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PARTIES, PROPERTY AND NOTICE OF PROCEEDINGS IN SUCCESSION LAW CASES

by

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INTRODUCTION

1 A common feature of many "succession law cases" (broadly defined) is that a person who is not named as a party to proceedings may be required to be given notice of the proceedings, coupled with an opportunity to intervene in the proceedings, or an invitation to appear in the proceedings, as a preliminary to an exercise by the Court of protective jurisdiction or probate jurisdiction, or upon an exercise of statutory jurisdiction on an application for a statutory will or for family provision relief.

2 Each type of jurisdiction has its own dynamic, governed by the nature and purpose of the jurisdiction to be exercised by the Court. Nevertheless, a common feature of each type of case is that the Court, and all who appear before the Court, must turn an eye towards persons who are not named as a party in originating process.

3 In each type of proceeding, a central focus of attention is a person who, by reason of incapacity or death is, in one sense or another, absent from an adjudication about what should happen about his or her property. There is, accordingly, a special public interest in such proceedings in ensuring that the perspective of the "absent" person is duly consulted.

4 A failure on the part of the Court, and participants in proceedings before the Court, to turn attention to identification of persons who should be given notice of proceedings can cause the proceedings to miscarry.

5 Each type of proceeding generally, if not universally, involves a determination by the Court which affects property rights. An exercise of protective jurisdiction differs from the other types of case because it may routinely involve orders affecting "the person", as well as "the estate" of a person who is, or may be, in need of protection. Nevertheless, in a protective regime in which most cases concerning "the person" are routinely dealt with by the Guardianship Division of the Civil and Administrative Tribunal of NSW ("NCAT") , most cases in the NSW Supreme Court involving an exercise of protective jurisdiction involve an application for orders affecting the estate (property) of an incapable person.

THE NATURE OF "SUCCESSION LAW"

6 In a modern Australian setting, a practitioner engaged in the practice of "succession law" must be familiar with law and practice across traditional jurisdictional lines.

7 In the contemplation of a succession lawyer, "death" should be seen as a *process*, not merely an event, in circumstances in which government encourages people to prepare for disability as a preliminary to physical death, and to make testamentary provision for disposition of property in the wake of physical death.

8 In ordinary experience, the process may begin when a person prepares an enduring power of attorney and a will, not uncommonly accompanied by an

appointment of an enduring guardian. The process ordinarily only comes to an end after the time has expired for the making of an application for family provision relief and there is little practical likelihood of an extension of time being granted.

9 If, along the way, a person becomes incapable of managing his or her affairs, an application might be made to the Supreme Court for the appointment of a protected estate manager under section 41 of the *NSW Trustee and Guardian Act* 2009 NSW, or to NCAT's Guardianship Division for the appointment of a financial manager under the *Guardianship Act* 1987 NSW.

10 Whether or not the protective jurisdiction of the Court or the Tribunal is otherwise invoked, an application might be made for a Court authorised ("statutory") will under sections 18-26 of the *Succession Act* 2006 NSW in respect of a person who lacks testamentary capacity.

11 A succession law lawyer must be able to view the "process of death" from each point along the continuum, looking forward from the point of commencement to anticipate developments and risks, and backwards from the perspective of an accounting for a deceased estate in the context of potential family provision claims. An illustration of the need for this can be found in the potential for abuse of powers of attorney, and an accompanying need, in collecting the property of a deceased estate, to inquire whether there has been such abuse. Recent examples of the factual scenarios in which misuse of a power of attorney can impact on succession to property are *Smith v Smith* [2017] NSWSC 408 and *McFee v Reilly* [2018] NSWCA 322.

A PURPOSIVE DISTINCTION AFFECTING SERVICE OF NOTICE OF PROCEEDINGS

12 Although succession law cases, across the spectrum, require consideration of whether notice of proceedings should be given to somebody not named as a party in the proceedings, a sharp line can be drawn between proceedings involving the estate of a living person and proceedings involving a deceased estate.

13 In the former type of proceeding the focus of attention is upon the welfare of the living person. In the latter type of proceeding the focus is upon ascertaining and giving effect to any duly expressed testamentary intentions of the deceased person, subject to due determination of any application for family provision relief.

14 An application for the appointment of a protected estate manager (whether upon an exercise of statutory or inherent jurisdiction) is squarely within an exercise of protective jurisdiction. An application for a statutory will involves an analogous form of jurisdiction. An exercise of either type of jurisdiction requires the Court to measure what is done, or not done, against a consideration of whether it is in the interests, and for the benefit, of the person in need of protection, paying due attention to the known or presumed intentions of that person after due enquiry of family, carers and significant others who might be able to throw light on the person's personal circumstances and preferences. In this context, a person not named as a party to proceedings might be required to be given notice of them, principally to assist the Court to assist the person in need of protection.

