceding three decades Lord Chancellors acknowledged that their lunacy jurisdiction extended beyond the traditional classes of incapable people (idiots and lunatics) to embrace those who, through incapacity for self-management, were as much at risk of exploitation as an insane person: *Gibson v Jeyes* (1801) 6 Ves 267; 31 ER 1044 at 1047; 6 Ves Jun Supp 594; 34 ER 936; *Ridgeway v Darwin* (1802) 8 Ves 65; 32 ER 275; *Ex parte Cranmer* (1806) 12 Ves 445; 33 ER 168 at 170-171; *In re Holmes* (1827) 4 Russ 182; 38 ER 774.
- 117 In the same period the principles governing the Chancellor's lunacy and infancy jurisdictions were assimilated – both governed by the principle that the welfare and interests of the incapable person are the paramount concern: *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243 and, on appeal, *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 131; 4 ER 1078 at 1081; *Re Eve* [1986] 2 SCR 388; 31 DLR (4<sup>th</sup>) 1, approved by *Secretary, Department of Health and Community Services v JWB and SMB (Marion's*

Case) (1992) 175 CLR 218 at 258-259. Implicit in this development was abandonment of the Crown's feudal, proprietary interest in the conduct of the affairs of a person is incapacitated by age or infirmity.

- 118 The family provision jurisdiction of modern courts, which now seems to dominate so much of the Australian law of succession, was unknown to the 19th century. When it came, its local origins were located in New Zealand. It spread beyond Australia to England, demonstrating a conversational quality of Anglo-Australian law sometimes lost in talk of the reception of English law in Australia.
- 119 The legislative direction that English law be received in the colony of New South Wales as it was "at the time of the passing" of the *Australian Courts Act* 1828 (25 July 1828) has sometimes, one suspects, been honoured in the breach. Only in isolated cases has there been a pause to identify the precise state of English law, and its applicability to NSW conditions, as at the specified date. Any future necessity to do so has been diminished by the NSW Parliament's enactment of the *Imperial Acts Application Act* 1969 NSW.
- 120 On the whole, NSW's foundational, Imperial legislation of the 1820s has been taken as a general warrant for adaptation of English law and practice to local conditions; sometimes more closely, at other times more perfunctorily. In *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292 (in a statement approved by the High Court of Australia in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 625-626 and 634-636) the Privy Council observed that "As the population, wealth and commerce of [a] colony [increased], many rules and principles of English law, which were unsuitable to it in its infancy, [were] gradually ... attracted to it; and... the power of remodelling its laws [generally belonged] to the colonial legislature".
- 121 For a little more than a century leading up to the commencement of the *Australia Acts* 1986 (Cth/Imp) on 3 March 1986, Australian lawyers, in all three branches of government, took their bearings from current English law and practice. Only in the 20th century, and even then only slowly, did

Australian lawyers publish legal literature embodying departures from English legal literature.

- 122 An illustration of how deeply embedded in NSW law are some ancient English ideas about law can be found in the *Imperial Acts Application Act* 1969 NSW. That Act was an attempt to rationalise the continuing operation in NSW of English Statutes in force on 25 July 1828 when, by force of section 24 of the *Australian Courts Act* 1828 (Imp), they were received as law in NSW.
- 123 Sections 12-15 of the *Imperial Acts Application Act* 1969 re-enact provisions relating to the administration of estates originally found in English Statutes harking back to the reigns of Edward III (1327-1377), Charles II (1660-1685) James II (1685-1688) and William and Mary (1689-1694).
- 124 Sections 36-37 of the *Imperial Acts Application Act* respectively re-enact provisions, fundamental to the law of real property, taken from the English Statute generally known as *Quia Emptores* (1289-1290) 18 Edward I chapter 1 (which effectively abolished subinfeudation), and the [Military] Tenures [Abolition] Act 1660 (Eng), 12 Charles II chapter 24, which abolished military tenures.

## THE LAW OF SUCCESSION IN ENGLAND'S LEGAL HISTORY TRADITION

- 125 Something of the complexity of any history of the Anglo-Australian law of succession is conveyed in the following extract from the "Introduction" to WS Holdsworth and CW Vickers, *The Law Of Succession: Testamentary and Intestate* (Oxford, 1899), with references omitted and emphasis added. Two particular points are to be taken from the extract. First, there is no need of a "law of succession" until disputes arise. Secondly, what is meant by "the law of succession" depends upon time and circumstance:

"The Common Law of England springs from the custom of the King's Court. The King's Court dates from the reign of Henry II. The rules adopted by that Court as to the subject matter of the law, and as to the extent of its own jurisdiction have left marks upon all branches of English law which are plainly visible to this day. The law of succession is a striking illustration of this fact. *The difference between the law of personal property and the law of real*

*property date from the days of Glanvil and Bracton; and these differences are nowhere more strongly marked than in the law of succession; for part of the jurisdiction over successions to personal property was abandoned by the King's Court to the Ecclesiastical Court. It thus grew up among different surroundings and was fashioned on different principles.*

At a later period the equitable jurisdiction of the Chancellor supplemented the deficiencies of the existing law. The law of succession was not left untouched. *The chancellors took the existing law as administered both in the Common Law Courts and in the Ecclesiastical Courts as their starting point, and proceeded to develop it on lines all their own. They introduced many new rules into the law itself, and they assumed a jurisdiction which affected both the jurisdiction of the Common Law Courts and of the Ecclesiastical Courts.* The Ecclesiastical Courts have not now, it is true, any jurisdiction in cases of succession; but since 1857 the Court of Probate (now the Probate Divorce and Admiralty Division of the High Court) has taken their place.

*The law of succession therefore is complicated, not merely by the division into real and personal property, but by the separate existence of three sets of Courts which have all played their part in the development of the law. These are complications which make this subject perhaps one of the most difficult branches of English law. For these different Courts have administered, to some extent, different laws; and they have applied different rules of interpretation to the laws which they have administered. The rules of the present law will often seem merely arbitrary unless we know something of the historical environment in which they have been severally developed....*

*At the present day it is clear that we mean by the law of succession the law which regulates the transmission upon death of the property of one individual to one or more individuals. Was this the sense in which a law of succession was understood in the Anglo-Saxon and early Norman period? Did those customs which made up the law in that period deal with succession to and by individuals? Or did they aim rather at settling what we may call the equities existing among some organised group of individuals? Professor Maitland has taught us the inherent vagueness of primitive legal conceptions. Even at the present day men do not precisely analyse the meaning of common practices. And we cannot lay down any clear rules as to what a law of succession meant in that age, partly for lack of evidence, but chiefly because there were no clear ideas upon the subject. At any rate, we cannot say that any group was so permanently organised that the individual became merged in it. There are no agnatic groups; for maternal relatives bear the blood feud and share the 'wer' when a man has been slaying; what group in fact will bear the blood feud and share the 'wer' depends on the particular individual killed. There may be groups of kindred who till the soil and hold together so closely that they can defy the king. The individuals who compose these groups may have duties to fulfil to one another, may have rights of inheritance from one another; but to say they form a body corporate is to apply a finished legal conception to a savage age. It is a mistake of the same nature as Montesquieu made in his tale of the prehistoric Troglodytes 'who systematically violated their contracts and so perished utterly'. Nor can we say that they are undeveloped corporate bodies. 'As regards the Anglo Saxons', says Professor Maitland, 'We can find no proof of the theory that among them there prevailed anything that ought to be called family ownership. No law, no charter, no record of litigation, has been discovered which speaks of land as being owned by a maegd, a family or household, or*

any similar group of kinsman. This is the more noticeable because we often read of *familiae* which have rights in land; but these *familiae*, however, are not groups of kinsman, but convents of monks or clerks'. Family ownership in one sense, there may have been; but in a sense that is not inconsistent with individual ownership. A man does not cease to own the land because he is a tenant in common or a parcener; and so we find in Anglo-Saxon times that several persons hold land in 'parage'. They are probably relatives who have not yet divided land which has descended to them. The dead man's property goes naturally to a man's nearest kin. *There is no need of a law of succession till disputes arise. But what if owing, eg. to priestly exhortation, men try to dispose otherwise of their property in their lifetime or after their death? Rules must be made when none before were needed;* and those rules will take the shape of what once happened before men were tempted to break through the old accustomed order. Thus we get what are called 'birthrights'. The fact that a man's child gets at birth a right to hinder the dissipation of that, which in the course of time, will naturally be his, is now put forth as a definite rule. We have traces of this in Glanvil; if a man's land is divisible among his sons he cannot deprive any one of them of his reasonable share. Such rights imply, not family ownership, but the need to state and enforce rules once tacitly obeyed. *The period of unconscious practice is over. Opposing interests demand a law of succession.*

