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CHALLENGES IN THE CONDUCT OF A 'SUCCESSION' CASE ACROSS JURISDICTIONAL BOUNDARIES

by

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INTRODUCTION

1. Perceptions of what constitutes a "challenge" in the conduct of a "succession" case depend upon perspective.

2. For a person with an expectation of participation (as an executor, administrator or beneficiary) in the administration of an uncomplicated, uncontentious case, challenges are essentially administrative in character: coming to terms with standard probate procedures, the *Probate Rules* and the Probate Registry.

3. For a party who believes himself or herself to be a beneficiary in a deceased estate, in circumstances in which there is an expectation of conflict, the challenges are far greater. The foundations for administration of the estate have to be established.

4. Problems may be encountered in unearthing basic information including, for example, identification of competing testamentary instruments. There may be a need to investigate the circumstances in which a will or codicil was prepared and executed, and the medical condition of the testator at or about the time of

execution of each testamentary instrument. Enquires may need to be made about the deceased's assets, liabilities and recent property dealings. There may be a need to ascertain whether the deceased ever executed an enduring power of attorney and, if so, whether there is a basis for believing that the estate might have an entitlement to recover property, or compensation, from the attorney for a breach of fiduciary obligations. Consideration may need to be given to the possibility of making, or having to defend, an application for a family provision order, in which case prompt action may be required in the commencement of proceedings.

5. Above all may be a concern about a liability for costs (both as between solicitor and client and on a party-party basis) in the event of engagement in contested proceedings. Decisions may have to be made about whether, on a cost-benefit analysis, disputation should be confined to a contest on a family provision claim even if there are grounds for believing that the last known will of the deceased may be invalid for a want of testamentary capacity. Forensic decisions may have to be made about the timing and likely course of settlement negotiations, a formal mediation and a contested hearing. Those decisions may have to be made with imperfect information if costs are to be contained.

6. For a practitioner inexperienced in the conduct of a "succession" case (as are many practitioners in their early years of practice) challenges may include, not only how to address the problems of a client, but also how to acquire experience in a system of court administration that presently favours mediations and limits opportunities for court appearances and the conduct of a contested hearing. The conduct of a "succession" case differs from a

conduct, for example, of a commercial case. To master "succession law", a practitioner needs to know something about the probate, family provision, protective and equity jurisdictions of the Supreme Court of NSW, each one of which might require particular study. To an outsider, each jurisdiction may appear to be replete with rules, the purpose of which is not transparent. Even if one masters the rules, one needs to appreciate that an exercise of jurisdiction in a "succession" case is generally discretionary, with the consequence that a practitioner needs to acquire familiarity with the culture of decision making. This is not as difficult as it may sound, but the "ins and outs" of succession law and practice cannot be taken for granted.

7. "Succession law" is too big a field to expect that all challenges in the conduct of a "succession case" can be identified and kept within a small compass. What this paper aims to do is to provide a general discussion of the context in which decisions about the conduct of a "succession" case may have to be made, and to draw attention to the need to have regard, not merely to the probate or family provision jurisdictions of the Supreme Court, but also to other factors commonly encountered.

8. A discussion of succession law in a modern setting requires appreciation that much has changed over the last four decades or so, both in terms of substantive law and the Court's procedures. Changes in substantive law have occurred as a result of conferral on the Court of increased discretionary powers and adoption of a case management philosophy that privileges dispute resolution by mediation. Collateral changes to the way the law is administered are no less important: for example, in empowerment of individuals to execute enduring powers of attorney and in establishment of an

administrative tribunal (currently the NSW Civil and Administrative Tribunal, "NCAT") to exercise much of the State's protective jurisdiction.

SUCCESSION LAW IN CONTEXT

9. "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.

10. In a modern setting, arrangements made in anticipation of death regularly include arrangements for the management of a person's affairs (his or her estate and person) in anticipation, or in recognition, of incapacity for self-management (including, but not limited to, mental incapacity) on the path to death.

11. "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.

12. 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. 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.

13. In *A Concise History of the Common Law* (5th edition, 1956) Professor TFT Plucknett described "the law of succession" as "an attempt to express the family in terms of property".

14. In every generation “succession law” takes colour from the society it serves, and that society’s understanding of what constitutes “proper preparation for death”, “property” and “family”.

15. 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.

16. With an emphasis on individual autonomy, the tendency of Australian law is towards *transactional* rather than *relational* analysis of the rights and obligations of a person living, and dying, in community.

17. Australian experience is consistent with Sir Henry Maine’s famous statement that “the movement of progressive [that is, non-static] societies has hitherto been a movement from *Status to Contract*”: HS Maine, *Ancient Law* (1861), Chapter 5.

18. 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 the individuals.

19. Australia’s focus on the perspective of the individual *vis-à-vis* collective concepts has not tipped the balance against the collective so much as reoriented individuals within new concepts of community. Perceptions of “the family” atomised into no more than a loose collection of individuals need to weighed against changing concepts of family.

20. Perhaps the clearest illustration of a move in Australian law from a relational analysis of the rights and obligations of individuals within a community to a transactional one can be found in evolution of the jurisdiction of the Supreme Court of NSW to grant family provision relief. The *Testators Family Maintenance and Guardianship of Infants Act* 1916 NSW was displaced by the *Family Provision Act* 1982 NSW (now replaced by Chapter 3 of the *Succession Act* 2006 NSW) which introduced the concepts of "eligible person" and "notional estate". The range of persons eligible to apply for a family provision order was extended beyond any concept of a traditional "family" and the property amenable to a family provision order extended beyond a deceased person's actual estate to include dispositions of property up to three years before death.

21. At about the same time as the family provision jurisdiction of the Court was expanded, legislation was enacted to empower individuals to execute an enduring power of attorney or an enduring guardianship appointment in anticipation for a loss of capacity for self-management; the process of appointing a financial manager or guardian for a person who has lost capacity was made more accessible to the community by establishment of an administrative tribunal (currently, the Guardianship Division of the NSW Civil and Administrative Tribunal, "NCAT") empowered to make protective orders; and the law of wills was liberalised to facilitate admission to probate of documents identified as evidence of a testator's real or presumed intentions.

22. Not all developments in the law of succession have been statutory. An illustration of this is found in the shift of family provision cases from a focus on **maintenance** for **widows and infant children** to a focus on the provision of

capital for **adult "children"** approaching or in retirement. The family provision legislation has facilitated this, but the nature of claims for relief made, and the Court's response to such claims, has been a major factor. Family provision jurisprudence has not been static.

23. The generational shift in the types of applications for family provision relief made by an ageing population has produced an increase in the number of cases in which questions of "moral duty" and "need" (to use short hand expressions commonly associated with sections 59(1)(c) and 59(2) of the *Succession Act* 2006 NSW) must be assessed in light of estrangement between the applicant for a family provision order and the deceased whose estate is sought to be charged with the order.

24. Changes in the law of succession over the past four decades are still being accommodated. A clear example of that fact is the prevalence of "financial abuse" arising from misuse of enduring powers of attorney, as a consequence of which those administering a deceased estate are often obliged to consider whether an asset of the estate is property, or compensation, recoverable from an attorney for a breach of fiduciary obligations.

25. Changes in the "substantive" law of succession have been accompanied by changes in the "procedures" employed for administration of the law. This has been facilitated, not only by the conferral upon the Court of discretionary powers (for example, in respect of informal wills, rectification of wills, statutory wills and an expanded family provision jurisdiction), but also in the adoption of a "case management" philosophy in the administration of justice.

26. That philosophy has justified the Court in taking a proactive role in case preparation supervised *via* directions hearings, orders for disclosure of information or discovery of documents, and in requiring proceedings to be the subject of a mediation before the allocation of a date for final hearing. The Court's case management philosophy has embraced a tendency to permit litigation within the one set of proceedings of claims across traditional jurisdictional boundaries so that (for example) a claim for probate or administration, a claim for a declaration of trust and a claim for a family provision order might be the subject of a single hearing following the conduct of a mediation. An earlier predisposition not to delay probate proceedings by encumbering them with other forms of claims for relief (including claims for equitable relief or a family provision order) has been largely abandoned.

