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THE PROVINCE AND NATURE OF PROBATE LAW AND PRACTICE

by

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INTRODUCTION

1 “Probate law” and “Probate practice” are often presented as a single topic (“Probate law and practice”) with lines between substantive and adjectival law subconsciously blurred. That is, perhaps, because the probate jurisdiction of the Supreme Court of NSW is largely concerned with the administration of estates and the availability of court orders to address common problems in the management of property, people and relationships consequent upon the death, or incapacity preceding death, of a propertied person. Probate law is essentially an action-based form of jurisprudence in which rules of practice are sometimes presented as rules of law or guidelines so fixed in the imagination of practitioners that any departure from them may be viewed as heretical.

2 Literature about probate law and practice is often presented in the form of annotated legislation, glossed with commentary based upon a core of established cases (most notably, for example, *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566) and examples of their recent application.

3 That is the approach of the two practice books in common use by NSW legal practitioners: Mason and Handler, *Succession Law and Practice*, NSW (Lexis Nexis, Australia, Loose Leaf Service) and Janes, Liebhold & Studdert, *Wills, Probate and Administration Law in NSW* (Law Book Co, Sydney, 2nd edition, 2020). They are built primarily upon commentaries on the *Probate Administration Act* 1898 NSW, the *Succession Act* 2006 NSW and the *Probate Rules* (*Supreme Court Rules* 1970 NSW, Part 78), recognising that problems associated with estate administration often engage other legislation, notably the *Trustee Act* 1925 NSW. They are more often consulted by reference to an index at the rear of the publication, or a particular legislative provision, than a table of contents.

4 "Probate law and practice" is not without narrative texts worthy of consultation in the course of research. Two that come to mind are Dal Pont and Mackie, *Law of Succession* (Lexis Nexis Butterworths, Australia, 2nd edition, 2017) and Certoma, *The Law of Succession in New South Wales* (Law Book Company, Sydney, 4th edition, 2010).

5 Two casebooks are commonly consulted for research purposes. The most recently published of the two is Croucher and Vines, *Succession: Families, Property and Death*; *Text and Materials* (Lexis Nexis, Butterworths, Australia, 5th edition, 2019). The most recent addition of the older of the two casebooks is known as Hutley, Woodman and Wood, *Succession: Commentary and Materials* (Lawbook Co, Sydney, 4th edition, 1990), edited by Wood and Certoma. The first (1967) edition was compiled by Frank Hutley and RA Woodman. Hutley was later a distinguished judge of the Court of Appeal. His preface to the third (1984) edition provides an unsympathetic but amusing critique of the *Family Provision Act* 1982 NSW, and what were then recent reforms of succession law. It demonstrates how far Australian law and society has changed over the past 40 years.

6 And yet, not everything has changed. An old, but still useful, practice text is *Mortimer on Probate Law and Practice* (Sweet & Maxwell, London, 1911). It

is not required for everyday practice, but it provides insight to a solid core of probate law and practice which remains relevant to the modern era.

7 However one approaches problem solving involving probate law and practice in a particular case, legal practitioners must have a grasp of concepts that inform an exercise of probate jurisdiction, an understanding of the dynamics of estate administration, and an appreciation of the interplay between an exercise of probate jurisdiction and other forms of jurisdiction (notably the protective and family provision jurisdictions) of the Supreme Court.

8 A problem with any attempt to conceptualise "probate law and practice" as a subject of study is one of terminology. What is casually described as "probate" law is sometimes described, with a greater focus on the particular, as "the law of wills", "the law of intestacy" or "the law relating to administration of deceased estates". Given the frequency with which the family provision jurisdiction of the Court is now invoked "to challenge a will", a casual reference to the probate jurisdiction might, upon inquiry, turn out to be a reference to an application for a family provision order, with or without a claim for probate relief.

