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DISCOVERY AND SUBPOENAS IN PROBATE MATTERS

by

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INTRODUCTION

1. Questions about "Discovery and Subpoenas in Probate Matters" have been addressed, at length, in a judgment (*Re Estates Brooker-Pain and Solous* [2019] NSWSC 671) published as recently as 28 June 2019.

2. Those questions must be addressed in their institutional setting, constantly bearing in mind the purposive character of the Supreme Court's probate jurisdiction and the nature of problems to be addressed on an exercise of that jurisdiction.

THE PURPOSIVE CHARACTER OF PROBATE PROCEEDINGS

3. 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 the beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

4. The purposive character of the Court's probate jurisdiction informs any exercise of that jurisdiction. Probate practice is not simply an exercise of applying "rules". It is purpose-driven.

5. Steps taken by a party in disregard of the purpose for which the Court's probate jurisdiction exists, or for collateral purposes, may be treated by the Court as an abuse of the processes of the Court: *Williams v Spautz* (1992) 174 CLR 509 at 526-530. A proper forensic purpose in deployment of the Court's processes for the compulsory production of documents is one that serves the purpose for which the Court's jurisdiction exists.

AN INSTITUTIONAL IMPERATIVE

6. In NSW the institutional setting includes a need to accommodate the Court's Practice Note No. SC Eq 11, which, in terms, applies to the conduct of proceedings in the Probate List in the Equity Division of the Court.

7. The Practice Note counsels practitioners against a premature, or unnecessary, resort to procedures for "disclosure of documents", an expression broad enough to refer to procedures for the production of documents upon subpoena (or notice to produce) and formal procedures for the discovery of documents.

THE MOST COMMON FORMS OF "DISCOVERY" PROCESS IN PROBATE PROCEEDINGS

8. Although other forms of "discovery" processes may be available under the *Civil Procedure Act 2005* NSW or the *Uniform Civil Procedure Rules 2005* NSW (in common with other civil proceedings), the "discovery" procedures most commonly encountered in probate proceedings today are subpoenas for

the production of documents, notices to produce to court, and applications for a direction that affidavits be filed and served on particular issues.

9. In the old language, "discovery" is a procedure (derived from Equity jurisprudence) for disclosure of documents which is closely related to procedures for the administration of interrogatories. Interrogatories are, in Equity jurisprudence, a procedure for the discovery of facts, as distinct from the discovery of documents.

10. In more recent times, with the practical abolition of "general discovery" procedures and the assimilation of old style discovery procedures with subpoenas and notices to produce, one needs to be aware of the context in which the word "discovery" is used.

11. A novel feature of *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [80] – [88] is its expression of a preparedness on the part of the Court to entertain an application for a direction (based upon ideas propounded in *Larke v Nugus* [2000] WTLR 1033), on terms, that a person involved in the preparation or execution of a will, or charged with responsibility as an executor for administration of an estate, provide to the Court (for provision to interested persons upon an application of case management principles) an affidavit disclosing the circumstances in which a will was prepared or executed.

12. The frequency of such applications, and the efficacy of such directions, will be kept under review by the Court.

PROBLEMS COMMONLY ENCOUNTERED IN PROBATE PROCEEDINGS

13. In probate proceedings, problems commonly encountered by a person who has an expectation of inheritance by will, or who seeks to challenge the validity of a will, include the following:

    a. identification of all testamentary instruments of the deceased, including arguably “informal wills”.

    b. investigation of the circumstances in which one or more particular testamentary instruments were prepared and executed.

    c. investigation of a deceased person’s medical condition at the time he or she executed, or otherwise adopted, one or more testamentary instruments.

THE IDIOSYNCRATIC NATURE OF PROBATE PROCEEDINGS

14. Probate law and practice does not fit neatly into the conceptual framework of Practice Note SC EQ 11 because of the idiosyncratic features of probate proceedings and the possibility, not uncommonly encountered, that the effective conduct of such proceedings may require that, at an early stage of the proceedings, it may be necessary that: (a) steps be taken to bring within the control of the court all known testamentary instruments of a deceased person, the file of a solicitor who drafted one or more of those instruments, and medical or other records bearing upon the deceased’s testamentary capacity; or (b) a direction be given that a person (usually, but not necessarily, a solicitor) who prepared a will or supervised its execution, explain the circumstances surrounding preparation and execution of the will.

15. Nobody should lose sight of the fact that a production of documents to the Court does not, of itself, warrant a grant of access to them. A party who

cannot identity a proper forensic purpose in being granted access to documents in the custody of the court cannot expect to be granted access. A grant of access is not a mere formality.