15 In proceedings relating to a deceased estate, notice of proceedings is generally required to be given to a person who is not named as a party to proceedings so as to enable such a person to protect his or her interest (if any) in property of the deceased estate, and thereby incidentally assist the Court to ascertain and give effect to a deceased person's testamentary intentions.

16 In each type of case – whether before or after the death of the person whose perspective is central to an exercise of jurisdiction – the Court may encounter resistance on the part of some litigants to the provision of reasonable notice of the proceedings to others. As officers of the Court, legal practitioners have a professional obligation to assist the Court to ensure that such resistance does not lead to a miscarriage of justice.

17 All succession lawyers, no less than the Court, must constantly bear in mind the purpose of any jurisdiction invoked.

DIFFERENT CONCEPTS OF "INTEREST" ENGAGED

Probate Proceedings – Property Interests

18 Probate proceedings are conventionally described as "interest proceedings" because the standing of a party to probate proceedings is governed by whether or not the party has, or might have, a property interest in the outcome of the proceedings. It is the existence of the potential for such a property interest that requires potentially interested parties to be given notice of probate proceedings.

19 An eligibility to apply for family provision relief does not constitute an interest in property (eg, to support a caveat over land), but in the due administration of a deceased estate the proper disposition of an application for family provision relief requires that all eligible persons be given notice of the proceedings. Family provision proceedings are, to that extent, analogous to probate proceedings (with which they are commonly associated).

Protective Proceedings – Social Interests

20 Protective proceedings are not "interest proceedings" in any way analogous to characterisation of probate proceedings as "interest proceedings". Protective proceedings cannot, or at least should not, be conducted otherwise than in the interests, and for the benefit, of a person in need of protection. Other participants in such proceedings (usually family, carers or significant others in the life of an incapable person) do not have a *property* interest in the outcome of protective proceedings however expectant they may be of incidental gain.

21 However, protective proceedings are in their own way "interest proceedings" in the sense that (in assessing what is in the interests, and for the benefit, of a person in need of protection) the Court generally must inquire about social relationships ("social interests") in order to take into account the personal circumstances and preferences of the person in need of protection.

22 A decision about whether people within an incapable person's social network should (or should not) be given notice of protective proceedings can be critical to the proper determination of the proceedings.

23 This can be particularly so in the context of an application for a statutory will. On the one hand, the Court must be vigilant to protect an incapacitated person by ensuring that an applicant is not seeking personal advantage by quietly excluding others from participation in the proceedings and, on the other hand, vigilant to ensure that the welfare and preferences of an incapacitated person are not placed in jeopardy by unnecessary publication of the proceedings or details of his or her financial circumstances. A need to accommodate these types of tension finds expression in a recent amendment to section 22(e) of the *Succession Act* 2006 NSW.

24 Section 22 mandates that the Court must refuse leave to make an application for a statutory will unless it is satisfied of five matters, the last of which is set out in section 22(e). Before amendment that paragraph read:

> "Adequate steps have been taken *to allow representation of all persons with a legitimate interest* in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought".

The paragraph was amended by omitting the expression "allow representation of all persons" and by inserting instead the expression "allow representation, as the Court considers appropriate, of persons". The paragraph now reads:

> "Adequate steps have been taken *to allow representation, as the court considers appropriate, of persons with a legitimate interest* in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought".

25 The word "legitimate", alone, can be problematic in a context in which prospective beneficiaries have no property interest in an estate before a testator's death, although the word is not necessarily to be read as indicative of a legal interest. Deletion of the word "all" and insertion of the words "as the Court considers appropriate" accommodate uncertainty in the expression "person with a legitimate interest". The word "appropriate" finds expression

earlier in section 22 – in section 22(c), which requires that the Court be satisfied "it is or may be appropriate" for an order to be made; and in section 22(d), which provides that the Court must be satisfied that an applicant for leave is an appropriate person to make application before the Court – so that there is greater consistency in the section. What is "appropriate" in the circumstances of a particular case may be measured against the standard of what is in the interests, and for the benefit, of the incapacitated person.

THE PURPOSIVE NATURE OF THE COURT'S JURISDICTION

26 The *protective* jurisdiction exists for the 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 not done 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.

27 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.

28 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.

29 *An application for a statutory will* is essentially an exercise of statutory protective jurisdiction, but one which requires the Court to anticipate prospective probate and family provision proceedings. This can be seen in both the classic NSW authority (*Re Fenwick* (2009) 76 NSWLR 22) and the more recent judgment of the Queensland Court of Appeal (GAU v GAV [2016] 1 Qd R1; [2014] QCA 308) which provides authoritative guidance in NSW (*Re K's Statutory Will* (2017) 96 NSWLR 69) . Attention must be given to a search for an incapable testator's presumed, "testamentary intentions" (highlighted in sections 22(a) and 22(e) of the *Succession* Act) as a fact finding exercise but, even if only implicitly, such a search inevitably requires consideration of whether what is proposed is a will which is in the interests, and for the benefit, of the incapable person.