In modern times we divide the law of succession into the law of intestate and the law of testamentary succession. *A will in ancient times is, as Maine has shown, the exact opposite of what it became in later law. It is a species of conveyance; and wills of land when sanctioned by Statute in 1540 were still regarded as present conveyances. But it was attempts to make conveyances which brought birthrights prominently into notice – which led to the existence of a law of succession. A will is one of the means by which the rights of children can be defeated; a conveyance, inter vivos is another; and we find them for this reason classed in the same category by Bracton. And... we get many documents at this period which seem to partake equally of the nature of conveyances inter vivos and wills. If then a law of succession has become necessary because birthrights must be enforced, if a will is one of those instruments which tend to defeat them, our division of the subject must be: (1) the law of intestate succession; (2) the law defining how much a testator may leave in spite of that law of intestate succession....*

- 126 Other expositions of the history of the law of succession in England can be found in Pollock and Maitland, *The History of English Law Before the Time of Edward I* (2<sup>nd</sup> edition, 1968), Volume II, chapter 5; TFT Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> edition, 1956), pages 521-530, 538-541, 544-545 and 710-746; JH Baker, *An Introduction to English Legal History* (4<sup>th</sup> edition, 2002), chapter 8, 15 and 22; SF Milson, *Historical Foundations of the Common Law* (Oxford UP, 2<sup>nd</sup> ed, 1981); AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (Sweet and Maxwell, 4<sup>th</sup> ed, 1962); WJV Windeyer, *Lectures on Legal History* (Law Book Co, Sydney, 2<sup>nd</sup> revised ed, 1957). A short historical introduction to the law of succession in



England and NSW can be found in RS Geddes, CJ Rowland and P Studdert , *Wills, Probate And Administration Law in New South Wales* (LBC Information Services, 1996), based upon R Hastings and G Weir, *Probate Law and Practice* (Law Book Co, Sydney, 2<sup>nd</sup> ed, 1948).

- 127 An exploration of interaction between “Courts Christian” and the Court of Chancery in England in the formative years of development of modern equitable principles can be found in WJ Jones, *The Elizabethan Court of Chancery* (1967) at pages 400-417. Two major contributions of equity jurisprudence to the law of succession are: first, the provision of more effective machinery for the taking of accounts than otherwise available in the ecclesiastical courts or at law; and, secondly, recognition that an executor, administrator and trustee of a deceased estate are all (as we would say) “fiduciaries” liable to account for estate assets to others beneficially entitled to the assets.
- 128 The interplay between ecclesiastical courts, and the Court of Chancery led to a distinction between “a court of probate” and a “court of construction” which found an echo in NSW jurisprudence at least until such time as the Supreme Court was empowered by statute to make orders for the rectification of a will: see, now, the *Succession Act* 2006 NSW, section 27. A function of a court of probate was to determine the validity of a will. A function of a court of equity was to construe a will. The two functions were notionally, if not institutionally, to be kept separate.
- 129 Such distinction can be observed in its English institutional setting in the following extract from the first English edition (of 1884) of Story’s *Commentaries on Equity Jurisprudence*, chapter 34, omitting citations of authority:

“[1445].... [The] proper jurisdiction, as to the validity of last wills and testaments, belongs to [tribunals other than a court of equity]. Where a will respects personal estate, it belongs to the Court of Probate; and where it respects real estate, it belongs to the courts of common law. But, although this is regularly true, and courts of equity will not in an adversary suit, entertain jurisdiction to determine the validity of a will; yet, whenever a will

comes before them, as an incident in a cause, they necessarily entertain jurisdiction to some extent over the subject; and if the validity of the will is admitted by the parties or if it is otherwise established by the proper modes of proof, they act upon it to the fullest extent. If either of the parties should afterwards bring a new suit, to contest the determination of the validity of the will so proved, the Court of Equity, which has so determined it, would certainly grant a perpetual injunction.

[1446] The usual manner in which courts of equity proceed in such cases is this. If the parties admit the due execution and validity of the will, it is deemed *ipso facto* sufficiently proved. If the will is of personal estate, and a probate thereof is produced from the proper court, that is ordinarily deemed sufficient. But if the parties are dissatisfied with the probate, and contest the validity of the will, the Court of Equity, in which the controversy is depending, will suspend the determination of the cause, in order to enable the parties to try its validity before the proper tribunal, and will then govern itself by the result. If the will is of real estate, and its validity is contested in the cause, the court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action ejectment to be brought at law; and will govern its own judgement by the final result. If the will is established in either case, a perpetual injunction may be decreed.

[1447] but it is often the primary, although not the sole, object of a suit in equity, brought by devisees and others in interest, to establish the validity of a will of real estate; and thereupon to obtain a perpetual injunction against the heir-at-law, and others, to restrain them from contesting its validity in future. In such cases the jurisdiction, exercised by courts of equity, is somewhat analogous to that exercised in cases of bills of piece; and it is founded upon the like considerations in order to suppress interminable litigation, and to give security and repose to titles. In every case of this sort, courts of equity will, unless the heir waves it, direct an issue of *devisavit vel non*, to ascertain the validity of the will. According to the course of modern decisions, the heir has an option either to bring an action of a ejectment, or to have an issue of *devisavit vel non*. But it will not feel itself bound by a single verdict either way, if it is not entirely satisfactory; but it will direct new trials, until there is no longer any reasonable ground for doubt. But a new trial will not be directed unless there is substantial evidence for believing that, on a second trial, other evidence of a weighty nature bearing upon the existing conclusion can and will be produced, which was not heard before. The general rule established in courts of equity is that, upon every issue and trial at law, all the witnesses to the will should be examined, if practicable, unless the heir should waive the proof. But the rule is not absolutely inflexible, but it will yield to particular circumstances. When, by these means, upon a verdict, the validity of the will is fully established, the court will by its decree declare it to be well proved, and that it ought to be established, and will grant a perpetual injunction.

[1448] If, however, the devisees have no further present object, than merely to establish the will are perpetuating the testimony of the witnesses thereto, this may be done... by a proper bill for the purpose; and the latter is, indeed, what is usually meant by proving a will in Chancery...”.

130 Signposts in English legal history around which stories are told about the development of the law of property (including succession law) are the following topics:

- (a) the feudal system of land ownership which prohibited disposal of land by will.
- (b) the rise of the Use as a means of transmitting land despite feudal prohibition on testamentary dispositions of land.
- (c) the *Statute of Uses* 1535 (Eng), 27 Henry VIII chapter 10.
- (d) the *Statute of Wills* 1540 (Eng), 32 Henry VIII chapter 1.
- (e) the *[Military] Tenures [Abolition] Act* 1660 (Eng), 12 Charles II chapter 24.
- (f) the *Statute of Distribution(s)* 1670 (Eng), 22 & 23 Charles II chapter 10.
- (g) the *Statute of Frauds* 1677 (Eng), 29 Charles II chapter 3.
- (h) the *Wills Act* 1837 (Eng), 7 William IV and 1 Victoria chapter 26.
- (i) the *Probate Act* 1857 (Eng), 20 & 21 Victoria chapter 77.