TYPES OF WILL UNDER CURRENT NSW LAW

9 There are three different types of will currently admitted to probate in New South Wales. The most common is a "formal will" executed in accordance with formal requirements of the *Succession Act* 2006 NSW. It forms the template usually (as in this paper) adopted for discussion of probate law and practice. The second most common type of testamentary instrument admitted to probate is an "informal will", admission to probate of which is governed by the *Succession Act* 2006, section 8. The third type of testamentary instrument admitted to probate is a "statutory will", governed by sections 18-26 of the *Succession Act*.

10 Informal and (particularly) statutory wills are creatures of statute, the product of law reform initiatives in the latter part of the 20th century. An informal will is sometimes viewed, not as a creature of statute, but as the product of an

authorised dispensation of the statutory requirements of a formal will. The statutory formalities required of a formal will have changed from time to time, with a history that reaches back into 17th century England.

11 Although informal and statutory wills are governed by particular legislation, the tendency of the courts is to construe that legislation by reference to substantive law concepts traditionally explained by reference to a formal will. That is not altogether surprising when one realises that, conceptually, the law governing the validity of a (formal) will under the general law is essentially a working out of the ultimate question upon an application for admission of a will to probate: Is this the last will of a free and capable testator?

12 For a recent exposition of the law, and practice, relating to an application for a statutory will, see the paper entitled "A Platypus in NSW Succession Law: Statutory Wills in a Managed Society" (presented by me on 17 November 2021) published on the website of the Supreme Court.

ESTATE ADMINISTRATION

Attorneys, Guardians and Wills

13 A practical illustration of the interconnectedness of the protective, probate and family provision jurisdictions of the Supreme Court is the tendency of Australians to prepare for incapacity and death by the simultaneous execution of an enduring power of attorney (governed by the *Powers of Attorney Act* 2003 NSW), an enduring guardianship appointment (governed by the *Guardianship Act* 1987 NSW) and a will (governed by the *Succession Act* 2006 NSW). Although separate, individual transactional documents these instruments have a unity of purpose in their expression of the preferences of a person (currently possessed of mental capacity) about management of his or her affairs (potentially affecting both property and the person) in anticipation of incapacity for self-management and death.

Associated Jurisdictions: Protective, Probate and Family Provision

14 One thing that the protective, probate and family provision jurisdictions have in common is a central focus on estate administration.

15 Here too one sees a shift in emphasis as a capable person approaches incapacity, dies and parts company with all things temporal. Accepting that the paradigm of Australian law is the autonomous individual living, and dying, in community, there is a shift in emphasis from the individual to community as one moves, in timely sequence, from an exercise of the protective, probate and family provision jurisdictions.

16 The protective jurisdiction is governed by "the paramountcy (or welfare) principle", according to which the welfare and interests of an incapable person are the paramount concern of the Court.

17 Upon exercise of probate jurisdiction one sees a shift from a concern about a deceased person's testamentary intentions (in the making of a grant of probate or administration) to the rights of beneficiaries (as the character of a legal personal representative changes from that of an executor to that of a trustee).

18 Upon an exercise of family provision jurisdiction the Court, with due respect for the testamentary intentions of a deceased person, makes a judgement about whether testamentary provision "ought" to have been made for an eligible person (a member of the deceased's community).

The Probate Jurisdiction: Historically and Functionally Distinct

19 The "probate jurisdiction" of the Supreme Court, presently administered within the Equity Division of the Court, is historically and functionally a distinct branch of the Court's "inherent jurisdiction" preserved by section 22 of the *Supreme Court Act* 1970 NSW and supplemented by legislation of the NSW Parliament.

20 It takes its current name from the form of order made by the Court upon proof of the validity of a will of a deceased person. A grant of probate is both an order of the Court and an instrument of title to property forming part of the estate of the deceased person whose will is admitted to probate: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233].

21 The primary field of operation of the probate jurisdiction is the "administration" of a deceased "estate". Disputation about the appointment of a "testamentary guardian" (that is, a guardian of children appointed by a will of a testator) is comparatively rare, and can be passed over upon a consideration of ordinary practice. For practical purposes, the probate jurisdiction is concerned with "succession" to property in anticipation of, on or consequentially upon death.

