

**COLLEGE OF LAW
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PROBATE LAW AND PRACTICE: AN APPETITE FOR CHANGE

by

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INTRODUCTION

1. In the Supreme Court of NSW, there is an appetite for change in the way the Court's probate jurisdiction is exercised.
2. This can be observed in judgments relating to both substantive and adjectival law, and in the Court's aspiration to develop a program for routine applications for a grant of probate or administration to be dealt with electronically.
3. *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [60] drew attention to distinctive features of probate proceedings, in a judgment recognizing a need for flexibility in court procedures designed to facilitate a timely, and cost-effective, disclosure of: (a) a deceased person's testamentary instruments; (b) the circumstances in which testamentary instruments were prepared and executed; and (c) medical records bearing upon a will-waker's testamentary capacity.
4. In *Mekhail v Hana* [2019] NSWCA 197 at [163] – [173] Leeming JA, with whom Basten JA at [1] agreed, developed a critique of principles governing a determination of testamentary capacity which built upon their earlier expressed views in *Carr v Homersham* (2018) 97 NSWLR 328; [2018] NSWCA 65 at [5] – [6] and [133] – [134].

5. Their Honours' observations cast doubt on the utility of analyses of testamentary capacity based upon: (a) a treatment of *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 as if a statutory formula; and (b) use of formulaic language about presumptions and shifting burdens of proof.
6. For the purpose of this paper, I may be forgiven for noticing that their Honours expressed agreement with the following observations I made in a paper presented to a South Australian Conference last year:

“Although conventional, this style of language does not sit comfortably with the way a modern probate suit is heard by a judge sitting alone, without a jury, receiving almost all the evidence on both sides of a question by affidavits, upon which deponents are selectively cross examined. In the modern form of ‘judge alone (case managed) trial’ it is generally artificial, at least at a final hearing, to analyse a case in terms of a ‘prima facie case’ or dispositive ‘presumptions’. By the time a judge is called upon to determine a case, it generally must be determined on all the evidence then before the Court, drawing whatever inferences may be available from that evidence.

What is perceived to be ‘law’ upon an exercise of probate jurisdiction is often no more than a reflection of ingrained attitudes of mind about case management based upon established practice. One needs to approach talk of ‘presumptions’ and shifting ‘burdens of proof’ with respect, but critically. When the language of the law does not sit comfortably with actual practice, a re-assessment of law, practice and their interaction may be called for in order to bring them into line. This might be done relatively easily with an appreciation that a ‘presumption’ is not, in the current context, so much a ‘legal rule’ as a common ‘inference’ drawn from particular types of evidence. It is, after all, a ‘rebuttable presumption of fact’ even if hedged about by formalistic reasoning.”

7. The key point to notice in these observations is the reference to “case management” in the context of probate proceedings.
8. The Court has determined that proceedings in the Probate List should be managed in a manner more in keeping with how proceedings in other specialist lists (in particular, the Family Provision List and the Real Property List) are managed, by the List Judge.

9. Hitherto, proceedings in the Probate List have been case managed, in the first instance, by a “Probate Registrar” (a Senior Deputy Registrar working under the supervision of the Prothonotary), with proceedings referred to the Probate List Judge to deal with particular problems (including notices of motion) where necessary or expedient for a referral to be made. In that context, the primary role of the Probate List Judge on a List Day has been to solve particular problems as they arise.
10. From the commencement of the new court term in 2020, a new Probate List case management regime will be introduced, and kept under review.
11. As currently envisaged, the Probate List Judge will ordinarily case manage proceedings in the Probate List rather than a Registrar. Nevertheless, as circumstances may dictate, particular business may be referred to a Registrar by the Judge.

THE COURSE OF PROCEEDINGS INVOLVING A CHALLENGE TO THE VALIDITY OF A WILL

12. The major departures from current practice in case management of probate proceedings are likely to relate to proceedings involving a challenge to the validity of a testamentary instrument.
13. Contested proceedings in which the essential validity of a testamentary instrument is in dispute will ordinarily be referred to mediation (or require certification by the solicitors for all parties that they have conducted a settlement conference *inter partes*) before directions are given for substantive preparation for a final hearing. Accordingly, contested proceedings will ordinarily proceed to a final hearing (if necessary) in two distinct stages, separated by a mediation or a settlement conference.
14. Subject to such, if any, requirement that there be for approval of a settlement (for example, if a grant of probate in solemn form is sought or the interests of a minor are involved), it is open to the parties to settle proceedings at any time. Hope springs eternal.