131 These references are necessarily no more than indicative of major changes in English law – necessarily incomplete– but they provide common points of reference in the telling of the history of English property and succession law.

132 That history cannot be told without some descent into technical detail. A convenient exposition of such detail – long out of print – is AD Hargreaves and BA Helmore, *An Introduction to the Principles of Land Law (NSW)* (Law Book Co, Sydney, 1963) from chapters 6 and 21 of which (with editorial adaptation, but omitting footnotes) the following extracts are taken:

## “CHAPTER VI

### USES, TRUSTS AND EQUITABLE INTERESTS

#### IN GENERAL

The doctrine of tenure and its corollary the doctrine of estates provided an adequate basis for the land law of the early Middle Ages. They were the legal interpretation of the existing facts of feudalism. But when the feudal organisation of society began to disappear, when the State again emerged as a sufficient protector of the King's Peace, when the relationship of lord and vassal ceased to represent a fact of political and economic importance, the feudalised law began to lose its contact with the requirements of the life of the people. In particular, ...the rapid degradation of the incidents of feudal tenure into their ultimate form of financial extortion; and their existence, together with the consequent refusal of the common law to recognise the validity of a devise of land by will, provided an ever-growing incentive to escape from the meshes of an antiquated jurisprudence.

The means of escape had to be discovered outside the common law and not within it. By the end of the thirteenth century the distinction between the judicial and the executive functions had become sufficiently well marked to deter the royal courts from broadening the common law on their own responsibility; the law had become rigid, tied down to that typical English formalism which insisted that a remedy could only be obtained through the medium of an existing form of writ; and in the case of the land law, which by reason of its political and practical importance had been subjected to a rapid and precocious development, the number of writs in effect was closed. Nor could relief be looked for from the activities of Parliament, for the King was still the prime factor in legislation, and the King had all to lose and nothing to gain from the abolition of tenures and their incidents.

Faced with these difficulties the landowner turned his attention to the Use. The basis of this institution is a simple transfer of property to a trusted friend, who is to hold it not for his own benefit but for the purpose of carrying out instructions given to him by the transferor. Throughout the Middle Ages and beyond the Norman Conquest to Anglo-Saxon times we can trace a thin stream of these transactions, carried out for a multitude of purposes, such as a provision for his children while the transferor is on a Crusade. Above all, the use was familiarised in the thirteenth century by the Franciscans, whose vows of poverty forbade them to own land; the faithful provided them with houses by conveying them to a trusted owner “to the use of” the friars.

For the purpose of evading incidents of tenure and of devising land by will, the land was formally conveyed to two or more joint tenants and their heirs “to the use of” the grantor: the transferees, known as the “*feoffees to uses*”, thus became the legal owners of the fee simple; they alone were subject to incidents of tenure and their consequences, but as the most burdensome incidents took effect only on an inheritance of the land, they did not apply on the death of one joint tenant, and they could always be completely avoided by a conveyance from the surviving tenant to a new set of feoffees to uses. But though the legal estate was thus in the feoffees, the beneficiary, usually called the “*cestui que use*”, was allowed by them to reap all the advantages of ownership without its limitations; he was let into possession – that is, possession as opposed to seisin, which remained in the feoffees – but as he

was not seised, no incidents arose on his death; and for the same reason he was able to transfer his interest either *inter vivos* or by will without regard to the formal restrictions of the common law, as all that was required was a simple instruction to the feoffees to hold the land in the future to the use of the new beneficiary.

### THE COURT OF CHANCERY AND THE USE

The success of an institution such as the use depends entirely on the extent to which the feoffees can be trusted or coerced. Until the fourteenth century the frequency of uses had not been sufficient to provoke serious litigation, and perhaps for that reason they had not been incorporated into the common law; but their increasing popularity led to the inevitable frauds and evasions of dishonest feoffees, so that some remedy had to be found if the use were to survive. The door of the common law was closed to the *cestui que use*, but he could still seek redress from a higher court – the King himself. The King was the fountain of justice, and from that source he still retained a vague residuary power which had not been exhausted by his creation of the common law courts in the eleventh and twelfth centuries. This residuary power enabled him to temper the rigidity of the common law in those cases for which no remedy was provided, to apply to the exercise of a strict legal right that higher justice which we call *equity*. ...

It was [the] Court of Chancery [the Lord Chancellor's court of equity] which in the fifteenth century began to protect the interest of the *cestui que use* against the feoffees to uses. The latter remained the legal owners, the only tenants recognised by the courts of common law, the only persons capable of defending that legal ownership or of conveying it to others; but equity compelled them to exercise their legal rights on behalf of the beneficiaries. Furthermore, these beneficial interests were enforced not only against the original feoffees, but also against all who came to the land in such a way that they could not in conscience disregard them: so, the heirs or devisees of a sole feoffee, or one who took the land as a gift *inter vivos*, all were bound by the use, for they could fairly claim no greater interest than that which the donor had to give. Even a purchaser for value must hold for the benefit of the *cestuis que use* if at the time of his purchase he knew or ought to have known of the existence of the use. On the other hand, if such a purchaser acted honestly and had no such knowledge, then his conscience was not affected and he was allowed to disregard the claims of the beneficiaries; they thereby lost their equitable interest in the land itself, but of course could obtain redress against the transferor for "breach of confidence" – the modern breach of trust....

The feoffee to uses was thus the legal owner of the estate, but behind that legal ownership there was a beneficial ownership enjoyed exclusively by the *cestui que use*, resulting in a division of ownership corresponding to that distinction between common law and equity....

### THE STATUTE OF USES

The increased frequency of uses after the decision of the Chancellor to protect them resulted in a considerable diminution in the value of the feudal

incidents of tenure, a loss the greater part of which fell upon the King; for we have seen that the simplification of the facts of tenure by the process of escheat had largely concentrated the financial benefits of those incidents into the royal coffers. It was for the purpose of avoiding such losses in the future that in 1535 Henry VIII forced upon an unwilling Parliament the famous Statute of Uses [27 Henry VIII chapter 10]. This Act did not abolish uses; its object was to ensure that henceforth the seisin and so the legal estate should be vested in the *cestui que use* so that on his death feudal incidents would once more become due to the lord or the fee. Consequently it was provided that: -

‘where any person or persons stand or be seised... to the use, confidence or trust of any other person or persons or of any body politic... that in every such case all and every such person or persons and bodies politic that have... any such use in fee simple fee tail for term of life or for years... or in remainder or reverter shall stand and be seised... in lawful seisin estate and possession of the same... lands... to all intents of and in such like estates as they had or shall have in the use.’

The Act applied not only to those uses in existence when the Act came into operation but also to all future limitations. Thus, a grant

*to A and his heirs to the use of B and his heirs*

would before 1535 pass the legal fee simply to A, and B's interest would be equitable only; but the same grant after the statute would at once vest the legal fee simple in B: to use the technical phrase, *the use was executed by the statute*, and A would take nothing. Further, the *cestui que use* obtained a legal estate corresponding in *quantum* to that interest which but for the statute he would have taken in equity. A grant

*to A and his heirs to the use of B for life, with remainder to the use of C and his heirs*

would vest in B a legal life estate in possession and at the same moment a legal remainder in fee simple in C.

## THE STATUTE OF WILLS

The inevitable result of this abolition of dual ownership of land, at law and in equity, was to restore the application of feudal incidents on the death of the *cestui que use*, and at the same time to destroy the power of devising land by will, for the beneficial owner was now seised of the land for a legal estate and thus subject to its common law burdens. But the will of land had taken a firm hold on the minds of the people, its loss was resented, and its restoration was placed in the forefront of the demands of those rebels who took part in the Pilgrimage of Grace in 1539. Henry was compelled to compromise, and in 1540 the Statute of Wills [32 Henry VIII chapter 1] was enacted.