DEMYSTIFICATION OF PROBATE LAW AND PRACTICE

22 The idiosyncratic character of the probate jurisdiction manifests itself in the terminology used to describe it. For those unfamiliar with the jurisdiction it can be demystified, to some extent at least, by recognition of parallel concepts in other areas of the law (principally the equity jurisdiction) to which different labels attach.

23 Probate lawyers speak of "administration" of an "estate", meaning simply "management" of "property". A "grant of administration" is the generic description of a "grant of probate" (of a will) or a "grant of letters of administration" (in respect of an intestate estate or in relation to a testate estate where a grant is made to a person not named as an executor in a will admitted to probate).

24 The Court can, and does, make interlocutory orders for the appointment of a "receiver and manager" (an office generally associated with an exercise of equity jurisdiction) pending the determination of a dispute; but, more often than not, upon an exercise of probate jurisdiction it appoints a "special administrator" (that is, it makes a grant of special administration) to do the same work.

25 Orders for the appointment of a special administrator can be particularly opaque because they have commonly been made by reference to traditional Latin tags without express articulation of the powers of "the administrator" (the equivalent of a receiver and manager). For an exposition of the law, and practice, relating to special grants of administration, see the paper (presented by me on 31 August 2019) entitled "The Concept of 'Special' Administration of a Deceased Estate" published on the Supreme Court website.

26 Orders for the appointment of a special administrator reflect the fact that an order for administration can be limited in time, scope or purpose.

27 The prevalence of the word "grant" in the formulation of orders made, upon an exercise of probate jurisdiction, for the administration (management) of an estate (property) reflects the preoccupation of the jurisdiction with property.

NOT ALL PROBATE BUSINESS IS "CONTENTIOUS", MOST IS NOT

28 An appreciation that the Court's focus is upon "due administration of an estate" (the proper management of property) is essential to an understanding of the probate jurisdiction. Parties to "contentious" probate proceedings tend to view the proceedings as adversarial in character, as a contest between competing claims of right, even though proceedings are directed to identification of the testamentary intentions of a deceased person, absent and sometimes forgotten. The public interest involved in the Court's ascertaining, and giving effect, to the testamentary intentions of a deceased person (by definition, a person absent from the bar table) is an impediment to a simple characterisation of probate proceedings as adversarial.

29 Probate law and practice is marked by the fact that most probate proceedings are "non-contentious" and dealt with administratively, in chambers, by a registrar. "Contentious" probate business is generally dealt with by a judge (or, sometimes, a registrar) in open court after allowing competing parties an opportunity to be heard.

30 The fact that the probate jurisdiction must accommodate both contentious and non contentious business may inform debate about the role of “presumptions” in the analysis of the validity of a will.

31 A loose illustration of the distinction between “contentious” and “non contentious” business is found in the two, alternative forms of grant that can be made when a will is admitted to probate.

GRANTS OF PROBATE IN “COMMON” AND “SOLEMN” FORM

32 A grant of probate “in common form” can be made with comparatively little formality, where the Court is satisfied that it is appropriate to do so, without insisting upon notice of proceedings for a grant to be served personally on all persons who might have an interest in opposing the admission of a will to probate. A common form grant is sometimes likened to an interlocutory order, liable to be revoked (set aside) on the application of a person with a sufficient interest to do so. An application for a common form of grant is commonly dealt with by the Court as “non contentious” business.

33 A grant of probate “in solemn form” is generally made only after a contest preceded by personal service of notice of an application for a grant upon all persons who might have an interest in opposing the application, allowing them a reasonable opportunity to intervene in proceedings on the application. Because of this precondition of service of notice, a grant of probate in solemn form is not as readily liable to be revoked as a grant in common form.

34 If a judge orders that a will be admitted to probate in solemn form the grant issued by the registry will ordinarily bear an endorsement to that effect. However, the absence of the words “in solemn form” on a grant is not necessarily indicative of a grant in common form: *Mortimer v David*; *Estate Dawn Audrey Day*, *Deceased* [2005] NSWSC 1166 at [28]. A grant made, on notice to all interested persons, after hearing evidence bearing on the validity of a will, may aptly be described as a grant “in solemn form” notwithstanding the absence of those words in the instrument of grant. The difference between common and solemn form grants is more than merely formulaic.