27. If claims for relief invoking more than one form of jurisdiction are made in the one set of proceedings care needs to be taken to ensure that jurisdictional imperatives, and boundaries, are duly observed in disposition of the proceedings. A settlement of family provision proceedings does not of itself entitle parties to have their agreement (which may or may not conform to jurisdictional constraints on the Court) embodied in orders, as distinct from notation of an agreement. Nor does the availability of a family provision order permit, or justify, relaxation of the requirements for a grant of probate or administration upon an exercise of probate jurisdiction.

28. That said, if the proceedings under consideration are primarily family provision proceedings, the Court may make in those proceedings (pursuant to section 91 of the *Succession Act* 2006) a grant of administration for the limited purpose of permitting the family provision proceedings to be determined, or it

might make an order under rule 7.10 of the *Uniform Civil Procedure Rules* 2005 NSW for the estate of the deceased person the subject of the proceedings to be represented for the purpose of the proceedings. This is, perhaps, an illustration of the growth of the family provision jurisdiction displacing traditional probate proceedings in a case in which a family provision order can be made in terms designed to leave no ongoing need for administration of an estate. A limited grant under section 91 or a representative order does not operate as a general grant of administration necessary for the transaction of business with strangers to the proceedings in which they are made.

29. Whatever may be, from time to time, the balance between the individual and collective forces in administration of the law of succession (illustrated by advocacy of "testamentary freedom" and the family provision jurisdiction respectively), there is one constant feature of succession law. That is the need for an orderly system of **accountability** in accommodating a transfer of **property**, and in resolving disputes, consequent upon the death of a person subject to the jurisdiction of local authorities.

WHAT IS A "SUCCESSION" CASE?

30. In its simplest guise, in practice, a 'succession' case might best be thought of as one that involves a claim for a grant of probate or administration, and/or a claim for a family provision order, in the context of a deceased estate of known value able to accommodate a family provision order (under chapter 3 of the *Succession Act* 2006 NSW) without an order for designation of notional estate.

31. Even such a simple description of a ‘succession’ case fails to acknowledge that any claim for a grant of probate or administration or a family provision order implicitly requires an understanding of tasks associated with identification of an estate, bringing estate property under control of an estate administrator (and hence the Court), and the broader field of estate administration.

32. In any event, in modern day practice, many ‘succession’ cases go well beyond the simple template of a claim for a grant of representation or a claim for a family provision order, if only because:

    (a) claims for a grant of probate or administration and claims for family provision orders are increasingly, and now routinely, heard together (either in the one set of proceedings or in multiple sets of proceedings with evidence bearing upon one claim ordered to be evidence bearing upon other claims so far as may be material), together with ancillary proprietary claims in equity;

    (b) a common feature of “probate” and “family provision” cases is a need to confirm the existence and nature of property (if not specific property) amenable to the Court’s orders, a need which may involve (for example, on a claim based upon an alleged contract to make a will) a determination of whether property nominally held by the legal personal representative of a deceased person is held on trust for another person, beneficially entitled independently of any testamentary instrument or any entitlement on an intestacy;

(c) claims for a grant of probate or administration and claims for a family provision order (traditionally, the core concerns of a 'succession' case), and any ancillary claims, are now subject to similar pre-trial procedures, including requirements for service of notice on interested persons, disclosure of documents and information, and a mediation process; and

(d) the administration of a deceased estate now routinely involves consideration of the fact, or the potential operation, of 'will-substitute' concepts and procedures beyond a mere claim for probate or administration or a simple claim for a family provision order.

33. Ultimately, the scope of a "succession" case generally depends, in practice, upon the availability of property amenable to the Court's jurisdiction at and after the time of death of a deceased person, the costs likely to be incurred in obtaining access to it and the availability of a jurisprudential basis for seeking, and obtaining, curial relief.

34. An exception to this may be an application for a court-authorised "statutory" will for a living person lacking testamentary capacity. Such an application (under sections 18-26 of the *Succession Act* 2006 NSW) involves an exercise of a statutory form of protective jurisdiction and requires knowledge of probate law and the family provision jurisdiction; but it does not neatly fit into any simple characterisation as a "protective", "probate" or "family provision" case. In NSW, the seminal case has long been *Re Fenwick* (2009) 76 NSWLR 22, now to be read in the context of the Court of Appeal's treatment of the topic in *Small v Phillips* [2019] NSWCA 222; *Small v Phillips (No 2)* [2019] NSWCA

268, 18 ASTLR 608; and *Small v Phillips (No 3)* [2020] NSWCA 24, from which judgments the High Court refused special leave to appeal: *Phillips v Small* [2020] HCATrans 96. Hallen J's assimilation of relevant case law can be found in *Re Huenerjaeger* [2020] NSWSC 1190 and *Re Alexa* [2020] NSWSC 560.

35. The statutory will jurisdiction works best when there is a consensus within an incapacitated person's social circle about his or her likely testamentary intentions. However, as may be illustrated by litigation attending the affairs of Millie Phillips (who survived until 19 July 2021) the jurisdiction sometimes involves complex cases and an element of speculation about an incapacitated person's state of mind and the future course of events.

THE FIELD OF OPERATION OF "SUCCESSION LAW"

36. The law of succession is marked by definitional imprecision the importance of which may be discounted by some practitioners because, in practice, the law governing estate administration is generally administered pragmatically.

37. A curious feature of the "law of succession" is that, at anything other than a high level of abstraction, it defies a neat definition, and insights into its field of operation are often best had by an examination of legal practice.

38. The law of succession is an amalgam of substantive and adjectival (procedural) law. It is anything but static. It differs between jurisdictions, and it changes over time.

39. Expressed in terms of the jurisdiction of the Supreme Court it involves, primarily, an exercise of **probate** jurisdiction and, commonly, an exercise of **family provision** jurisdiction and consideration of the Court's **protective**

jurisdiction, all in the context of the Court's **equity** jurisdiction and, less obviously, the **common law** jurisdiction. The law of succession commonly engages with the general law so far as it bears upon the ownership, control, management and assignment of property.

40. In a modern setting, a will, an enduring power of attorney and an enduring guardianship appointment are executed in anticipation of mental incapacity on a path to death. For the most part, a will attracts an exercise of probate jurisdiction; enduring "agency" arrangements attract the protective jurisdiction; all deceased estates are subject to an exercise of family provision jurisdiction; and, because the estate of a person who, by reason of incapacity or death, is incapable of managing his or her own affairs must be managed (administered), if at all, by another person on his or her behalf, there is routinely scope for the application of equitable principles relating to fiduciary relationships. The common law's contribution is expressed, *inter alia*, through the law of property, the law of agency and contracts for the disposition of property.

41. At a high level of abstraction the law of succession is law governing the passing of property on, or in anticipation of, death by an autonomous individual living and dying in community, an important expression of which is his or her family.

42. Under NSW law, the law of succession sanctions orderly procedures for the expression, and implementation, of an individual's testamentary intentions (by a will, an "informal will" or a "statutory will" governed by Chapter 2 of the *Succession Act* 2006 NSW), in default of which statutory rules of intestacy (governed by Chapter 4 of the *Succession Act* 2006, historically derived from

the *Statute of Distributions* 1670 (Eng) as amended by the *Statute of Frauds* 1677 (Eng)), subject to modification by a family provision order (governed by Chapter 3 of the *Succession Act*) are applied to give effect to the State's recognition of "family" relationships as a natural manifestation of an individual's community.

SUCCESSION LAW'S TWO WAYS OF THINKING ABOUT PROPERTY

43. In operation, the law of succession involves two different ways of thinking about property. They are commonly present in solving any succession law problem. They often operate in tension with one another.