This statute enabled a testator to devise the whole of the land which he held by socage tenure, for from such a tenure arose no incidents of value; but his testamentary power extended to two-thirds only of land held by knight service, and in both cases provisions were made whereby the devisee was considered to be subject to feudal incidents as if he were the heir. It was not until the abolition of those incidents and the transformation of all freehold tenure into socage by the Statute of Tenures of 1660 [12 Charles II chapter 24] that the tenant of land obtained complete freedom of testation.

The Statute of Wills did not require nor did it restore the machinery of the use. The devisee took not an equitable interest as he had done before 1535; he took the legal estate, and he took it directly without the intervention of the Statute of Uses; but in construing the Act of 1540 the common law courts recognised the continuity between the old system and the new....

## TRUSTS

Although the Statute of Uses was in the main successful in its attempts to abolish the distinction between legal and equitable ownership, it was quickly recognised that that success was not complete. In particular, two types of equitable interests were not affected:-

- (a) *Uses of personalty.* The statute only applied where one was *seised* to the use of another. There was by that time no seisin of personal property, with which, therefore, the Act was not concerned: and as personalty included leaseholds, a grant  
*to A for 999 years to the use of B*  
would still vest the legal term of years in A, and B's beneficial interest would still be effective and enforceable only in equity.
- (b) *Active uses.* After some hesitation, the common law courts decided that the statute did not take away the legal estate from a feoffee who was directed to carry out some *active duty* which could not be fulfilled without it. Consequently, a grant  
*to A and his heirs upon trust to collect the rents and profits and pay them to B*  
would still vest the legal fee simple in A, for he would have no justification at law for collecting those rents without being seised of the land for a legal estate. For a similar reason, a trust for sale was outside the scope of the statute, and in both cases the enforcement of the duty remained in the hands of the Court of Chancery.

The use of personalty and the active use, not being executed by the statute, provided ample materials for the perpetuation and extension of the conception of equitable ownership which was to become the modern trust. But of equal importance in the history of the trust is the development of a *use upon a use*, and of another closely allied train of thought which is usually, though it seems, wrongly classified under the same head.

A. A grant *to A and his heirs to the use of B and his heirs to the use of C and his heirs.*

1. Before the statute, A obtained the legal fee simple. The equitable interest was vested in B alone, for having exhausted the whole of the beneficial interest in favour of B, the grantor could not proceed to declare a further use in favour of C. The last use was *repugnant* to the first, and equity compelled A to hold to the use of B alone.
2. After the statute, A still held to the use of B, who was the sole beneficiary. Consequently, the statute vested the legal estate in B. C took no interest before the statute, and therefore took no interest afterwards.

B. A grant *unto and to the use of B and his heirs to the use of C and his heirs*.

1. Before the statute, a grant of this kind was affected by an equitable rule of a different nature. In the fifteenth century, uses for the purpose of enabling the grantor to make a will of land were of such frequent occurrence that the existence of such a use in a simple grant of land became a presumption of equity. A grant to X and his heirs was thus construed by the Chancellor as a grant to X to the use of the grantor. But this "*resulting use*", being but a presumption, could be rebutted in either of two ways (1) by showing that X gave value (consideration) in return for the grant, or (2) by expressly declaring that X was to hold to his own use, as by a grant "*unto and to the use of X*". If this second method were adopted, it is clear that the whole beneficial interest has been vested in the grantee; hence, the declaration by the grantor of a further use would be repugnant and void. It follows that, before the statute, the grant which we are now considering would vest both the legal and beneficial ownership in B, and equity would refuse to recognise any claim on the part of C. B was not seised to the use of anyone.
2. After the statute, B's position was not affected. He still remained the absolute owner. He was still not seised to the use of another, and therefore the statute *did not apply*.

The "use upon a use" was not, of course, of frequent occurrence immediately after 1535. Its legal affect was finally determined in *Jane Tyrrel's Case* (1557) 2 Dyer 155a; 73 ER 336 where it accidentally arose as a result of the peculiar form of conveyance adopted. In both of our variations the result was the same: B obtained the legal estate, in the one case by virtue of the statute, in the other by virtue of the common law; and in neither did C take any interest either at law or in equity.

For at least a century after the statute the position remained unaltered. When, however, the burdensome feudal incidents were abolished by the Statute of Tenures [12 Charles II chapter 24] in 1660, the Crown's financial interest in the prohibition of equitable ownership ceased to exist, and with no excuse but that of popular demand the Chancellors felt able to regain the ground they had lost. They began to enforce not only active uses and uses of personalty but also those second uses which before this time had been considered to be repugnant; the statute was construed as determining the vesting of the legal estate only, and once that was ascertained its effects were exhausted even though equity compelled the owner of that estate to hold it for the benefit of another. So, in the two examples we have last given, the legal estate remained in the hands of B, but he was now deemed to hold it upon trust for C.

The first instances of this new development occur before 1660, but they appear to have been accompanied by some form of fraud, which on general equitable principles would be a sufficient additional



circumstance to take the cases out of the statute. After 1660 the existence of fraud ceased to be essential. Conveyancers began to use the two formulas of the “use upon a use” for the avowed purpose of creating equitable ownership; not now for the avoidance of feudal incidents or for acquiring a power of devise, but because of the greater freedom obtainable behind a trust in the manipulation of beneficial interests: and in 1738 Lord Chancellor Hardwicke was able to boast that the statute “had had no other effect than to add at most three words to a conveyance”.

There was a change of name: the new relationship became the “trust”, in which the legal owner was the “trustee”, while the old expressions “use”, “feoffee to uses”, and “cestui que use” were in practice reserved for those uses which were intended to be executed by the statute. But this changed terminology does not alter the fact that by an obvious technical ruse the statute had been successfully set aside and the jurisdiction of Chancery over equitable ownership completely restored....

## CHAPTER XXI

### SUCCESSION ON DEATH

#### SUCCESSION UNDER WILLS

... [The] right of testamentary alienation of land did not exist in the earlier part of the Middle Ages. Holdsworth, in his History of English Law, considers that although there is some evidence of alienation of lands by will in England before the end of the thirteenth century, from that time onwards a tenant in fee could not prevent his heir from inheriting what he left at his death, even though the right of free alienation in the tenant's life-time was recognised.

When uses became common and were protected by the Court of Chancery they were used as a means of testamentary alienation. The tenant in fee would convey his land to “feoffees to uses” to hold to the use of the feoffor for life and after his death to the uses declared by his last will. In fact Holdsworth states that in a large, or perhaps the largest, number of cases of feoffments to uses, the uses were those declared by the will of the feoffor. The general view is that the Statute of Uses put an end to testamentary alienations by means of feoffments to uses, though this proposition ... is not universally accepted.

Be this as it may, in 1540, five years after the Statute of Uses, the Statute of Wills was passed. This empowered tenants in fee simple to dispose by will of two-thirds of lands held by them by “knight service” (i.e. military tenure) and the whole of their lands held by socage tenure. The Statute of Charles II, which converted all military tenures into tenures by “free and common socage” completed the process and made the right of testamentary disposition of lands universal.

The famous Statute of Frauds required wills of land to be in writing signed by the deviser or by some other person in his presence and by his express direction, and to be attested and subscribed in the

presence of the deviser by three or four “credible” witnesses, though wills of personalty were not required to be signed or attested at all.