35 As explained in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249], a grant of probate expressly issued in "solemn form" is a judicial statement that, on the Court's then assessment:

(a) all persons interested in the making of a grant (and, particularly, those with an interest adverse to the making of a grant) have been allowed a fair opportunity to be heard, with a consequence that principles about the desirability of finality in the conduct of litigation should weigh heavily on any application for revocation of the grant;

(b) on evidence then formally noticed, the Court is satisfied that the particular grant represents, consistently with the law's requirement that testamentary intentions be expressed formally, an expression of the deceased's last testamentary intentions, if any; and

(c) an order for a grant in solemn form appropriately serves the due administration of justice.

REVOCATION OF A GRANT

36 The distinctive character, and purpose, of a grant of probate is on show in consideration of its susceptibility to revocation, considered in *Estate Kouvakas* [2014] NSWSC 786.

37 At least three different types of case require attention.

38 First, as has been noticed, a grant of probate in common form is generally regarded as liable to be revoked upon the application of an interested person calls upon the propounder of the will admitted to probate to prove its validity on an application for a grant in solemn form.

39 Secondly, a grant of probate (whether made in common or solemn form) can be revoked if a later will of the deceased is subsequently discovered and made the subject of an application for a grant.

40 Thirdly, a grant of probate (whether made in common or solemn form) can be revoked where the object of the application for an order that the grant be revoked is not to contest the validity of the will admitted to probate but to change the identity of a person charged with administration of the estate.

41 In the last of these cases an order for revocation of a grant is accompanied by an application for a grant of administration "with the will annexed" so as to permit administration of the estate so far as not administered to date.

42 This is the traditional form of procedure. An alternative form of procedure, sometimes adopted, is for the Court to make orders for removal and replacement of the person or persons charged with administration of the estate, in a manner analogous to the removal and replacement of a trustee: *Riccardi v Riccardi* [2013] NSWSC 1655.

PROBATE LITIGATION IS "INTEREST LITIGATION"

43 Implicit in this discussion about "grants" is the fact that probate litigation is "interest litigation". A party must have an interest in proceedings in the sense that its rights will, or may, be affected by the outcome: *Nobarani v Mariconte* (2018) 265 CLR 236 at [49]; *Gardiner v Hughes* (2017) 54 VR 394; *Gertsch v Roberts; The Estate of Gertsch* (1993) 35 NSWLR 631.

44 Protective and family provision cases are not normally described as "interest litigation" because of the nature of the jurisdiction called upon to be exercised in those cases. However, in a manner that reflects their respective purposes, each of the protective jurisdiction and the family provision jurisdiction needs to take into account an idiosyncratic concept of "interest".

45 Although, upon an exercise of protective jurisdiction, the welfare and interests of the incapable person are the paramount consideration (*Marion's Case*

(1992) 175 CLR 218 at 258-259), the Court often calls upon people within the community of the incapable person (family, friends, carers) for information about the affairs of the incapable person; such persons have what might be described as a "social interest" in the affairs of the incapable person, not a proprietary interest.

46 Upon an exercise of family provision jurisdiction, all "eligible persons" (and, through a legal personal representation of the deceased defending a claim for provision, beneficiaries of an estate) are entitled to be put on notice of a pending application for a family provision order so that they can protect their own interests (for example, by themselves making an application for a family provision order or seeking to intervene in the proceedings).

47 In each type of case the existence and nature of an "interest" beyond that of persons named as parties in proceedings governs a requirement that notice of the proceedings be given.