44. Viewed from the perspective of the Court or a person charged with administration of an estate, the law of succession is primarily concerned with the "management" of property.

45. Viewed from the perspective of a person who claims an interest in estate property, or expects to inherit an interest in the estate as beneficiary or as a successful applicant for a family provision order, the law of succession is concerned with the recognition, and enforcement, of "rights" and "obligations".

46. Any tension between the "management" and "rights" perspectives of estate management generally works itself out during the course of administration of an estate. At the beginning of the process, at the point of death, a testator has a "right" to dispose of property in accordance with his or her intentions. During the process of administration a beneficiary has a "right" to "due administration" of an estate, not an interest in estate property: *Commissioner of Stamp Duties (Queensland) Ltd v Livingston* (1964) 112 CLR 12; [1965] AC 694. That changes when, in administration of an estate, "executorial duties"

have been completed, allowing estate property to be held on trust for beneficiaries.

47. In the selection of a personality to administer an estate, at the beginning of the process courts prioritise a testator's nomination of an executor; but, if problems emerge in administration of an estate to the extent that the identity of an executor or administrator is called into question, preference may be given by the Court to whatever is necessary to ensure that administration of the estate can be completed effectively: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229.

48. The "management" perspective of the law of succession has become more prominent in recent decades at both a substantive and, just as importantly, a procedural level.

49. At a procedural level, the importance of routine directions hearings and compulsory mediations as a preliminary to a contested final hearing cannot be ignored. Outcomes are often negotiated rather than determined by court order and, in time, this may affect styles of advocacy. Anecdotally, it has done so already. An advocate must be able to negotiate an outcome *inter partes* and persuade the Court towards a particular outcome in its management or determination of a case. Junior advocates lack opportunities to learn their court craft, and the practical operation of rules of evidence, in a contested hearing.

50. In the realm of substantive law, the prominence of the management perspective of the law of succession can be seen in:

(a) recognition of a right in a person (by execution of an enduring power of attorney and/or an enduring guardianship appointment) to nominate a person, or persons, to manage his or her affairs after the onset of mental incapacity (*Powers of Attorney Act* 2003 NSW, *Guardianship Act* 1987 NSW);

(b) conferral upon an administrative tribunal (currently, in NSW, the NSW Civil and Administrative Tribunal, "NCAT") of discretionary powers relating to the appointment of a financial manager, the appointment of a guardian, the review of powers of attorney and guardianship appointments and the giving of consent to mental or dental treatment;

(c) promotion of private management of protected estates, relegating the State's public manager (in NSW, the NSW Trustee) to the role of a manager of last resort (*Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245); and

(d) conferral upon the Court (in addition to the family provision jurisdiction first granted by the *Testator's Family Maintenance and Guardianship of Infant Act* 1916 NSW) discretionary powers:

    (i) to admit an informal will to probate: *Succession Act* 2006 NSW, section 8;

    (ii) to order that a will be rectified: *Succession Act*, section 27;

(iii) to order that a "statutory" will be made on behalf of a person lacking testamentary capacity: *Succession Act*, sections 18-26;

(iv) to order that the general rules of intestacy be varied by the making of a "distribution order" where a deceased person leaves "multiple spouses" (*Succession Act*, section 126) or belonged to an indigenous community (*Succession Act*, section 133); and

(v) to make a family provision order (under the *Succession Act*, Chapter 3) in favour of a wide range of "eligible persons" based upon relationships not confined by any traditional relationship of "family", against property which, although not part of a deceased person's estate, can be designated as "notional estate".

51. Viewed separately, each of these discretionary powers is required to be exercised in a manner that preferences the wishes of a person who, by reason of incapacity or death, is unable to manage his or her affairs but who, as a person living in community, is entitled to have his or her dignity respected.

52. Viewed collectively, an exercise of these powers not uncommonly involves an imputation of intention to an "absent" person by a court or tribunal assuming the role of an objective, empathetic bystander, making a management

decision after, so far as may be practicable, consulting persons who may be able to provide information bearing upon the decision or whose interests (legal or social) might be affected by the decision.

SUCCESSION LAW AS A SUBSET OF ESTATE ADMINISTRATION

53. The core concern of the law of succession with the passing of property is manifested in the centrality of orders, upon an exercise of probate jurisdiction, expressed as a "grant" of probate or administration. This is the language of property.

54. The distinctive character of the probate jurisdiction is illustrated use of the language "grant" not only in relation to "final" orders, but in relation to interlocutory orders for the management of an estate. An "interim" grant of administration (by whatever name known) is the probate equivalent of equity's appointment of a receiver and manager.

55. Any consideration of the "law of succession" must place it in the broader field of "estate administration" of which it is a part.

56. The "law of succession" is governed by the purposes served by the probate jurisdiction, and the family provision jurisdiction, administered by the Court to give effect to it.

57. There is a close affinity between the probate and family provision jurisdictions (on the one hand) and (on the other hand) the State's protective jurisdiction, administered by the Court, the Guardianship Division of NCAT and the NSW Trustee. This is because, in common experience, a deceased person's estate may have been, at and well before the time of death, subject to management as a "protected estate" under the *NSW Trustee and Guardian Act* 2009 NSW.

Protected estate management terminates upon death, and the protected person's estate is held on trust pending a grant of probate or administration in respect of the deceased estate.

58. Not uncommonly, in probate or family provision proceedings reference is made to reasons for decision and orders of NCAT, and parties adduce in evidence a transcript of NCAT proceedings or accounts filed with the NSW Trustee by the manager of the deceased's protected estate.

59. The protective jurisdiction, broadly defined, deals not only with management of an estate as a protected estate but also with the supervision of enduring powers of attorney and guardianship appointments. This is an area of law that can be of critical significance in determining whether property the subject of an *inter vivos* disposition constitutes part of a deceased person's estate (in probate or family provision proceedings) or supports a designation of property as notional estate in family provision proceedings.

60. Upon an application for a statutory will to be made on behalf of a protected person, a plaintiff commonly seeks a grant by the NSW Trustee of authority to apply funds under management in incurring the costs of making an application. The jurisdiction to authorise the making of a statutory will is a statutory form of protective jurisdiction.

61. The probate jurisdiction looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a testator's testamentary intentions, and to see that beneficiaries get what is due to them:

In the Goods of William Loveday [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

62. The family provision jurisdiction, equally, 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.

63. The probate jurisdiction focuses upon what "is" the testamentary scheme for administration of an estate, privileging the intention of the individual testator. The family provision jurisdiction, within its limits, focuses on what "ought" to be, modifying a testator's scheme to accommodate others in the interests of community.

64. The conceptual framework of estate administration proceedings is markedly different from the conceptual framework of other civil proceedings.

65. In most civil proceedings the constitution of the proceedings is determined by competing claims of "right", which form the subject matter of the proceedings, contested by parties who are identified or (if they form a class) identifiable. This is particularly true of common law proceedings (such as a claim in contract), the traditional mode of determination of which was trial by jury. Claims in equity qualify the common law paradigm because equitable relief is generally discretionary, rather than awarded as of right, and an exercise of equitable jurisdiction often involves management of property and an associated need to ensure that all persons interested in the property are joined or represented in the proceedings.

66. The constitution of estate administration proceedings may, from time to time, involve competing claims of right, but such proceedings remain focused on a need to facilitate the orderly transmission of the estate of a deceased person. The role of the Court is necessarily more active in estate administration proceedings than in other forms of civil proceedings. If need be, the Court must go in search of the deceased, his or her estate (gross and net of liabilities) and his or her beneficiaries. The concept of a "party" may differ in estate administration proceedings from that in other proceedings, where the character of proceedings is often defined by the identity of named parties. In estate administration proceedings an "interested person" may be bound by a determination of the Court, although never named as a party, if given notice of proceedings and a reasonable opportunity to intervene (*Osborne v Smith* (1960) 105 CLR 153 at 158-159); as is sometimes said, probate orders operate *in rem* (against the whole world) rather than simply *inter partes*: *Re Dowling* [2013] NSWSC 1040 at [23]-[25].