In 1837 the English Wills Act required a will to be signed at the foot or end thereof by the testator, or by some other person in his presence or by his direction, and that the signature should be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and that such witnesses should attest and subscribe the will in the presence of the testator. This Act was adopted in New South Wales on and from 1<sup>st</sup> January, 1840, and its provisions are now embodied in the Wills Probate and Administration Act 1898 [now chapter 2 of the *Succession Act 2006* NSW].

At common law there was not any need for a grant of probate or letters of administration of a will of lands. The supervision of wills of personalty (which included leasehold interests in land) was the prerogative of the ecclesiastical courts, which required such wills to be “proved” before them, but their jurisdiction did not extend to lands. If any dispute arose as to the validity of a will of land or as to who was entitled to land under a will or intestacy this was settled by the Court of Chancery....

### **SUCCESSION ON INTESTACY**

At common law, intestate succession to real property was a by-product of the feudal system, and had as its object the keeping of the inheritance intact, where possible, in the hands of a single male tenant, though females were not excluded from inheritance, nor was a blood relative excluded by reason only of the fact that relationship was traced through a female. The rules applied not only to the descent of lands on intestacy, but also the devolution of an estate tail. Inheritance was based on blood relationship, so that relatives by marriage were excluded, and even a surviving spouse as such. But there was no restriction on the claims of distant relatives, so that, in the absence of nearer relatives, any blood relationship would suffice, however remote, provided only that the pedigree could be properly proved.

Males were preferred to females, and amongst males of equal degree the rule of “*primogeniture*” (i.e. the prior right of the first born) applied, the eldest only inheriting. Where there were females in the nearest degree of relationship of the deceased, and no male, the females took jointly as “co-parceners”. Thus, if an intestate left three daughters, no sons and no issue of a son or sons, the daughters took jointly as “co-parceners”.

Lineal descendants represented a deceased ancestor, thus receiving the priority which the ancestor would have obtained if he had survived and so a grandson of the intestate, being the eldest son of his deceased eldest son, would take before his living second son, and, in the absence of sons of the eldest son, granddaughters being daughters of the eldest son, would take as co-parceners in priority to a second son.

The widow of the intestate, if surviving, was entitled to a life interest known as “dower” in one-third of the lands, a widower to a life interest in the whole of the lands of a female intestate as tenant by *curtesy*, but only if a child had been born alive capable of inheriting.

Though these rules of descent subsisted in England until 1925 they were swept away in New South Wales in 1862 by the Real Estate of Intestates Distribution Act (“Lang’s Act”) under which the rights of persons in distribution of real estate of an intestate were assimilated to those applicable to personal estate as established by the Statutes of Distribution, with the exceptions that a husband or wife was only entitled to the same interest as he or she would have had as tenant by the curtesy or doweress respectively under the old law.

These exceptions were abolished by the Probate Act 1890, and thenceforth both species of property devolved on intestacy in the same way. Lang’s Act provided that lands should vest in the legal personal representative, i.e. the administrator, or, in the case of partial intestacy, the executor or administrator with the will annexed, as in the case of chattels real, and this disposition was continued under the Probate Act 1890.

The rules of distribution, which, with minor amendments, had prevailed from the time of the last-mentioned Act, were considerably altered for all types of property by the Administration of Estates Act 1954.”

- 133 The importance of the English *Wills Act* of 1837 (which NSW adopted in 1840 and for which chapter 2 of the *Succession Act* 2006 NSW now provides) to the emergence of the modern concept of a “formal will” is underscored by Plucknett (*A Concise History of the Common Law*, 1956, page 740) in the following terms, with footnotes omitted:

“The Statute of Wills, 1540, merely required that a will of land should be ‘in writing’; the Statute of Frauds, 1677, required as an essential form that a devise of lands be in writing, signed, and witnessed ‘by three or four credible witnesses’; but the requirement of signing and witnessing of wills generally dates from 1837 [upon enactment of the *Wills Act* of that year]. The word ‘credible’ caused much trouble. By taking as a model the common law rules about witnesses, it was at once apparent that a person interested in the subject-matter could not be a witness; from this it followed that if a witness to a will devising land was a beneficiary under it, then he was not a ‘credible’ witness, since he could not give his evidence in court, with the result that (unless there was a sufficient number of other witnesses who were qualified) the will was void under the Statute of Frauds. This disastrous conclusion was remedied in 1752 when it was enacted that a legatee could be a witness, but the legacy to him should be void”.

- 134 The law relating to a beneficiary-witness has since been liberalised in NSW. Section 10(3) of the *Succession Act 2006 NSW* provides, *inter alia*, that a beneficial disposition to an attesting witness is not void if the court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.
- 135 A feature of the *Wills Act 1837* (Eng) which has since been thoroughly assimilated in modern thought is the stipulation (reproduced in section 30 of the *Succession Act 2006 NSW*) that a will takes effect, with respect to all property disposed of by the will, as if executed immediately before the death of the testator. The object of the *Wills Act 1837*, section 24, in adopting this rule was to abolish old law that a testator could only devise land which he or she owned at the date of making the will, and to equate realty with personalty, which was capable of being disposed of by will even if acquired by the testator after execution of the will: *McBride v Hudson* (1962) 107 CLR 604 at 614-615. An inconvenience of the old rule was that, if a will was to express the true intentions of the testator, it would have to be updated each time the testator acquired an interest in real property.
- 136 Sir John Baker's explanation for enactment of the Statute of Distribution(s) 1670, 22 & 23 Charles II chapter 10, is as follows, extracted (with footnotes omitted, but editorial adaptation) from *An Introduction To English Legal History* (Butterworths LexisNexis, London, 4<sup>th</sup> ed, 2002) at pages 386-387:

#### **“SUCCESSION ON DEATH**

Before the Norman conquest, English customs of succession seem to have been designed to provide for the whole family of the deceased by dividing his estate into aliquot parts or shares, usually halves or thirds. Under the influence of Christianity, the deceased was also given a 'part' to dispose of by testament (or through his representatives) for the good of his soul; the other two parts went to the widow and children. This system survived Norman feudalism in the case of moveable property, and survives in Scotland to the present day. Under the early common law there was a writ, similar to debt, called *de rationabili parte honorum*, whereby the widow and children could claim their reasonable parts. In the thirteenth century, however, the spiritual jurisdiction won control of testate and intestate succession to moveable estates. Thereafter questions about testaments and parts fell to the Church courts.

The Church encouraged people to make wills, even to the extent of disposing of all their movables, no doubt because testators were likely to be more impartial than administrators. As a result of this policy, the fixed parts of the widow and children could be claimed only if the deceased died wholly or partly intestate, or if a local custom preserved the older principle restricting testation to the deceased's part. Before 1600, the province of Canterbury (excepting Wales and London) came to permit complete freedom of testation, whereas the province of York adhered to the old system of parts until 1692. Freedom of testation was not universal in England until 1724, when it was extended to the city of London. Probate of wills, and litigation related thereto, belonged to the Church courts until 1857.

The administration of intestates' estates also belonged to the ecclesiastical authorities and in 1357 it was enacted that bishops were to commit their responsibilities in this connection to administrators, who were made capable of suing and being sued in the same way as executors. In the course of time, partly through inefficiency and partly through interference from the lay courts, the Church courts lost effective control over administrators, who usually divided the property among themselves once they had paid off any debts. After a particularly scandalous case of 1666 [*Hughes v Hughes* (1666) Carter's Rep 125; 124 ER 867] brought the matter to the king's personal notice, a statute was passed in 1670 to end this anarchic situation by laying down a definite scheme of distribution which administrators were obliged to observe. The thirds rule was incorporated into this scheme, but the dead man's part was abolished. The rules for distribution have since been adjusted many times by statute [currently, in NSW, Chapter 4 of the *Succession Act* 2006 NSW], though the rules are of necessity arbitrary... The extension of free testation had led to the harsh result that widows and children could be completely cut off by their husband or father making a will in favour of someone else. It was over two centuries before the remedy was found [in 20<sup>th</sup> century family provision legislation].