15. At an early stage of proceedings, all parties may be required (by a direction of the Court) to complete, file and serve a questionnaire in the form of a "Disclosure Statement" *via* which all known testamentary instruments, repositories of those instruments and a deceased person's medical records can be brought to attention. A lack of candour in completion of a Disclosure Statement may be visited with an order for costs.
16. No subpoenas for the production of documents will be able to be issued, and no notices for the production of documents will be able to be served, without the leave of a Judge sought on notice to all parties actively involved in proceedings.
17. The Court will give early consideration to whether it is necessary or desirable for provision to be made for a return of subpoenas for the production of documents, or notices for the production of documents to the Court, *limited* to bringing within the control of the Court (with or without liberty to apply for access to any documents produced to the Court):
 - a) all known testamentary instruments of the deceased.
 - b) the file of any solicitor or other person known to have prepared, or supervised the execution of, a testamentary instrument of the deceased.
 - c) clinical records of a treating doctor of the deceased (*not* medical, hospital or nursing home records generally).
 - d) any orders, and supporting reasons for decision, of NCAT relating to the welfare of the deceased (*not* the whole NCAT file).
18. In deciding whether or not to make a *general* grant of leave for the issue of subpoenas for the production of documents or for the service of notices for the production of documents to the Court, and upon a determination of any

application made for a subpoena or notice to produce to be set aside, the Court will ordinarily attach importance to:

- a) whether there is clarity in *identification of the real questions in dispute* in the proceedings.
 - b) whether a *proper forensic purpose* has been identified justifying a deployment of the Court's processes for the compulsory production of documents at the time of decision.
 - c) whether the deployment of those processes involve an element of *oppression*.
 - d) whether *considerations of reasonableness*, in the application of case management principles to the particular case, should govern deployment of the Court's processes.
 - e) whether the Court's processes for the compulsory production of documents might be displaced, or supplemented, by *an order for the provision of an affidavit or affidavits* directed to identified topics.
19. Access to documents produced to the Court on subpoena, or in response to a notice to produce, will not ordinarily be granted to any party unless and until that party has demonstrated a proper forensic purpose for inspection of the records. Establishment of a proper forensic purpose will ordinarily require that a party has, to the best of his or her knowledge, information and belief, pleaded a case and supported that case by affidavit evidence or, at least, articulated a case that satisfies the Court that the applicant for access is not simply "fishing" for a case. Due completion of a Disclosure Statement might aid demonstration of a proper forensic purpose.
20. The Court will give early consideration to whether orders should be made (as contemplated in *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [98] – [102]) for provision to the Court, and service on all parties, of an

affidavit, or affidavits, deposing to the circumstances in which a testamentary instrument was prepared or executed.

21. In consideration whether the proceedings are ready for a referral to mediation, the Court will generally consider whether there has been:
 - a) a sufficient identification of the deceased's testamentary instruments;
 - b) a sufficient service of notice of the proceedings on interested persons; and
 - c) a sufficient identification of real questions in dispute.
22. If satisfied that the proceedings are ready for referral to mediation, the Court will make an order for mediation under section 26 of the *Civil Procedure Act* 2005 NSW and give directions for the conduct of the mediation, including a direction that each party file and serve a written estimate of costs.
23. In the ordinary course, recognizing that a mediation may be directed (amongst other things) to settlement of questions in dispute, the fundamental prerequisites for an order by the Court that proceedings be referred for mediation may be:
 - a) the disclosure of all known testamentary instruments (including wills, codicils and "informal wills") of the deceased; and
 - b) proof of service of notice of the proceedings on all persons interested in the outcome of the proceedings (confirmed by an affidavit compliant with UCPR Form 151) insofar as such persons can reasonably be identified and served.
24. If those conditions are satisfied, an order for mediation may be made at the outset of contested proceedings or soon thereafter.