NOTICE OF PROCEEDINGS

48 A distinctive feature of probate proceedings, reflecting the origins of the probate jurisdiction in the ecclesiastical jurisdiction of an English church court, is that a person with an interest in the outcome of an application for probate is ordinarily bound by the outcome, even if not formally joined as a party, if given notice of the proceedings and a reasonable opportunity to intervene: *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

49 Procedures designed to publicise the making of an application for a grant of probate or administration are not mere formalities. That is so whether one has in view a Notice of Intended Application or the service of a Notice of Proceedings. These procedures are fundamental to the operation of a grant as an instrument of title "against the whole world". A person interested in an estate needs to be given notice of an application for a grant, and an opportunity to intervene in proceedings on the application, if he, she or it is to be bound by a grant subsequently made.

A DIFFERENT DYNAMIC: IN SEARCH OF PARTIES AND OTHER FUNDAMENTALS

50 This is, perhaps, one of the most fundamental of principles that distinguishes probate proceedings from other types of proceedings. The common law concept of parties (namely, that only persons named as a party in proceedings are bound by a determination of the proceedings) is a product of the types of "causes of action" (competing claims of right) litigated *via* the traditional common law mode of trial by jury. Upon an exercise of equity jurisdiction (principality in the determination of rights concerning property) the Court has an inherent jurisdiction to make orders for the representation of an absent party, including a person as yet unborn. The distinctive nature of an exercise of probate jurisdiction is that an absent party may be bound, without any order of the Court, if given notice of pending proceedings and a reasonable opportunity to intervene.

51 In standard common law and equity proceedings parties present themselves to the Court with a "cause of action" (commonly thought these days to include a common law cause of action, an "equity" justifying the Court's intervention in civil affairs or a statutory entitlement) against named persons based upon allegations of fact. Although parties might apply to the Court for interlocutory relief in the nature of discovery, interrogatories and the like, there is generally no need for the Court to go in search of parties or the subject matter of proceedings. Nor is the Court customarily concerned, beyond case management considerations, to intervene in the conduct of proceedings by adversarial parties. On the whole, all affected parties are before the Court and able, or at least required, to protect their own interests, often best known to themselves.

52 Probate proceedings (in common, more or less, with other forms of estate administration proceedings) are different. In the earliest stage of probate proceedings, and sometimes at later stages as well, the Court must actively supervise arrangements designed to go in search of an absent central player (a person deceased or presumed to be deceased), his or her property, statements of his or her testamentary intentions (if any), his or her named

beneficiaries (if any) and personal relationships which may bear upon selection of a person (an executor or administrator) to manage his or her affairs, disposal of his or her body, collection and management of his or her property, identification and payment of his or her debts, realisation of his or her property and accounting for administration of his or her estate. Even though interested persons may be left to protect their own interests, the Court's procedures provide a framework within which an estate is to be administered and claims on an estate determined in an orderly way.

FIRST STEPS IN PREPARATION OF A PROBATE CASE

53 In probate proceedings an initial, key step in any decision making, problem solving process is generally to identify:

(a) the central personality (the deceased or a missing person presumed deceased) through whose lens the world must be viewed;

(b) the nature and value of the "estate" (property) to which that key personality is, may be, or has been entitled and which may have a bearing upon administration of his or her deceased estate;

(c) the existence or otherwise of any and all legal instruments that may govern, or effect, the disposition or management of property of the central personality: eg, a will, statutory intestacy provisions, an enduring power of attorney, an enduring guardianship appointment, a financial management order, a guardianship order, or a death benefit nomination pursuant to a superannuation policy;

(d) the full range of persons whose "interest" may be affected by any decisions made. (As has been noted, 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);

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

(f) whether any (and, 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.

PHASES IN THE ADMINISTRATION OF A DECEASED ESTATE

54 The administration of an estate upon an exercise of probate jurisdiction ordinarily involves, conceptually, at least three phases (not mutually exclusive):

(a) a first, "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, "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, "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 "commission" (remuneration) that might be made; and effecting a distribution of the estate to beneficiaries.

55 Identification of these “phases” is intended only as an aid to understanding different factors that may bear upon different aspects of estate administration. It is not suggested that all estates are administered by reference to a consecutive sequence of formal stages.

56 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”.