- 137 Note the date (1724) attributed to the arrival of "testamentary freedom" in England. Any such "freedom" is generally regarded as having been qualified by enactment of family provision legislation. That occurred in NSW, first, with the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 NSW, later replaced by the *Family Provision Act* 1982 NSW, since replaced by chapter 3 of the *Succession Act* 2006 NSW.
- 138 Well into the 20th century reference was commonly made to "the Statutes of Distributions" in discourse about intestate estates in NSW. That is the title to a treatment of intestate estates found in the popular text of HV Edwards, *The New South Wales Lawyer. A Handbook of the every-day laws of this State* (William Brooks & Co, Sydney, 2<sup>nd</sup> ed, 1904) at pages 167-168. The standard probate text of Hastings and Weir, *Probate Law and Practice* (Law Book Co, 2<sup>nd</sup> ed, 1948) – published before the intestacy rules operating in NSW were

restated in the *Administration of Estates Act* 1954 NSW, Division 2A of Part 2 of the *Wills, Probate and Administration Act* 1898 (enacted in 1977), and chapter 4 of the *Succession Act* 2006 NSW (enacted in 2008)– reproduced as material to everyday practice in NSW the Statute of Distribution(s) 1670: p 345 *et seq* and p740 *et seq*. An historical treatment of that Act can be found in *Hastings and Weir*, and in IJ Hardingham, *The Law of Intestate Succession in Australia and New Zealand* (Law Book Co, Sydney, 1978), chapter 2.

## **CHANGING CONCEPTS OF “FAMILY” AND “PROPERTY”**

- 139 A history of the law of succession is complicated, not only by a need to allow for changing concepts of “family” but, also, by a need to take into account changing concepts of “property”.
- 140 To illustrate this, a NSW lawyer need only look to the way succession law operated before enactment of the *Testator’s Family Maintenance and Guardianship of Infants Act* 1916 NSW and, then, to that Act’s evolution into the *Family Provision Act* 1982 NSW, replaced in its turn by Chapter 3 of the *Succession Act* 2006 NSW.
- 141 Testamentary freedom has been qualified by the availability of family provision relief, a discretionary remedy available in post-death litigation, for certain persons left without adequate provision for their proper maintenance, education and advancement in life. The categories of persons “eligible” to apply for family provision relief have expanded, and become more diffuse; and an expansive view of “property” is implicit in authorising claims to be made, not only against a deceased person’s estate, but also against property designated as “notional estate”. In a society in which there is now such a thing as “compulsory superannuation”, it is not altogether surprising that superannuation entitlements often sit on the boundary between the estate and notional estate of a deceased person: superannuation entitlements are commonly thought of as a person’s property, although their legal character requires them to be dealt with as notional estate.

## **THE CONCEPTUAL NATURE OF “PROPERTY” AND “TITLE” TO PROPERTY**

## **The Significance of “Property” *vis-à-vis* “The Law of Succession”**

- 142 It is as well to be reminded of the width and flexibility of the concept of “property”, foundational as it is to any treatment of “the law of succession”... succession to property.
- 143 “Inheritability” (in common with capacity for enjoyment, transferability and value) is a usual, although not an essential, characteristic of “property”.
- 144 A “law of succession” generally emerges from a need to manage property in transition either side of death, coupled with a need to resolve disputation as to entitlements to property upon death. Absent a need for management of property and relationships, property may pass quietly, informally, from one generation to the next by communal acceptance or negotiation.
- 145 Where “property” (or, perhaps more accurately, communal acceptance of ownership of property) requires something more than physical possession to pass from one generation to another it is likely to be accompanied by both a need for management and a need for dispute resolution procedures – the drivers of a formal law of succession.

### **Property : A Conceptual Definition**

- 146 Conceptually, “property” is “a thing” (tangible or intangible), recognised by law, as able to be:
- (a) possessed, used, enjoyed or destroyed by the holder (owner) of property rights referable to the thing; and
  - (b) transferred for the value (that is, bought and sold) or by way of gift; and/or
  - (c) inherited.

- 147 Characteristically, property can generally be divided between more than one person so that, at the same or different times, separate people, jointly or severally, may have a distinct, identifiable “interest” in the “thing” that constitutes property.
- 148 If a “thing” has a value to more than one person (particularly a “market” value) it is likely, consequentially, to be “property”. A modern illustration of this is “Bitcoin”, and comparable, alternative forms of “private” currency. The attribution of value to a thing is an expression of community.
- 149 Recognition of a “thing” capable of characterisation as “property” depends upon communal insights, aided by changes in technology or social practice. Copyright (a legal construct) is a comparatively modern phenomenon, dependent upon the invention of printing. More recent developments have given rein to broader notions of “intellectual property”. At a more mundane level: who, once, would have paid for a boutique bottle of water in a society served (as are urban living Australians) by free-flowing, publicly available water supplies on tap? At the other end of the spectrum, at a high level of constitutional thought: who in the current generation of Australians can really contemplate life in a society in which (as lived in England until at least the mid-19<sup>th</sup> century) public offices – including those critical to administration of the law and military service – were bought and sold as private property? The unimaginable and the commonplace are not beyond change in perceptions of property.
- 150 Lest these observations be dismissed as too abstract for everyday contemplation, note: (a) the current reference to the NSW Law Reform Commission of the question whether the law governing access to digital assets upon death or incapacity should be the subject of specific legislation (NSWLRC *Consultation Paper 20*, August 2018); and (b) the concept, meaning and application of the expression “literary executor” has evolved since recognition of copyright as a species of property and the development of markets for books, films and the like (Lindsay, “The Literary Executor and the



Lighthouse”, Judicial Speeches, NSW Supreme Court website, 16 November 2016).

### **Property and Contract : A Conceptual Contrast**

151 The concepts of “contract” and “property” are often related, either because they co-exist or because they can be contrasted one with the other.

152 An essential difference is that:

(a) contractual rights and obligations exist as between **parties** to an agreement, express or implied.

(b) property rights and obligations may exist as between a property “owner” and “the whole world”, independently of any agreement.

153 “Contract” is often, although not necessarily, a vehicle for a “promise” for something to be done, or not done, *over a period of time*.

154 “Property” is generally something that exists, or may exist, *at one or more points in time*.

155 These concepts can interact in ways that demonstrate that they are not mutually exclusive. Classic examples of that, not uncommonly encountered in the law of succession, are the equities which arise from “a contract to make a will” or the not-too-different concept of “mutual wills”. A broader example is a contract for the sale of future property. In each case, equitable principles play a role.

### **Title to Property is Relative to Competing Claims**

156 Anglo-Australian does not embrace a concept of “absolute” ownership, but is based upon the concept of “relativity of title”.

157 This reflects, *inter alia*, the fact that the concept of “property” was developed in English law through the vehicle of “actions” instituted, by one person

against another, in the old Courts of Common Law rather than in the abstract. In court proceedings the question is not whether one or another of the litigating parties has “the” (absolute) title to land so much as which of the contending parties (each relative to the other) has the “better” title.

### **Rationale for Grants of Probate in Solemn Form**

- 158 The possibility that the title to property inherited from a deceased estate might be defeated by a subsequent claim to the same property is, at core, the reason for distinguishing between a grant of probate in solemn form and a grant in common form.
- 159 A grant of probate (or administration) bears the character of both a court order and an instrument of title: *Estate Kouvakis; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233].
- 160 A grant in solemn form is not made unless the court is satisfied, so far as may be practicable, that all persons potentially interested in an estate have been given an opportunity to advance a claim to the estate inconsistent with the testamentary instrument the subject of the grant: *Estate Kouvakis* [2014] NSWSC 786 at [236]-[283].