25. In the ordinary course, absent arrangements for fast tracking proceedings to mediation (or a settlement conference), the Court expects that there should be no more (and preferably fewer) than three or four directions hearings before mediation is held.
26. The object of the Court's directions preliminary to mediation (or a settlement conference) will ordinarily be to expose questions in dispute, and evidence bearing on those questions, in sufficient detail to facilitate the conduct of a meaningful mediation without undue costs. Save in exceptional circumstances, leave to adduce expert evidence (or to issue subpoenas for the production of documents, or to serve notices to produce, generally) will not ordinarily be granted in advance of mediation.
27. In preparation of proceedings for a contested hearing following an unsuccessful mediation, the Court will ordinarily allow the parties an opportunity to address the following topics:
 - a) Whether any application is made for an amendment of pleadings.
 - b) Whether any (and, if so, what) substantive affidavits are required.
 - c) Whether any (and, if so, what) leave should be granted for forensic expert evidence (e.g., medical, handwriting or I.P. evidence) to be adduced by a joint or several experts.
 - d) Whether any (and, if so, what) leave should be given for the issue of subpoenas for the production of documents or the service of notices to produce.
 - e) Whether any (and, if so, what) orders should be made for discovery.

CAVEATS

28. In probate practice, a caveat is a notice to the Court not to allow proceedings to be taken with respect to a particular deceased estate without notice to the

caveator: *Estate Kouvakis; Lucas v Konakis* [2014] NSWSC 786 at [242]. A person who lodges a caveat without proper cause may be liable to a costs order.

29. Where a caveat is lodged in respect of a deceased estate, proceedings for a grant of probate or administration generally depend upon:
 - a) the caveat lapsing (after the expiry of its six months duration) without lodgement of a further caveat;
 - b) an order being made by the Court for the caveat to cease being in force; or
 - c) the filing of a statement of claim for a grant naming the caveator as a defendant.

30. An application for an order that a caveat cease to be in force may provide an occasion for: (a) testing whether the caveator has a sufficient interest in the deceased estate to require that any application for a grant of probate or administration be made by way of proceedings commenced by a statement of claim; (b) ascertaining the strength of any challenge made by the caveator to the validity of a will or other testamentary instrument of the deceased; (c) weighing that challenge against competing cases for a grant of administration of an estate; and (d) applying case management principles to advance administration of the deceased's estate.

31. Upon an application for an order that a caveat cease to be in force:
 - a) the applicant *and* the respondent caveator may *both* be ordered to file and serve an affidavit, or affidavits, identifying the nature of the relief to be sought on an application for a grant and the grounds upon which such relief is to be sought; and
 - b) if the respondent caveator identifies a reasonably arguable interest in the deceased's estate, an order that the caveat cease to be in force

will not be made, leaving the proceedings to proceed in the ordinary course as a contested application for a grant of probate or administration.

THE GROUNDS OF CHALLENGE TO THE VALIDITY OF A WILL

32. The grounds upon which the validity of a will or codicil may be challenged are generally limited to:

- a) an allegation that the instrument propounded as the last will of the deceased was **not duly executed** in the manner and form required by law.
- b) an allegation that, at the time the propounded instrument was made, the deceased **lacked testamentary capacity**.
- c) an allegation that, at the time of execution of the propounded instrument, the deceased **did not know and approve** of the contents of the instrument.
- d) an allegation that the instrument propounded was obtained by **undue influence (in the sense of coercion)**.
- e) an allegation that execution of the instrument propounded was obtained by **fraud**.
- f) an allegation that the instrument was **revoked** by the deceased.

33. If and to the extent that some other ground of challenge (including a claim for family provision relief under Chapter 3 of the *Succession Act 2006* NSW) is advanced, the party advancing that challenge will generally be required to identify, specifically and distinctly, each additional ground of challenge so that the Court can consider whether any (and, if so, what) special case management orders are required.

34. As is presently the case, probate proceedings in which a claim for family provision relief is made may be transferred by the Court, on its own motion, from the Probate List to the Family Provision List.
35. An allegation that a testamentary instrument was executed in “suspicious circumstances” is not, of itself, a ground upon which the validity of a testamentary instrument can be challenged; but such an allegation may be made in order to identify particular factors which counsel caution on the part of the Court in approaching a finding that a testamentary instrument is the last will of a free and capable testator. An allegation of suspicious circumstances, if made, must be made, and particularised, distinctly.
36. If and to the extent that a party to probate proceedings asserts a case not reasonably related to an application for a grant, or re-grant, of probate or administration (e.g., a derivative claim for recovery of property on behalf of an estate; a claim for an order that accounts be taken; a claim that estate assets are held on a trust other than that for which a testamentary instrument provides; or a family provision claim), the Court may, on the application of a party to the proceedings or on its own motion, make an order (under the *Uniform Civil Procedure Rules 2005 NSW*, rule 28.2) that probate questions (particularly, questions directed to identification of the person or persons entitled to administer an estate) be heard and determined separately and before any other question in the proceedings.