16. Probate proceedings are most effectively conducted when all persons potentially interested in an estate are given due notice of the proceedings (so as to ensure that they are bound by the outcome of the proceedings, for reasons explained in *Osborne v Smith* (1960) 153 at 158-159) and parties active in the proceedings cooperate in their preparation for a final hearing.

17. Of central importance to the effective conduct of probate proceedings, *vis-a-vis* deployment of the Court's processes for the compulsory production of documents, are:

    a. clarity in *identification of the real questions in dispute* in the proceedings.

    b. identification of *a proper forensic purpose* in deployment of the Court's processes for the compulsory production of documents.

    c. *avoidance of oppression* in deployment of those processes.

    d. recognition that engagement of the Court's "discovery" processes must be governed by *considerations of reasonableness*, in the application of case management principles, in the particular case.

    e. an understanding that, in management of a probate case, *the Court may adapt its procedures to facilitate a determination of the real issues in dispute* by, for example:

        (i) permitting documents to be brought within the control of the Court at an early stage of

proceedings, if need be deferring any inspection of them until parties have identified a reasonable foundation for access at the particular time; or

(ii) directing that a solicitor or other person who prepared, or arranged for execution of a will explain the circumstances in which the will was prepared or executed.

18. The four touchstones for decision-making bear repetition: (a) identification of *real issues* in dispute; (b) identification of a *proper forensic purpose* for the deployment of discovery processes; (c) consideration of whether deployment of those processes is *oppressive* in nature or scope; and (d) consideration of whether the deployment of those processes is *reasonable* in the prevailing circumstances.

IDENTIFICATION OF "REAL ISSUES"

19. Identification of "real issues" in dispute requires familiarity with: (a) general principles governing a grant, or the revocation of a grant, of probate or administration; (b) the nature of probate pleadings, reminiscent of old style common law "issue pleadings"; and (c) the standard grounds for challenging the validity of a will.

20. On an application for a grant of probate (or the like), the grounds for a challenge to the validity of a will may address "formal validity" or "essential validity".

21. Grounds relating to formal validity focus on compliance with the formal requirements of a will prescribed by the *Succession Act 2006* NSW, bearing in

mind that, if those formalities have not been satisfied, an instrument may nevertheless be admitted to probate as an "informal will" pursuant to section 8 of the Act.

22. Standard grounds relating to "essential validity" are:

    a. a want of testamentary capacity at the time the will under challenge was executed.

    b. a want of knowledge and approval of the contents of the will.

    c. undue influence (in the sense of coercion).

    d. fraud.

23. In most cases attention is focussed on a want of testamentary capacity and a want of knowledge and approval.

24. Allegations of undue influence or fraud rarely succeed, but parties are often tempted (beyond the reasonable) to go in search of material to ground an allegation of that character.

25. An allegation of "suspicious circumstances" is commonly encountered (particularly, to rebut a presumption of knowledge and approval arising from proof of testamentary capacity and due execution), but it is not, of itself, a ground of challenge to the validity of a will.

COUNTERVAILING CONSIDERATIONS IN CASE MANAGEMENT

26. In the exercise of case management principles the Court, and all participants in probate proceedings, must generally be conscious that:

    a. it is generally in the interests of all persons with a *bona fide* interest in administration of a deceased estate that all potentially competing

wills, and information bearing upon their validity, be made available to all interested persons sooner rather than later; and

b. a countervailing consideration is a need to limit the extent to which "discovery" processes are used, unreasonably, to construct a speculative case.

27. Although the Court's procedures are adaptable to the circumstances of a particular case, probate proceedings (no less than other civil proceedings in the Court) are driven by a need for the definition of "real issues in dispute" by reference to pleadings (or the like), not by demands for "discovery" by whatever name known.

28. Care needs to be taken not to allow proceedings to be subverted by a premature, or otherwise inappropriate, deployment of "discovery" processes.

29. Demands for "discovery" unconstrained by pleadings can be insatiable, frustrating the purpose for which the Court's probate jurisdiction exists and subjecting parties to oppressive procedures and costs.

CONCLUSION

30. Given the public interest character of probate proceedings, importance attaches to the Court's ongoing control of its own processes, including those for "discovery" and "subpoenas".

31. Questions which arise concerning "Discovery and Subpoenas in Probate Matters" should be addressed in that context, and by reference to the purposive character of the Court's probate jurisdiction.

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