57 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 of probate in solemn form points to the fact that much of the Court’s probate work is non-contentious.

58 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. For a recent exposition of the law, and practice, relating to an application for judicial advice, see the paper (presented by me on 19 November 2021) entitled “An Application for Judicial Advice: Text, Context and Functional Purpose” published on the NSW Supreme Court website.

59 Proceedings of this character illustrate different perspectives of estate administration proceedings. Some proceedings are best viewed as requiring the Court to make a management decision. Other proceedings are best viewed as requiring the Court to make a determination as between competing claims of right. A Benjamin order and judicial advice (each of which may be expressed in terms that an executor or trustee would be “justified” in the

administration of an estate on a particular basis or "at liberty" to do so) are forms of Court order designed to protect an executor or trustee from personal liability if an estate is administered in accordance with the Court's orders. They are not designed as a 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.

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

61 The idiosyncratic nature of probate proceedings is on show in each of the three phases of estate administration, but the most idiosyncratic is the (first) establishment phase.

THE (FIRST) ESTABLISHMENT PHASE

62 In the establishment phase practitioners often have to confront peculiarities of probate law relating to:

(a) procedures for lodgement of a "caveat" and applications to the Court for an order that a caveat "cease to be in force": *Probate and Administration Act* 1898 NSW, sections 144-148; *Supreme Court Rules* 1970 NSW, Pt 78, rules 66-74; *Estate of Katalinic* [2020] NSWSC 805; *Estate of Linworth* [2021] NSWSC 334.

(b) the availability or otherwise of procedures for the timely disclosure of information: *Re Estates of Brooker-Pain and Soulos* [2019] NSWSC 871.

(c) the operation of principles relating to the "formal" and "essential" validity of a will, including:

(i) the statutory requirements for due execution of a valid "formal" will (*Succession Act* 2006 NSW, Chapter 2, Part 2.1, especially sections 4-7 and 9-10).

(ii) statutory requirements for admission of an "informal" will to probate (*Succession Act* 2006, section 8);

(iii) general law principles, both substantive and adjectival.

(d) the service of notice of proceedings on persons who are, or may be, interested in the outcome of proceedings on an application for a grant.

(e) a form of pleadings more akin to old style "issue" pleadings at common law than to the equity style of pleading a narrative of facts which is now used in most civil proceedings.

PROBATE PRESUMPTIONS

63 An undercurrent in dealing with each of these topics is the possibility that a particular decision by the Court may turn upon the operation of what are traditionally called "presumptions" arising, ultimately, from an assumption that the testator had the capacity to make a will at the time of its execution (in the old language, was "sane") and a finding that his or her will was duly executed.

64 Probate presumptions are presumptions of fact, not law. They are rebuttable by evidence. Their field of operation is confined to "formal" wills, the validity of which depends upon compliance with formal requirements for the execution of a will. They have no direct application to proof of an "informal will". Ultimately, their rational foundation is found in inferences of fact drawn from common experience. The starting point is an assumption that everybody is to be taken to be "sane" unless proven otherwise. From there, it is assumed that if a sane person goes to the trouble of compliance with formalities for the due execution of a will, he or she is likely to have knowledge of the contents of the duly executed will, and to approve the terms of the will as his or her statement of testamentary intentions.

65 The utility of such presumptions is most clearly on display in the conduct of non-contentious business (in the course of which, in theory, a grant of probate

in common form might be made simply upon presentation of a duly executed will) or in the conduct of an interlocutory dispute in which the evidence before the Court is less complete than it may be on a final hearing of an application for a grant of probate or administration. In the days when such an application was determined at a trial by jury, presumptions might have been of significance in addressing the jury about the "legal" onus (or burden) of proof on the propounder of a will, and the shifting "evidentiary" burdens affecting a party opposed to admission of the will to probate.

66 The utility of presumptions, by that name, is less clear in the conduct of a final hearing by a judge, sitting alone, in a case in which parties have been required to adduce most of their evidence in the form of affidavits filed and served before the commencement of the hearing. In such a case, the task of the judge is essentially to draw such inferences bearing upon the validity of a will as may be drawn from the whole of the evidence.