ACCOUNTS AND CLAIMS FOR COMMISSION

37. Consideration is being given to whether practical arrangements can be made for the process of passing accounts in complex cases to be referred out to a referee for report to the Court.
38. Consideration is also being given to whether claims for commission might be determined by a Registrar in open court, as was formerly done.

THE CONDUCT OF DIRECTIONS HEARING BEFORE THE PROBATE JUDGE

39. When appearing before the Probate Judge on a directions hearing, each party is, and will be, expected to hand up to the Court draft “Short Minutes of Order” setting forth the orders, and any formal notations, sought by that party.
40. Where the orders or notations sought from the Court are lengthy, the Probate Judge will expect that an electronic (WORD) version of the draft Short Minutes will have been sent to the Judge’s centralised email address (*Chambers.LindsayJ@courts.nsw.gov.au*), in real time, to enable the Judge to adapt the Short Minutes in orders and notations made.
41. On any contested application (or on an application for the Court’s approval of a settlement) the Probate Judge will expect the parties to provide to the Court, at the time of the directions hearing:
 - a) a short written outline of the orders and notations sought, submissions in support of those orders and notations, and evidence relied upon; and
 - b) a bundle of any affidavits and documents relied upon in support of, or in opposition to, the application.
42. In the interests of case management, the Court might defer until after the conduct of mediation any interlocutory application which appears to the Court to be unnecessary to decide before mediation. Parties are encouraged to keep interlocutory applications to a minimum. Motions may be listed for hearing without regard to the convenience of counsel.
43. In the ordinary course, orders and notations for the disposition of proceedings will be made in open court or following a referral to chambers made in open court

COSTS ORDERS

44. No party to probate proceedings has an unqualified entitlement to costs out of the deceased's estate or is immune from exposure to an order for costs.
45. A party who fails to comply in a timely manner with the Court's orders may be visited with a costs order, including (as the nature of the case might require) a lump sum costs order enforceable at an interlocutory stage of the proceedings.

CONCLUSION

46. In implementation of a new case management regime in the conduct of proceedings in the Probate List, there is likely to be a degree of experimentation based upon lived experience.
47. However, a constant factor to be borne in mind is that the Probate List is administered on the basis that:
 - a) the governing purpose of the law of succession is the due and proper administration of a particular estate, having regard to any duly expressed testamentary intention of the deceased and the respective interests of parties beneficially entitled to the estate: *In the Goods of Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192. The task of the Court is to carry out a testator's duly expressed testamentary intentions, and to see that beneficiaries get what is due to them.
 - b) probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *Nobarani v Mariconte* [2018] HCA 36; (2018) 92 ALJR 806 at [49].

- c) in the interests of a proper and final determination of probate proceedings, and in the interests of settled rights to property upon succession, all persons who have, or may have, an interest in a contested estate should, so far as may be practicable, be given notice of the proceedings and an opportunity to intervene so as to be bound by the outcome of the proceedings; a person interested in the outcome of probate proceedings may be bound by the outcome even though not a party to the proceedings if on notice of the proceedings and possessed of a reasonable opportunity to intervene in them: *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

- d) all participants in probate proceedings have a duty (reinforced by the *Civil Procedure Act 2005 NSW*, section 56) to assist the Court in a timely disclosure of:
 - i. all known testamentary instruments (including wills, codicils and “informal wills”) of a deceased person, whether or not valid.

 - ii. the circumstances in which a contested testamentary instrument was prepared and executed.

 - iii. information about the deceased’s medical condition and treatment so far as may be material to any dispute about the validity of a testamentary instrument of the deceased.

- e) no person interested in a deceased estate who participates in probate litigation has an unqualified entitlement to costs of that participation.

12 November 2019

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