67. Estate administration proceedings involve a unique element of public interest because of the importance of an orderly transmission of property and because the central personality in the proceedings is, by reason of death, unable to participate personally in the proceedings. Because estate administration proceedings are concerned with the management of property, participation in them requires a party to have an "interest" in the determination of the proceedings.

68. The special character of estate administration proceedings is illustrated by the facts that: (a) the existence or otherwise of a grant, or an application for a grant, of probate or administration is a dominant consideration in the

disposition of proceedings; (b) a “grant” of probate or administration is both an order of the Court and an instrument of title to estate property; (c) in the ordinary course, a “grant” of probate or administration is made in contemplation of further steps being taken in management (administration) of an estate and, although it may operate as a “final order” for the purposes of an appeal or principles governing the final determination of proceedings, it is not necessarily the end of litigation concerning an estate; (d) interlocutory orders in the nature of an order for the appointment of a receiver and manager are customarily described (often with Latin tags) in the language of an “interim grant” of administration; (e) proceedings for a grant of probate or administration, or for a family provision order, involve procedures for the discovery of documents and the disclosure of information potentially very different from other, more adversarial forms of civil proceedings; and (f) a claim for legal professional privilege over documents confidential to the deceased has to be assessed in light of the principle that privilege does not attach to documents relating to the making of a will and, in the absence of a grant, the Court is required to manage access to otherwise confidential information (*Estate of Fuld* [1965] P 405 at 409-411; *Re Estate Pierobon, Deceased* [2014] NSWSC 387; *Boyce v Bunce* [2015] NSWSC 1924).

EVALUATIVE REASONING IN SUCCESSION LAW

69. Although the law of succession is replete with rules (in the form of both legislation and long established “rules of practice”), the proper administration of the law requires an appreciation that the operation of such rules is generally informed by the purpose served by the jurisdiction being exercised.

70. Of profound significance, and not always fully appreciated, is the fact that a dispute about the validity of a will (a core feature of a standard "probate case"), no less than a claim for a family provision order, involves a form of evaluative reasoning very different from the form of reasoning routinely encountered in the determination of a common law claim epitomised by a claim in contract.

71. The evaluative character of an application for a family provision order is manifest in the text of chapter 3 of the *Succession Act* 2006 NSW, particularly its use of the words "adequate", "proper" and "ought" in sections 59(1)(c) and 59(2) of the Act. A close reading of *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566 points in a similar direction. That can be seen, for example, in the element of "testamentary capacity" (articulated at 565) expressed as an ability "to comprehend and appreciate the claims to which he [the testator] ought to give effect".

72. In a contest over the validity of a will, an antidote to rigid reasoning is to remember that the ultimate question is whether a particular testamentary instrument represents the last will of a free and capable testator: *Estate Rofe* [2021] NSWSC 257 at [104] *et seq*. The grounds upon which the validity of a will may be challenged are a logical deconstruction of that ultimate question. They do not raise above it. Nor should they be permitted to be applied in a narrow way, uninformed by life experience.

73. Although medical evidence may be highly informative and prudently obtained, questions about the validity of a will are ultimately questions for determination by the Court. Any tendency to outsource decision making about the validity of a will to medical experts should be resisted.

DIFFERENT PHASES OF ESTATE ADMINISTRATION

74. The administration of an estate ordinarily involves, conceptually, at least three phases (not mutually exclusive):

(a) the first phase, which for convenience may be described as an "establishment" phase, involves the identification of estate property, identification of any testamentary instrument of the deceased, and identification of all persons who may be interested in the estate, as well as ancillary steps relating to the publication, and service, of notice of proceedings;

(b) a second phase, which might for convenience be called a "management" phase, generally involves a process of bringing estate property under control of an estate representative (an executor or administrator), realising assets, paying debts and readying the estate for distribution; and

(c) a third phase, which for convenience might be called an "accounting" phase, involves the estate representative in accounting to beneficiaries (and, if need be, the Court) for administration of the estate; as an ancillary part of the accounting process, making any claim for remuneration that might be made; and effecting a distribution of the estate to beneficiaries.

75. The purpose of identifying these "phases" is not to suggest that all estates are administered by reference to a consecutive sequence of formal stages, but to

provide a basis for recognition of different factors bearing upon different aspects of estate administration.

76. Because, in a practical sense, a deceased estate is, or may be, administered under the control of the Court, litigation can, and often does, arise in each of the three phases of estate administration. Nevertheless, much of the litigation encountered (at least in the second and third phases) is, as is traditionally the case in equity proceedings, administrative in character. That means that it is amenable to presentation to the Court in a form which enables a judge, upon being satisfied of particular factors, to make orders "as of course".

77. In terms of contested proceedings the first phase is perhaps the most prominent because it requires the parameters of estate administration to be determined, often with all the paraphernalia of pleadings and adversarial debate, although the distinction between a grant of probate in common form and a grant in solemn form (explained in *Estate Kouvakis* [2014] NSWSC 786) points to the fact that much of the Court's probate work is non-contentious.

78. The second phase might be more likely, characteristically, to involve applications to the Court for judicial advice; directions, including a Benjamin order or the like; or, perhaps, a contested construction suit. A "Benjamin Order" (named after *In re Benjamin* [1902] 1 Ch 723) and "judicial advice" (each of which may be expressed in terms that a trustee would be "justified" in administration of an estate on a particular basis or "at liberty" to do so) are forms of court order designed to protect trustee from personal liability if an estate is administered in accordance with the Court's order(s). They are not designed as means of determining contested rights such as might be

determined on a construction suit in which competing claims might be the subject of adjudication. They are a management tool.

79. The third phase is often dealt with administratively by a registrar, subject to an application for review being made to a judge.

80. The idiosyncratic nature of the "establishment" phase in the administration of an estate requires particular notice because, in a modern procedural setting (at least in New South Wales), the Court embraces a liberal attitude to a combination in the one set of proceedings of probate, family provision and equity claims for relief, each of which may require accommodation of jurisdictional idiosyncrasies.

81. The modern practice of subjecting probate and family provision cases (in particular) to a process of mediation before the allocation of a date for a contested hearing depends for its success on the preparedness of parties, at an early stage, to articulate their claims, exchange information and enter into *bona fide* settlement discussions. When the mediation process works, it works well. However, if the preconditions for its success are not met it can simply add an extra layer of cost, particularly if parties insist upon "front loading" their case preparation (fearing the unknown or a need to impress an opponent with the strength of their case) before mediation.

ROUTINE STEPS IN THE ESTABLISHMENT PHASE OF ESTATE ADMINISTRATION

82. In probate and family provision proceedings an initial, key step in any decision making, problem solving process is generally to identify:

(a) the central personality (the deceased) through whose lens the world must be viewed;

(b) the nature and value of the "estate" (property) to which that key personality was at the time of his or her death entitled, and its amenability to the jurisdiction of the Court;

(c) the existence or otherwise of any and all legal instruments that may govern, or affect , the disposition or management of the deceased's property (including a will, a codicil, a "statutory will", the "intestacy provisions" of chapter 4 of the *Succession Act* 2006 NSW, an enduring power of attorney or enduring guardianship appointment, a financial management order or a guardianship order);

(d) the full range of persons whose "interests" may be affected by any decisions to be made:

    (i) 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 634; *Nobarani v Maricote* (2018) 265 CLR at [49]); and

    (ii) family provision litigation is "interest litigation" in a different sense; participation in family provision proceedings requires a party to be an "eligible

person", a legal personal representative (an executor or administrator of the deceased person the subject of a claim for a family provision order), a beneficiary of the deceased person's estate, or a person affected by an application for designation of property as notional estate.