SEMINAL CASES BEARING UPON NOTICE OF PROCEEDINGS

The Protective Jurisdiction

30 Upon an exercise of protective jurisdiction a seminal authority which encapsulates ideas which continue to inform the due administration of a protected estate is the judgment of Lord Eldon in *Ex parte Whitbread in the matter of Hinde, a lunatic* (1816) 2 MER 99; 35 ER 878.

31 The headnote and judgment are extracted in *W v H* (2014] NSWSC 1696 at [39]-[40], here set out:

> '[39] With emphasis added, the headnote reads as follows:
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> > "*Practice of making an allowance* to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and *founded not on any supposed interest in the property, which cannot exist during the Lunatic's life-time, but upon the principle that the Court will act with reference to the Lunatic and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court.*"

[40] Lord Eldon's judgment (at 2 Mer 101-103; 35 ER 879) elaborates the specified principle, encased in a precautionary tale about the intersection between human frailty and what is necessary for the due administration of a protected estate (with emphasis here added):

> "The *Lord Chancellor* [Eldon]. For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund [**102**] which, it is probable, may one day devolve upon themselves. Nevertheless, *the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons.* So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; *upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars.* So also*, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, - but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.*
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> *The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes [**103**] care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.*

> The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children - to brothers and other collateral kindred; and *if we get to the principle, we find that it is not because the parties are next of kin to the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.*
>
> [No Order was made upon the Petition.]'

32 For my part, I find Lord Eldon's observations worthy of notice even in the context of a statutory will application. The Court endeavours to act with reference to an incapacitated person in his or her interests, and for his or her benefit, as it is probable he or she, himself or herself, would acted if of sound mind.

The Probate Jurisdiction

33 In the context of probate proceedings the seminal judgment, upon a consideration of the concept of notice of proceedings, is the judgment of the High Court of Australia in *Osborne v Smith* (1960) 105 CLR 153 at 158-159. There Kitto J wrote the following:

> "It was both proper and necessary in the second suit (concerning a deceased estate) to treat as binding upon the appellant the findings as to knowledge and approval which had been made in the first suit. She, it is true, was not a party to the first suit; but there is a well-established principle of probate practice, which grew up in the ecclesiastical courts, that any person having an interest may have himself made a party by intervening, and that if he, knowing what was passing, does not intervene, but is 'content to stand by and let his battle be fought by somebody else in the same interest', he is bound by the result, and is not to be allowed to re-open the case: *Wytcherley v Andrews* (1871) LR2 P & D 327; *Nani Afori Atta II v Nana Abu Bonsra II*I [1958] AC 95. The principle applies in the Supreme Court of NSW in its probate jurisdiction…."

34 This principle is central to a judicial determination that a grant of probate be issued "in solemn form": *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249] *et seq.* A grant in solemn form is binding on the parties to the probate proceedings in which it is granted, on anyone who has been duly

served with formal notice of the proceedings and on anyone of full capacity who has an interest in the proceedings, and notice of the proceedings, but chooses not to intervene.

35 Because a grant of probate in solemn form is, in practice if not in theory, harder to have revoked than a grant in common form, it is much preferred as a means of securing the title to estate property of beneficiaries named in a will.

36 The mere fact that a probate suit is contested does not justify the making of a grant in solemn form. A contested proceeding may conclude in a determination that there be no more than a grant in common form if, for example, the Court is not satisfied that all persons who have, or may have, an interest in the subject estate have been duly served with notice of the proceedings.

37 From time to time, lawyers anxious to overcome a deficiency in the due service of notices of proceedings have been known to insist that they are content for the proceedings to conclude with a grant in common form only. This cannot be condoned. The interests of justice, affecting both a testator and his or her true beneficiaries, require conformity with the established practice that a contested probate suit ordinarily should not be listed for hearing, let alone determined, without evidence capable of supporting a solemn form grant.

38 In practice, some practitioners endeavour to fudge their responsibility to ensure that due notice of probate proceedings is given to all interested parties by simply posting a letter or sending an email. Strictly, personal service is required, or an alternative form of proof (eg, by an acknowledgement of service) that all interested persons have been given due notice of the proceedings.

39 A failure to give due notice of proceedings to all eligible persons in family provision proceedings can cause injustice no less than in probate

proceedings. In *Re Estate Di Meglio; Di Meglio v Carle* [2018] NSWSC 1690 can be found an example of procedural problems that can arise where an eligible person is a protected person (within the meaning of section 38 of the NSW Trustee and Guardian Act 2009) and insufficient attention has been given to the identity of a person, or persons, authorised to manage the protected estate.

CONCLUSION

40 Unless close attention is given to questions about the service of notice of proceedings injustices may occur, if only in subjection of an estate to a multiplicity of proceedings or exposure of parties to costs orders consequent upon a failure to comply with the Court's requirements

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