### **PRACTICAL ILLUSTRATIONS: WHEN FORMALITIES MUST BE OBSERVED IN THE ENJOYMENT OF INHERITED PROPERTY**

- 161 An incident of an historical emphasis on the relativity of title to property is that, if in practice there is no need to engage with a court or regulatory system in the transfer or ownership of property, then *possession* may truly be said to be nine tenths of the law. An illustration of this is that, even with the complexity of modern society, not everybody needs a grant of probate or letters of administration in order to have their testamentary wishes carried out after death. Personal effects can, for example, be distributed without formality and their possessor can generally enjoy them without formality beyond the taking of possession.

- 162 One of the fundamental shifts that has occurred on our way to the modern “managed society” is that more and more people are likely to have “property” which can only be fully enjoyed if formal procedures are engaged. Those formal procedures may, or may not, govern “title” to property in the mindset of a lawyer. But, for practical purposes, a lawyer’s concept of title may be irrelevant. To illustrate this, one merely needs to reflect on how many deceased estates (rich and poor) involve “property” which cannot be fully accessed without formalities: land, a car, a bank account, superannuation entitlements, shares in a public company. Sometimes, the necessity for formality is a function of government: a public regulatory requirement. Sometimes, it is a function of commercial necessity or expediency: a need for conveniently available evidence of ownership, or control, so as to minimise the transactional costs of investigating such questions in future dealings; insurance comes to mind. In a managed society, not all bureaucracy is government owned.
- 163 It may be no accident that the first three cases in which indigenous families have invoked the jurisdiction of the Supreme Court (under Part 4.4 of the *Succession Act 2006*) to make a distribution order in respect of an intestate estate have involved superannuation entitlements not accessible without a grant of representation by the Court: *Re Estate Wilson deceased* [2017] NSWSC 1; 93 NSWLR 119; *The Estate of Mark Edward Tighe* [2018] NSWSC 163; *Re Estate Jerrard, deceased* [2018] NSWSC 781.
- 164 Indigenous communities accustomed to negotiating succession to property in accordance with traditional, customary law may be drawn into the broader, more formal Australian legal system by a need to manage property, and to resolve disputes about property, not amenable to traditional, customary forms of decision-making unaided by a court determination. Australian succession law, generally, may well be enriched by a need to reflect upon what is essential in this context.

## **GENERAL CHANGES IN LAW AND PRACTICE AFFECTING HOW “LAW” IS PERCEIVED AND ANALYSED**

- 165 By adopting a view of history that endeavours to make sense of the present by reference to the past we are better able, and we generally need, to recognise paradigm shifts in our legal system and the ways in which it works.
- 166 On one view, “history” is a process of storytelling designed to make sense of the present by reference to the past. It is necessarily selective, because nobody can easily encapsulate either the present or the past in a simple narrative. It often involves an attempt to identify what is “essential” to an understanding of present-day decision-making. A story told in one generation may need to be recalibrated in another in order to address contemporary problems in each.
- 167 As explained in “A Province of Modern Equity: Management of Life, Death and Estate Administration” (2016) 43 *Australian Bar Review* 9, much has changed since the foundations of Australian law were laid in the 19<sup>th</sup> century.
- 168 In the eyes of modern law, “death” is now, more than formerly, less an *event* and more a *process* that may commence before, and extend beyond, *physical death*. Incapacity for self-management is no longer, if it ever was, a rarity. Problems associated with management of the person, and property, of those unable to manage themselves or their affairs and now commonly confronted in everyday life. Individuals, living in community, are increasingly called upon to take steps in anticipation of incapacity and death.
- 169 When viewed in terms of the law in action, taking into account not only abstract “rights” and “obligations”, but also the practical operation of systems of enforcement, even though the collective imagination remains committed to concepts of “rights” and “obligations”, essentially all Australians live in an increasingly “managed society”.
- 170 It is, perhaps, a mark of how little Australia’s distinctive legal history is studied that older lawyers continue to think of Australian legal history as a continuation of English legal history, and younger lawyers have not been trained to see contemporary problems through the prism of history. A

tendency of modern lawyers in the “managed society” in which we live is to focus on legislation, to the exclusion of the underlying general law, and subconsciously to think of problems, and solutions, in terms of fast-developing administrative law principles and remedies.

- 171 This tendency of mind might be expected to continue if, and as, Australians are increasingly swept along by a search for solutions to every problem in an appeal to “human rights” upon an assumption that such “rights” can, or should, be enforced by law in an administrative tribunal, if not a court. An abstract, conceptualised “right” (prone to conflict with other claims of “right”) translates, perhaps, into a “principle” formulated to guide discretionary decision-making “in all the circumstances” of a particular case in a manner reflective of equity jurisprudence.
- 172 As a preliminary to more specific observations about “the law of succession” the following general observations find a place:
- (a) An historical legacy of the law of succession (with particular reference to an exercise of probate, or protective, jurisdiction) is that it is generally articulated in terms of *an action* to be taken in the Supreme Court, giving rise to *a remedy*, rather than in terms of an abstract exposition of law. It remains firmly tethered to legal practice and the thought patterns of legal practitioners rather than academic discourse.
  - (b) Nevertheless there is a discernible process of change affecting analysis and articulation of Australian law. This is, in part, a reflection of changes in legal education (particularly after World War II) with a shift in emphasis from on-the-job-training to university training; and, in part, a reflection of the development of legal literature directed to an exposition of *principles* rather than *practice* books.

- (c) Trial by jury has been largely abolished in civil proceedings, replaced by an emphasis on “case management” which has, in large measure, abolished the concept of a “trial” as a single, once-for-contest. This has aided a tendency for all claims of right to be qualified by the discretionary procedural hurdles they encounter in their vindication. In a case management decision-making environment “rights” and “obligations” evolve into guideline principles.
- (d) With a proliferation of legislation and bureaucratic structures (of both government and non-government) in modern society, the contemporary mindset has become increasingly captivated by “administrative law” jurisprudence and associated patterns of thought for the management public decision-making (informed, perhaps, by equity jurisprudence with its emphasis on discretionary decision making).
- (e) From all this, coupled with development of the welfare state and a more recent tendency to commercialise the provision of domestic services, has developed a “managed society” in which people, collectively and individually, generally expect, and enjoy, a society which regulates behaviour and outcomes from cradle to grave.
- (f) Management decision-making is characteristically governed by the purpose, or purposes, served by the making of a decision.

173 Illustrations of how Australia’s “managed society” operates are not wanting:

- (a) The nature of “property” people possess and enjoy has changed in a way that often requires formalities to be observed, whether those formalities do or do not govern the ownership of property. Property, people and relationships are liable to management decisions attending formalities.

- (b) The protective function of the State (formerly personified in the Crown) has changed over 250 years from a belief that mental illness is beyond cure to one in which it is seen as a natural, manageable incident of a normal life: Kathleen Jones, *Lunacy, Law and Conscience 1744-1845: The Social History of the Care of the Insane* (1955). The protective function is now thought not to be tied at all to any concept of “mental illness”, but directed towards management of “functional” incapacity.
- (c) The State has authorised the courts, and individuals, to make decisions on behalf, and in the name, of persons who lose mental capacity or otherwise lack capacity for self-management. The Court has power to make a statutory will on behalf of a person lacking testamentary capacity. Individuals have been encouraged to provide for their prospective incapacity through the execution of enduring powers of attorney and instruments appointing enduring guardians. Through statutory tribunals (currently the Guardianship Division of the NSW Civil and Administrative Tribunal, “NCAT”) a broad range of orders can be made, with comparatively little formality, affecting both the person and the property of a person lacking capacity for self-management.
- (d) By an exercise of family provision jurisdiction, the “testamentary freedom” of individuals is subject to management: qualified by the jurisdiction of the courts, in appropriate cases, to re-order a deceased person’s affairs as they “ought” to be so as to provide for those left without adequate provision from the person’s estate, or notional estate.