67 In that procedural environment, a reasoning process that requires conflation of questions of onus of proof and findings of fact can be an impediment. There may be greater utility in focusing attention on: (a) the ultimate question whether a particular instrument is the last will of a free and capable testator; and (b) the subsidiary questions that logically follow on from that question:- whether the testator had testamentary capacity to make the contested will, whether he or she knew and approved the terms of the will, whether his or her execution of the will was procured by an exercise of undue influence, and whether the will's execution was procured by fraud.

THE ULTIMATE AND SUBSIDIARY QUESTIONS IN CONTEXT

68 Statements about the elements of a valid (formal) will have traditionally been framed in terms of "rules" embodying reference to presumptions and the substantive elements. A recent, authoritative statement of the law in those terms can be found in *Tobin v Ezeki*el (2012) 83 NSWLR 757, which also (at [44]) confirms that the ultimate question for the Court in assessment of the

validity of a testamentary instrument is whether it represents the last will of the deceased as a free and capable testator.

69 That question is conventionally (and logically) analysed by reference to four main, subsidiary questions:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had "testamentary capacity": *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566; *Bailey v Bailey* (1924) 34 CLR 558; *Timbury v Coffee* (1941) 66 CLR 277; *Worth v Clasohm* (1952) 86 CLR 439; *Re Estate of Griffith*; *Easter v Griffith* (1995) 217 ALR 284.

(b) whether the will was made with the testator's "knowledge and approval" of its contents: *Nock v Austin* (1918) 25 CLR 519 at 528; *Tobin v Ezekiel* (2012) 83 NSWLR 757; *Lewis v Lewis* [2021] NSWCA 168.

(c) whether the testator's execution of the will was obtained by an exercise of "undue influence" on the part of an identified individual or individuals: *Winter v Crichton* (1991) 23 NSWLR 116; *Hall v Hall* (1868) LR 1 P&D 481; *Wingrove v Wingrove* (1885) 11 PD 81; *Petrovski v Nasev* [2011] NSWSC 1275 at [269]; *Dickman v Holly* [2013] NSWSC 18; *Estate Rofe* [2021] NSWSC 257.

(d) whether the testator's execution of the will was obtained by the "fraud" of an identified individual or individuals: *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136.

70 The party propounding a testamentary instrument bears the onus (a "legal onus") of proving the ultimate fact that it represents the last will of a free and

capable testator, and the subsidiary elements of testamentary capacity and knowledge and approval.

71 A party alleging undue influence or fraud bears the onus (an "evidentiary onus") of proving the allegation as a factor vitiating the testamentary intention of the deceased.

72 This allocation of the burden of proof largely follows the precept that "he who alleges must prove", starting from the proposition that a sane person who duly executes a formal will is likely to have done so deliberately and that, if he or she is alleged to have done so only at the instigation of another person, that must be proved affirmatively by anybody who opposes admission of the will to probate.

THE SUBSIDIARY QUESTIONS IN DETAIL

73 Conceptually, the subsidiary questions underlying the question whether a testamentary instrument was the (last) will of a free and capable testator each have a distinct field of operation:

(a) The concept of "testamentary capacity" is directed to whether the testator had the *mental capacity* to make a valid will. That generally requires consideration of a further layer of logical, subsidiary questions considered, in common experience, to bear upon the existence of testamentary capacity: whether, at the time the will was made, the testator understood the nature of a will and its effects; whether he or she understood the extent of the property available for disposition; whether he or she was able to comprehend and weigh claims on his or her bounty; and whether his or her faculties were materially impaired by a medical condition.

(b) The concept of "knowledge and approval" is directed (upon an assumption of testamentary capacity) to whether the testator truly *knew* the terms of a will and *intended* to give effect to them.

(c) The concept of "undue influence" (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, "influence" is "undue" if it overbears the testator's independent judgement. In probate law, "undue influence" is often described as "coercion"; but that word, standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person's undue influence (coercion) is not the instrument of the testator, but of the other.