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration; and

(f) whether any (and so, if so, what) steps need to be taken to ensure that all "interested persons" are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

83. For practical purposes, the grounds upon which the validity of a will or codicil can be challenged are settled. They are testamentary incapacity, lack of knowledge and approval, undue influence in the nature of coercion, and fraud. An allegation of "suspicious circumstances" attending the execution of a testamentary instrument is not a separate ground of challenge, but puts the Court and the propounder of a testamentary instrument on notice of the facts which tend to prove that a testator lacked knowledge and approval of an instrument and, possibly, that he or she lacked capacity.

84. The theoretical possibility (noticed in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63]) that equitable principles governing undue influence might qualify a grant of probate has not been taken up by litigants.

85. Traditional “presumptions” said to arise from proof of “due execution” of a testamentary instrument and testamentary capacity (whether they be characterised as rebuttable presumptions of fact or as inferences drawn from common experience) may have significance upon an assessment of “evidentiary onus” in the conduct of a contested application for probate, but they do not affect the ultimate onus of proof on the propounder of an instrument (to prove testamentary capacity and knowledge and approval) or the onus of proof on a person who alleges an instrument is invalid on account of undue influence or fraud. See: *Estate Rofe* [2021] NSWSC 257 at [104] *et seq*.

NOTICE OF PROCEEDINGS

86. A sound working rule of practice generally is that, in management of a probate or family provision case, prudence dictates that, as soon as may be practicable, all estate property should be identified, and all potential claimants on estate property should be given notice of the proceedings and an opportunity to intervene.

87. This is a function of the nature of property and the desirability of the title to property being settled in an orderly way without unnecessary exposure to successive claims. The Court does, and parties responsible for the administration of a deceased estate should, generally endeavour to “build an estoppel” against those who might contest the Court’s orders: *Estate Kouvakis* [2014] NSWSC 786 at [276]-[283].

88. The need to ensure that all interested persons are given due notice of probate or family provision proceedings is generally justified, as here, by reference to

a need for an orderly succession to property, anticipating the potential necessity for determination of the proceedings after a contest. In a procedural setting (such as presently operates) that privileges a process of mediation over an adversarial trial, an equally important rationale for the service of notice of proceedings on all interested persons is that, if all interested persons agree on a scheme for administration (and, importantly, distribution) of an estate, there may be greater scope for practical outcomes than if the Court, acting within jurisdiction, imposes an outcome on the estate.

89. In some cases, where there may be a doubt as to the Court's jurisdiction, an outcome attended by the agreement of all interested persons may incidentally overcome those doubts or prevent an appeal because there is nobody left to complain.

RECOGNITION AND ROLE OF 'WILL-SUBSTITUTES'

90. 'Will-substitute' is an expression apparently commonly found in US literature; it is not a term of art in Anglo-Australian jurisprudence: Alexandra Braun and Ann Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart Publishing, Oxford, 2016).

91. Loosely deployed, it is a convenient description of concepts and procedures which may bear upon the conduct of a 'succession' case, however defined. The ease with which a will, or an informal will, can be made in NSW, and be made the subject of a grant of probate or administration, militates against any use of "substitute" procedures as a means of avoiding routine probate procedures.

92. Transactions characterised as a form of "will-substitute" might simply be a transaction effected in the ordinary course of estate planning. In any event, importance attaches to an understanding that succession to property can be effected other than by a will, and the existence of a transaction in the character of a "will-substitute" may have a bearing on an application for designation of property as notional estate in family provision proceedings.

93. In the leading essay in *Passing Wealth on Death*, entitled "Will-Substitutes: A US Perspective", Thomas P Gallanis (at page 10) offers the following introduction to the concept of a will-substitute:

> "The traditional way to transmit property at death is by writing a valid will. The court-supervised process of determining whether a will is valid is called 'probate', from the latin *probare*, meaning 'to prove'. The court in which this occurs is typically called a 'probate court'. The same court also oversees a related process: the administration of the decedent's estate. The relationship between 'probate' and 'administration' is so close that, in informal usage, the two terms are used synonymously.
>
> Yet there are ways to transmit property at death that need not involve a court process. Rather than using a will, the owner of property can instead use a 'will-substitute' to arrange for a 'non probate transfer'. Put simply, a non probate transfer occurs outside of probate; it does not require any court process. The owner of property merely designates one or more beneficiaries to receive the property at the owner's death. A formal definition of a will-substitute appears in the *Restatement of Third of Property* which defines a will-substitute as
>
> > 'an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.'
>
> One example of a will-substitute is a life insurance beneficiary designation. The owner of the life insurance policy can designate a beneficiary to receive the proceeds on the owner's death. The proceeds are paid directly from the insurance company to the beneficiary, without involving a Probate Court …"

94. Professor Prue Vines of UNSW Law School (with a Kiwi co-author, Nicola Peart) wrote a chapter in *Passing Wealth on Death* on will-substitutes in New Zealand and Australia.

95. In the Australian section of that chapter the subject headings indicative of will-substitutes commonly used in Australia comprise the following: (adjustment of) property entitlements under the *Family Law Act* 1975 Cth; joint tenancies; (*inter vivos*) trusts; superannuation and superannuation death benefits; life insurance, superannuation and protection from debt; contracts for passing of property on death; family provision and the notional estate; enduring and irrevocable powers of attorney; and applications to have an estate distributed according to Aboriginal customary law.

96. To this list might be added: applications for a statutory will; use of corporations; a management order made under the *NSW Trustee and Guardian Act* 2009, and directions for the use of property and income, affecting the estate of a missing person; and, more exceptionally, principles governing *donatio mortis causa* and secret trusts.

97. If, as I apprehend, regard has to be had to the protective jurisdiction of the Court, another candidate for a will-substitute is a court-approved family settlement in management of an estate in anticipation of the death of a person under the Court's protection: *W v H* [2014] NSWSC 1696.

98. Although a list of will-substitutes in common usage can be prepared, it is unlikely to be an exhaustive account of potential mechanisms for the passing of property. The concept of property is fluid. Property is inherently divisible.

Ultimately, “property” and the means for its “passing” from one person to another are a function of community acceptance and expectations.

99. Leaving aside taxation considerations, Professor Vines suggests that the desire to control property distribution after death remains an important reason for deployment of will-substitutes in Australia.

100. Insightfully, Vines and Peart make the following observations (at page 128):

> “Despite the widespread use of will-substitutes to pass property on death, the major issue of current concern about their effect on succession law is the extent to which they undermine a testator’s moral duty to provide for his or her family. In [NSW] the notional estate provisions [of the *Succession Act* 2006] are intended to prevent testators from evading their responsibilities. Capital Gains Tax and stamp duty also help to mitigate the use of will-substitutes and hence their adverse effect on family provision.”

101. Will-substitutes are often spoken of in terms of legal rights, obligations and interests. In practice, anything may be possible if social norms are strong enough to permit property to be legally vested by one person in another on an understanding that it will be enjoyed or used according to the will of the first person, leaving adversaries the burden of clothing an informal understanding in legal garb.

102. In practice, the pendency or threat of a claim for a family provision order (with a need, reinforced by the Court’s Practice Note No SC Eq 7, to make disclosures about “prescribed transactions”) may be instrumental in exposing to view transfers of property *via* will-substitutes.

103. Vines and Peart rightly conclude that there has been a “non-probate revolution” in Australia in response to social and fiscal incentives.

104. Superannuation ticks both “social” and “fiscal” boxes within the context of a Commonwealth legislative regime, but the “non-probate revolution” extends to less worthy responses to social change.

105. A principal example of this is “financial abuse” affecting elderly people through misuse of enduring powers of attorney, resulting in costly contests about the existence of fiduciary obligations, their breach and remedies for breach. The law of succession is no less (but perhaps more) affected by this phenomenon because powers of attorney are being used for purposes for which they were not designed.