174 At the time of reception of English law in NSW the lunacy jurisdiction of the Lord Chancellor would not have been perceived as intersecting with the ecclesiastical jurisdiction of England’s church courts. Distinct jurisdictional concepts have been drawn together by subsequent developments – including:

(a) legislative authorisation of court-authorized (“statutory”) wills (*GAU v GAV* [2014] QCA 308; [2016] 1 QdR 1; *Re K’s Statutory Will* [2017] NSWSC 1711); (b) the need for judicial supervision fiduciaries purportedly exercising powers as an enduring attorney or guardian (*Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430; *Smith v Smith* [2017] NSWSC 408); and (c) the Court’s preparedness, when for the benefit and in the interests of a protected person, to approve a family settlement, involving an ex gratia payment out of the protected estate and a release of prospective entitlements to apply for family provision relief (*W v H* [2014] NSWSC 1696).

175 No mortal can rule the world from the grave; but a need to manage property in anticipation of death, or during incapacity for self-management, can profoundly affect perceptions and practice of “succession law” in all its dimensions.

## **SIGNPOSTS IN RECENT NSW HISTORY**

### **Probate Law**

176 The legislative history of the law of probate in NSW is told, in summary terms, in Geddes, Rowland and Studdert, *Wills, Probate and Administration Law in NSW* (1996), drawing upon *Hastings & Weir* (2<sup>nd</sup> Edition, 1948). That text takes the story to the mid-1990s, after which the tale focuses upon a push for uniform succession law across Australian jurisdictions – which, perhaps, stalled with enactment of the Succession Act 2006 NSW.

177 Written large, the story is essentially one of assimilation of the treatment of real and personal property; expansion of the concept of family to embrace empirically defined social relationships such as de facto relationships and ex-nuptial children, looking beyond the formalities of a registered marriage; a move away from patriarchal concepts of family and succession to property; confirmation of the role of an executor, administrator and trustee of a deceased estate as the holder of a fiduciary office; and greater flexibility in the administration of deceased estates (testate or intestate), including



empowerment of the Court to authorise the making of a will for a person lacking testamentary capacity, to order that a will be rectified to give effect to testamentary intention, to admit to probate a broad range of “informal wills”, to make distribution orders in favour of “multiple spouses” and in respect of an indigenous estate in application of intestacy rules.

### **Protective Jurisdiction**

- 178 The legislative history of the protective jurisdiction of the Supreme Court of NSW, insofar as it concerns those incapable of managing their own affairs through age or infirmity is told by PE Powell (formerly the Court’s Probate and Protective List Judge) in his aptly named monograph, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of NSW* (Forbes Society, Sydney, 2004).
- 179 That story is supplemented by cases such as *M v M* [2013] NSWSC 1495, *Ability One Financial Management Pty Limited & Another v JB by his tutor* [2014] NSWSC 45, *CJ v AKJ* [2015] NSWSC 498, *P v NSW Trustee & Guardian* [2015] NSWSC 579 and *Re AAA; Report on a Protected Person’s Attainment of the Age of Majority* [2016] NSWSC 805 which relate the story of a trend towards “privatisation” in the management of the estates of persons incapable of managing their own affairs.
- 180 In recent decades, the major legislative developments have been enactment of the *Protected Estates Act 1983* NSW (repealed and replaced by the *NSW Trustee and Guardian Act 2009* NSW), the *Guardianship Act 1987* and the *Powers of Attorney Act 2003* NSW (and its *Conveyancing Act 1919* NSW antecedents), supplemented by the *NSW Civil and Administrative Tribunal Act 2013* NSW. Recent reports of the NSW Law Reform Commission suggest that further legislative change can be expected in the foreseeable future.
- 181 Far-reaching developments to date have been the legislative introduction of enduring guardianship and enduring powers of attorney, followed closely by adaptation of judicial decision-making techniques to administrative decision-

making processes (including Tribunal processes) for an exercise of analogous powers.

- 182 On one view, the common thread in changes over recent decades and in ongoing proposals for change is a determination on the part of the government to “privatise” social welfare services, a process promoted by government as empowerment of citizens but seen by some as a contraction of public services sorely needed.
- 183 Although the Supreme Court’s protective (*parens patriae*) jurisdiction over children remains intact, most cases involving children these days find their way to the Family Court of Australia. Nevertheless, the Court’s “adoptions” jurisdiction remains an important part of its work, and much of the Court’s supervision of protected estates involves minors who have recovered substantial compensation for personal injuries.

### **Family Provision Jurisdiction**

- 184 The legislative history of the family provision jurisdiction is easily traced in references to the *Testator’s Family Maintenance and Guardianship of Infants Act 1916 NSW*, the *Family Provision Act 1982 NSW* and Chapter 3 of the *Succession Act 2006 NSW*.
- 185 That history can be supplemented by reference to a succession of judgments of the High Court of Australia, including classics such as *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19-20.
- 186 It can also be supplemented by an account of the expanding ranges of persons “eligible” to apply for family provision relief and expansion of the Court’s jurisdiction to reach beyond a deceased person’s “actual estate” to his or her “notional estate”.
- 187 However a deeper story, not so easily analysed, may be found in evolution of the Court’s approach to whether, and when, a family provision order “ought” to

be made. The Court's broad, "evaluative" discretions have, over time, enlarged the jurisdiction – from that of a safety net for abandoned widows and infant children who might otherwise be a charge on the State's social security system, to greater emphasis on objectively justifiable expectations, all the while disclaiming jurisdiction to remake a will in the interest of "fairness".

### **The General Equity Jurisdiction**

- 188 There is one commonly overlooked feature of the shift in the law, and its administration, from a focus on formal relationships to situational, transactional treatment of the process for succession of property. That is the ongoing difficulty of maintaining standards of conduct, and accountability, *vis a vis* the people (executors, administrators, trustees, financial managers and guardians) entrusted with management, or an influential role in assisting management, of the estate of a person who (by reason of age, infirmity or death) is incapable of self-management.
- 189 This is not a new problem, but a perennial one – all the more important because it is a core concern of lawyers in the administration of justice.
- 190 The challenge is to devise, and manage, a regulatory regime that protects legitimate interests without stifling an individual's freedom of self-management.
- 191 Cases such as *Smith v Smith* [2017] NSWSC 408 (involving misuse of an enduring power of attorney) bring to mind the observation of WJ Jones in *The Elizabethan Court of Chancery* (1967) at 412: "...towards the end of Elizabeth's reign [that is, around 1600] it was becoming clear that chancery action frequently resembled a bolting of the door of the horse had fled."
- 192 There is no ready solution to the problem of dealing with a defaulting fiduciary – still less, a fiduciary prospectively a defaulter – but, one imagines, there continues to be a need for a strong equity tradition, coupled with access to justice. This is particularly important in an environment in which management

of the person and property of vulnerable people is entrusted to private interests, including commercial interests, not otherwise or closely regulated. In that environment conflicts between interest and duty abound.

## CONCLUSION

- 193 Anything but a superficial treatment of “the History of the Law of Succession” is likely to expose fundamental questions about the nature, purpose and operation of law in a contemporary setting.
- 194 One key point to bear in mind is that the concept of a “law of succession” arises from *a need to manage* “property”, and disputes about “property”, either side of the death of a person who owns, or possesses, “property”.
- 195 Another key point – less abstract, but an incident of any management regime – is that the law and its administration are critically informed by the purpose, or purposes, served by the law. Management of property in the context of the law of succession is *purposeful management*.
- 196 Knowledge of the purposive character of the law is a critical necessity for successful legal practice.

GCL

7 September 2018

Revised 12 September 2018 (by insertion of paragraph 54(g))

\*\*\*\*\*