106. A general, enduring power of attorney can facilitate dealings with a third party who acts upon the instrument’s representation that an attorney has authority to bind his or her principal (*Taheri v Vitek* (2014) 87 NSWLR 403); but, as between principal and attorney it does not absolve an attorney from a breach of his or her fiduciary obligations to the principal (*Estate Tornya, Deceased* [2020] NSWSC 1230).

107. In practice, financial abuse of an elderly principal commonly takes the form of self-dealing by a family member acting as an attorney in disregard of the interests of the principal.

THE NATURE OF PLEADINGS IN A “SUCCESSION” CASE

108. In probate proceedings involving a challenge to a will, pleadings take the form of old style, common law, “issue pleading” which, so far as concerns grounds for the challenge, principally requires identification of the grounds relied upon, with particulars as appropriate. This form of pleading contrasts with the

narrative style of “fact pleading” (characteristic of an exercise of equity jurisdiction) ordinarily required in support of an allegation of a breach of trust.

109. Even if a claim for a family provision order is made in a statement of claim, the ordinary practice is for the claim simply to be asserted. It is not necessarily inappropriate to plead the various elements of a claim (in most cases, focusing upon sections 57-59 of the *Succession Act*) but, as the form of originating process generally required for a family provision claim is a summons, there is generally little utility in any form of pleading (be it issue pleading or fact pleading).

110. The fact that different forms of the Court’s jurisdiction in dealing with a succession case involve different forms of pleading is a reminder that the imperatives, and boundaries, of each form of jurisdiction must be recognised.

DISCOVERY OF DOCUMENTS AND DISCLOSURE OF INFORMATION IN A “SUCCESSION” CASE

111. Probate proceedings commonly do not sit comfortably with constraints on orders for discovery of documents, or for the disclosure of information, governed by Practice Note SC Eq 11. That is because, in probate proceedings, it is commonly necessary for parties to go in search of basic information about the existence of testamentary instruments, the circumstances in which such instruments may have been prepared and executed; to investigate a deceased person’s medical condition at the time he or she executed one or more testamentary instruments; and to seek to verify the existence of property in NSW to ground the Court’s jurisdiction.

112. For that reason, the Court may require parties to file and serve, at an early stage of the proceedings, “disclosure affidavits” bearing on these questions, and it might also allow an issue of subpoenas (and the service of notices to produce) at an early stage of proceedings: *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671.

IDENTIFYING ESTATE PROPERTY

Availability of Property amenable to the Court’s jurisdiction

113. Orders made by the Supreme Court of NSW for a grant of probate or administration in respect of a deceased estate require property located in the state to ground the Court’s jurisdiction: *Probate and Administration Act* 1898 NSW, section 40. In family provision proceedings an order for provision can only be made in respect of property outside NSW if the deceased was domiciled in the State at the time of death: *Succession Act* 2006 NSW, section 64.

114. In the determination of an application for a family provision order the Court can take account of property held outside the jurisdiction even if it is not amenable to an order for provision: *Estate Grundy; La Valette v Chambers-Grundy* [2018] NSWSC 104.

“Inclusion” of Property in a deceased Estate: Property recoverable as a result of financial abuse of a person now deceased

115. An enduring power of attorney (in a form authorised by the *Powers of Attorney Act* 2003 NSW) is an instrument which empowers an attorney to bind an incapacitated principal *vis-à-vis* a third party who relies upon it; even if an

attorney acts beyond his or her actual authority, the principal is bound by the attorney's ostensible authority: *Taheri v Vitek* (2014) 87 NSWLR 403.

116. As between an incapacitated principal and his or her attorney:

(a) the attorney's actual authority might, or might not, be defined by the terms of the power of attorney; as an instrument, it operates as a grant of authority to deal with third parties, but the nature and extent of the attorney's authority might be qualified by instructions given by the principal to the agent in a form extrinsic to the instrument: *Estate Tornya, Deceased* [2020] NSWSC 1230; and

(b) in the absence of any extrinsic, countervailing fact, the attorney occupies the office of a fiduciary and, subject to the terms of the instrument, is bound by the obligations of a fiduciary to act only in the interests, and for the benefit, of the principal (generally articulated in terms of a duty not to make, or to retain, an unauthorised benefit and a duty not to act in a situation of conflict between the attorney's duty and the interests of the principal.

117. An attorney who acts in breach of fiduciary obligations owed to his or her principal, may be held liable to account to the principal (or, after the death of the principal, the principal's legal personal representative) for property (held on a constructive trust for the principal or his or her estate) or equitable compensation.

118. Thus it is that the estate of a deceased principal might include property or compensation recoverable, *via* a claim in equity, against a defaulting attorney or others who participate in the attorney's breach of fiduciary's obligations or who, otherwise than as a purchaser for value without notice, receive property.

119. Where an attorney transfers a principal's property to himself or herself in breach of terms expressed in the instrument granting him or her authority, a claim that the attorney be held liable to account may present itself in a relatively simple guise. However, what sometimes happens in management of the affairs of an incapable person is that an attorney, by an exercise of influence over a principal, encourages or allows the principal to effect a transaction in his or her favour without overt deployment of any power of attorney. In that context, the attorney usually signs no documentation, all of which (perhaps a memorandum for the transfer of land or a bank withdrawal slip) is executed by the principal personally.

120. In the nature of things, such cases may involve a principal who is vulnerable to exploitation, if not lacking in the mental capacity to effect a transaction; and, if the attorney is to be held to account, enforcement proceedings are commonly taken either (before the death of the principal) by a financial manager (appointed by the Guardianship Division of NCAT pursuant to the *Guardianship Act* 1987 NSW or an equivalent appointment by the Court under section 41 of the *NSW Trustee and Guardian Act* 2009 NSW) or, after the death of the principal, by his or her legal personal representative.

121. In these circumstances, if enforcement action is to be taken against an attorney, claims made against the attorney customarily include one or more of: (a) an allegation of undue influence; (b) an allegation of unconscionable

conduct in the nature of a “catching bargain” taking advantage of a special disadvantage on the part of the principal; and (c) an allegation of breach of fiduciary obligations.

122. In practice, a standard response by an attorney to such allegations is a contention that: (a) the principal did not lack the mental capacity necessary to effect an impugned transaction; (b) insofar as an impugned transaction conferred a benefit on the principal, the intention of the principal was to make a gift to the attorney; (c) the proposal that a gift be made originated with the principal, not the attorney; and (d) the principal gave his or her fully informed consent to the transaction.

123. A forensic contest defined by these allegations and counter allegations is often, in practice, rendered complex, and expensive, by a need to determine whether, in purporting to effect a particular transaction, the principal did or did not have mental capacity assessed in accordance with principles enunciated in *Gibbons v Wright* (1954) 91 CLR 423 at 437-438. “Sanity” is generally presumed. To prove that a principal did not have the capacity to transact a particular piece of business, it is necessary for the principal, or his or her representative, to establish that he or she did not have “such soundness of mind as to be capable of understanding the general nature of what he [or she] was doing” and that he or she did not have the capacity to understand the nature of the transaction even if explained to him or her.

124. The complex, and expensive, task of litigating a principal’s mental capacity might, in practice, be avoided if there is clear evidence that the principal was, at least, vulnerable to exploitation and his or her consent to an impugned transaction was procured by undue influence on the part of the attorney,

constituted unconscionable conduct on the part of the attorney in the nature of a catching bargain, or a breach of fiduciary obligations on the part of the attorney without the attorney having obtained the principal's fully informed consent to the transaction.

125. In their application to the affairs of a person vulnerable to exploitation, if not mentally incapacitated generally, these three types of case often operate in a similar fashion, although they are conceptually distinct.

126. In practice, consideration generally should be given to pleading claims for relief, "further and in the alternative", by reference to allegations of undue influence, unconscionable conduct and a breach of fiduciary obligations. A common feature of each form of "equity" is the unconscientious receipt or retention of property of a weaker person by stronger one.

127. In the nature of an enduring power of attorney, when it becomes operative as an "enduring" instrument (if not earlier) the attorney is likely to occupy a position of strength *vis-à-vis* the incapacitated principal in whose interests, and for whose benefit, the attorney is required to exercise his or her powers.

128. Upon an exercise of equity jurisdiction, the Court recognises subtle, but important, different paths to a finding that a stronger party has, against good conscience, received or retained property of a weaker party in circumstances in which the stronger should be held liable to account to the weaker for that property.

129. Undue influence looks to the quality of the consent or assent of the weaker party to an impugned transaction (as generally explained by reference to *Johnson v Buttress* (1936) 56 CLR 113 at 134-136 and conveniently

summarised in *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675), whereas unconscionable conduct in the nature of a "catching bargain" (described in *Bridgewater v Leahy* (1998) 194 CLR 457 at [75] and commonly articulated by reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447) looks to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person (the weaker party) under a disadvantage.

130. Another point of difference is that "undue influence" may be established by means of a presumption in some cases whereas no presumption is available in support of an allegation of unconscionable conduct.

131. Upon an exercise of equity jurisdiction (as distinct from probate jurisdiction), "undue influence" denotes an ascendancy by the stronger party over the weaker party such that an impugned transaction is not the free, voluntary and independent act of the weaker party; it is the actual or presumed impairment of the judgement of the weaker party that is the critical element in the grant of relief on the ground of undue influence. "Unconscionable conduct" focuses more on the unconscientious conduct of the stronger party. It is a ground of relief which is available whenever one party (the weaker party), by reason of some condition or circumstance, is placed at a special disadvantage *vis-à-vis* another (the stronger party) and unfair or unconscientious advantage is taken (by the stronger party) of the opportunity thereby created: *Bridgewater v Leahy* (1998) 194 CLR 457 at [71]-[76].

13 The critical feature of a fiduciary relationship, and the attendant obligations of a fiduciary, are commonly identified by reference to the observations of

Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97:

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v Boardman* [1967] 2 AC 46 at 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility ...
>
> It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. …"

132. The categories of fiduciary relationships are not closed. Fiduciary relationships are of different types, carrying different obligations and they may entail different consequences: *Hospital Products Ltd v United States Surgical Corporation* (1984) at 68-69 and 96.

133. Fiduciary obligations may be owed to a person under care, particularly by a carer who holds appointments as the enduring attorney or guardian of an incapacitated person: *Hewitt v Gardner* [2009] NSWSC 1107 at [99]-[102] and [70].

134. Questions about a breach of fiduciary obligations by a member of the family of an incapacitated person who holds an enduring power of attorney and/or an enduring guardianship appointment commonly require, upon a determination of a claim of breach of a fiduciary obligation, consideration of:

(a) the nature of the obligation of a "guardian" (by whatever name known) to account for property entrusted to him or her for the maintenance and support of a person under his or her care. The guardian is not liable to account as a trustee, but has a liability to account assessed by reference to whether the purpose of his or her appointment (that is, due care of the person under care) has been served. A guardian may be relieved of the obligation of accounting precisely for expenditure and, if he or she fulfils the obligation of maintenance of the person under care, in a manner commensurate with the property available to him or her for the purpose, an account will not be taken: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.

(b) the possibility that a "guardian" (by whatever name known) might, upon an exercise of protective jurisdiction, be, or have been, excused from a liability to account if he or she has acted honestly and reasonably in management of the property of the person under care: *C v W (No 2)* [2016] NSWSC 945.

135. These possibilities are often overlooked by parties engaged in adversarial litigation on a claim for relief arising from deployment of an enduring power of attorney. However, they should not be seen as an attorney's means of escaping liability for an unjustified deployment of an enduring power of attorney. *Smith v Smith* [2017] NSWSC 408 provides an illustration of a case in which they were the subject of consideration without a grant of relief to a defaulting attorney.

“Exclusion” of Property from a deceased Estate: Trusts that bind an Estate

136. Subject to chapter 3 of the *Succession Act*, property nominally forming part of a deceased estate might not be held beneficially by “the estate” in circumstances in which the legal personal representative of the deceased may be found to hold property on trust, not for the beneficiaries of the deceased, but for a claimant to estate property who invokes principles governing:

(a) mutual wills: *Birmingham v Renfrew* (1937) 57 CLR 666;

(b) a contract to make a will: *Schaefer v Schumann* [1972] AC 572; *Barnes v Barnes* (2003) 214 CLR 169; and

(c) an agreement to make a will, enforceable in estoppel: *Giumelli v Giumelli* (1999) 196 CLR 101; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483.

137. In theory, the legal personal representative of a deceased person might be bound, in equity, to hold estate property on trusts other than those in a will admitted to probate where execution of the will was procured by an exercise of “undue influence” as understood in equity: *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63], discussed in *Boyce v Bunce* [2015] NSWSC 1924.

138. If an allegation of equitable undue influence were to be made, it would be most likely to succeed (if at all) in a case in which execution of a will was procured by the testator’s lawyer, doctor or carer, classes of persons who (if named as a beneficiary in the will) might be presumed to have exercised undue influence.

139. So far, nobody appears to have taken up the challenge of pursuing such an allegation. In part, that might be because: (a) established grounds for challenging the validity of a will (testamentary incapacity, lack of knowledge and approval, undue influence in the nature of coercion and fraud) provide flexible opportunities for sound outcomes; and (b) if, upon an application of equitable undue influence principles, an estate is to be held on trusts other than those for which a probated will provides, there is uncertainty as to the terms of such a trust.

DIFFERENCES IN THE DYNAMIC OF DIFFERENT TYPES OF "SUCCESSION" CASE

Introduction

140. Differences in the dynamic of conducting different types of "succession" case can bear critically upon forensic decisions about whether to engage in litigation of one type or another.

141. This phenomenon manifests itself in different approaches to pleadings; discovery of documents and disclosure of information; the nature of evidence likely to be required or encountered; and the usual course of a contested hearing.

Contested Management in Probate

142. The nature of a contested application for a grant of probate or administration generally depends upon the nature of the contest. If the validity of a will is not in issue, and if the issue is confined to identification of a person or persons to whom a grant of representation should be made, the disputed questions generally bear a managerial flavour, focusing on what steps need to be taken

to finalise administration of an estate and the identity of the person or persons best able to take them.

143. Respect must be shown for a testator's choice of an executor, but the dominant consideration is what is required for the due administration of the estate. An unproductive tendency on the part of interested persons to elevate disagreements into disputes about the character or fitness of one or another for the office of executor or administrator should not be indulged. The Court does not need to make findings about character or fitness in order to justify the appointment or retention of a legal personal representative other than an executor named in a will or a person to whom a grant of probate or administration has formerly been made. A focus on the "management" character of the process of identification of a person to be entrusted with a grant of probate or administration may sometimes require pleadings, discovery and all the paraphernalia of a contested hearing. However, more often than not the outcome of a dispute of this nature will depend upon objective factors such as a demonstrated delay in the administration of an estate or a breakdown in the relationship of co-executors or other interested persons.

A Contested Will in Probate

144. A contested application for a grant of probate or administration in which the primary question for determination is the validity or otherwise of a will generally requires pleadings which collectively: (a) identify the deceased person whose estate is the subject of contest and any testamentary instrument propounded; (b) assert that the deceased died with property in NSW; (c) plead that due notice has been given of an intention to apply for a

grant; and (d) articulate the grounds upon which the validity of the will is challenged, with particulars.

145. At an early stage of proceedings, each party to the proceedings might be called upon to file and serve affidavits that demonstrate that there is a reasonable factual foundation for each case sought to be made. In order to identify real questions in dispute, the Court might order each party to file and serve a "disclosure affidavit" deposing to knowledge of facts bearing upon due administration of an estate, including knowledge of competing wills, the circumstances in which wills were prepared and executed, medical records relating to the deceased, enduring powers of attorney that might have been executed by the deceased, and *inter vivos* property transactions bearing upon estate administration.

146. Recognising a need for interested persons to be allowed a reasonable opportunity to investigate facts outside their personal knowledge, a liberal attitude may be taken by the Court to the issue of subpoenas for the production of documents designed, for example, to bring within the Court's control competing testamentary instruments, records of any solicitor or other person known to have been involved in the preparation or execution of a testamentary instrument, medical records, powers of attorney and records relating to the conduct of financial management or guardianship proceedings in NCAT.

147. A final hearing of proceedings of this type commonly involves detailed lay evidence as to underlying facts; expert forensic medical evidence based upon those facts and available clinical records; and substantial cross examination.

A Family Provision Case

148. A contested application for a family provision order rarely involves any form of pleading unless there is a claim for a grant of provision out of property designated as notional estate and disputation about the existence or otherwise of a "prescribed transaction" sufficient to ground a designation of property as notional estate. Ordinarily, an application for a family provision order is made in a summons. If it is incorporated in a statement of claim for a grant of probate or administration it still generally takes the form of a bare claim for a family provision order out of the deceased person's estate or notional estate.

149. Questions relating to the discovery of documents or the disclosure of information are generally subordinated to early disclosure procedures mandated by the Court's Practice Note SC Eq No 7: a standard form of administrator's affidavit and a formal affidavit of the plaintiff can ordinarily be expected to address the basic elements of a claim for a family provision order.

150. At a final hearing, section 100 of the *Succession Act* 2006 NSW facilitates the admission of statements made by the deceased. Experienced advocates tend to take no objections, or comparatively few objections, to affidavits filed in support of, or in opposition to, a claim for a family provision order; and they are conscious that prudence generally suggests that cross examination of competing claimants on the bounty of the deceased be limited. Overly aggressive conduct of a case can be counter-productive insofar as it generates sympathy for the case of the object of aggression.

151. Although too many parties in family provision proceedings evidently feel a need to ventilate long held grievances, the jurisdiction operates best when affidavits are short and to the point, and cross examination on affidavits is disciplined.

152. The criteria for decision making set forth in section 60(2) of the *Succession Act* 2006 should be consulted in the preparation and conduct of a case, but there is no necessity expressly to labour each and every point.

153. In most cases, attention is upon identification of the plaintiff as an "eligible person" (section 57); confirmation that the plaintiff's application for a family provision order was made within time, or should be allowed to be made out of time (section 58); the existence of "factors warranting" in the case of a plaintiff who is a former spouse, a person who was dependent on the deceased and either a grandchild or a member of the household, or a person who lived in a close personal relationship with the deceased (section 59(1)(b)); whether the plaintiff was left without adequate provision for his or her proper maintenance, education or advancement in life (section 59(1)(c)); and, if so, what provision "ought to be made" for the plaintiff's maintenance, education or advancement in life (section 59(2)).

Equity Claims bearing upon Identification of Estate Property

154. Equity proceedings for the recovery of trust property or equitable compensation on behalf of a deceased estate (for example, for a breach of fiduciary obligations by an enduring attorney who engaged in self-dealing property transactions during the lifetime of the deceased) or for a declaration that property is held on trust by the estate on terms other than the deceased's

last will (by reason, for example, of a contract to make a will) generally involve litigation which, although it may be necessary for the due administration of an estate, bears the characteristics of disputation about competing claims of right.

155. Narrative “fact” pleadings are usually required where, as in these cases, there is an allegation of breach of trust. Processes for the discovery of documents and disclosure of information are governed by the constraints imposed by Practice Note SC Eq No 11, so that the availability of subpoenas and discovery may not be available until after pleadings have closed and affidavits have been served. A trial of this type of case may require fulsome cross examination.

Forensic Choices

156. The conduct of a dispute about the validity of a will, or of a claim about the existence of a trust, is generally more costly than the conduct of a claim for a family provision order unattended by the complexities of probate law and an exercise of equitable jurisdiction. There is a clear costs incentive in the confinement of a “succession” case to an exercise of family provision jurisdiction if all interested persons are “eligible persons”.

ORDERS FOR A JOINT HEARING OR A DETERMINATION OF SEPARATE QUESTIONS

157. Rules of court make no special provision for the circumstances in which an order should be made for the hearing together in the one proceedings of disparate claims for relief (e.g., invoking each of the probate, equity and family

provision jurisdictions), or in the making of an order for the separate determination of particular questions.

158. Nevertheless, upon consideration of what types of claim for relief can, or should, be heard in the one set of proceedings, regard might usefully be had to ensuring that, at the earliest practical time, an order is made for a grant of probate or administration so that any claims against the estate can be assessed by a person charged with responsibility for administration of the estate.

159. Parties who are unmindful of the importance of an orderly administration of an estate, and who focus their attention on competing claims of "right" against an estate or disputes about identification of estate property often get bogged down in collateral disputes that simply serve to impede the administration of the estate.

160. A decision about whether more than one type of claim should be heard together should address the following questions, reflective of the fact that the administration of a deceased estate might affect the interests of persons other than active participants in proceedings before the Court:

    (a) Is it necessary, or convenient, for the due administration of the estate that these claims be heard together?

    (b) Will the due administration of the estate be unreasonably burdened by these claims being heard together?

COSTS AS A FACTOR IN THE CONDUCT OF A "SUCCESSION" CASE

161. In terms of formal logic, the starting point for consideration of any proposed order for costs is usually section 98 of the *Civil Procedure Act* 2005 NSW,

read together with rule 42.1 of the *Uniform Civil Procedure Rules* 2005 NSW. Together, those provisions provide for costs orders to "follow the event" unless the Court otherwise orders.

162. In practice, a party representing an estate ordinarily receives costs out of the estate assessed on the indemnity basis, and other parties (if allowed costs out of the estate) get an order for costs assessed on the ordinary basis.

163. A common assumption that these forms of costs orders will be made routinely, without exposing a party to a substantial risk of costs liability, is a dangerous assumption for any party to make. The principles governing an award of costs in probate proceedings (commonly identified by reference to *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709 and explained by White J in *Gray v Hart; Estate of Harris (No 2)* [2012] NSWSC 1562 by reference to their historical origins in *Mitchell v Gard* (1863) 3 Sw & Tr 275 at 277; 164 ER 1280 at 1281) operate as a disincentive to involvement in speculative proceedings. An applicant for family provision relief must also proceed, prudently, on the basis that if he or she is unsuccessful an adverse cost order is likely to be made.

164. In family provision proceedings, the Court's powers to order that costs be paid out of the estate or notional estate of a deceased person are supplemented by section 99 (read with section 78) of the *Succession Act* 2006 NSW.

165. The quantum of costs commonly charged on a solicitor-client basis in probate and family provision proceedings often appears excessive, even allowing for modification on an assessment of costs. Capping the costs payable out of an estate in family provision proceedings on a party-party basis, without capping

costs recoverable from a party on a solicitor-client basis, often appears to be an exercise futility, given the purpose of family provision proceedings, grounded in making orders responsive to a "need" for provision.

166. It is not the practice of the Court, at this stage, to make orders capping solicitor-client costs. Whether such a practice might emerge in the future is a question not currently the subject of debate, but which cannot be discounted.

CONCLUSION

167. Meeting challenges in conducting a "succession" case requires a broad appreciation of the law, in practice, governing the administration of the estate of a person who, by reason of incapacity or death, is incapable of managing his or her own affairs. That requires: (a) an appreciation of the principles governing an exercise of the protective, probate, family provision and equity jurisdictions, including those governing the fiduciary obligations of an enduring attorney; (b) an appreciation of practice notes and practice directions governing "succession" proceedings; (c) an appreciation of the work of the Guardianship Division of NCAT; and (d) an appreciation of the different perspective of each person interested in the due administration of an estate. There are no short cuts.

4 August 2021

GCL

(Revised 10 August 2021)