(d) The concept of "fraud" (upon an exercise of probate jurisdiction) is directed to whether the testator was *misled* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

74 The ostensibly logical precision of these concepts provides a structured approach to a determination of whether a testamentary instrument was the (last) will of a free and capable testator. However, their application is not a mechanical exercise: *Carr v Homersham* (2018) 97 NSWLR 328 at [6] and [133]-[134]; *Re Estate of Griffith (Dec'd); Easter v Griffith* (1995) 217 ALR 284 at 295-296. Any "tests" they embody are evaluative in character. An element of practical wisdom is required in the evaluation of evidence, focusing upon the perspective and personal circumstances of the testator, whose absence from the witness box is a central fact of probate proceedings. Medical evidence may be critical but, in contested proceedings it may not in the final analysis be determinative.

STANDARD FORM PLEADINGS

75 The standard form of pleadings in a contested probate suit generally reflects the subsidiary, substantive law concepts, albeit with an appreciation of the importance of probate presumptions. A statement of claim will ordinarily allege that the deceased person died, leaving property in New South Wales, having duly executed a particular instrument as his or her last will. A defence to such a pleading ordinarily denies the validity of the will and, in terms, alleges (in most cases) a want of testamentary capacity and/or a want of knowledge and approval, and (less frequently) an allegation of undue influence or fraud. Customarily, a defence identifies those grounds for opposition to a grant of probate (that is, it identifies an issue) without a narrative form of pleading of facts, but simply setting forth particulars of each ground.

BEWARE OF DISTRACTION BY PREMATURE “ACCOUNTING” DISPUTES

76 A trap to be avoided in the establishment phase of contested probate proceedings is the danger of allowing parties to become unduly deflected, in their conduct of the proceedings in an adversarial manner, by concerns about identification of estate assets. Some parties focus such attention on questions of accounting (particularly if there is an allegation that an estate includes property recoverable by reason of a breach of fiduciary obligations by a carer or relative of the deceased during the lifetime of the deceased) without reflecting sufficiently on the fact that, before property may be recovered on behalf of the estate, somebody must be appointed (by the issue of a grant of probate or administration or by the making of a special grant) to represent the estate.

EQUITY’S ENGAGEMENT WITH PROBATE LAW AND PRACTICE

77 In the course of administration of a deceased estate there may be an intersection between the operation of the Court’s probate and equity jurisdictions. Three common examples are: (a) confusion about the meaning of the expression “undue influence” in probate law; (b) the possibility that the

assets of an estate include a right to recover property or compensation arising from a breach of fiduciary obligations by an attorney, carer or relative of the deceased during the lifetime of the deceased; and (c) recognition that the office of an executor, administrator or trustee of a deceased estate is a fiduciary one.

"Undue Influence"

78 In probate law, the concept of "undue influence" is directed to whether the will (that is, the independent mind) of the testator was overborne in the execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. This form of "undue influence", sometimes described as "coercion", must be proved as a fact without the benefit of any presumption of undue influence arising from relationships such as may be relied upon in equity. The probate jurisdiction is concerned with the existence of a testamentary intention rather than (as is the equity jurisdiction) with the quality of that intention or the means by which it was produced: *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475, [62]-[63].

79 In *Bridgewater v Leahy* at [63], the High Court observed that no party to the proceedings before it had submitted that equity might apply or extend its principles respecting undue influence and dispositions *inter vivos*, not to attack a grant of probate itself, but to subject property passing under a will to a trust in favour of the residuary beneficiaries or the next of kin.

80 The possibility that the equity jurisdiction could extend to a grant of such relief was explored in *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[201], noting conceptual and procedural differences between an exercise of the probate and equity jurisdictions.

81 So far, nobody appears to have taken up the High Court's challenge. If they are to do so the groundwork for doing so probably needs to be clearly established at first instance because an appeal court is unlikely to be able to deal with a fresh allegation of "equity" undue influence on appeal.

82 The fact that probate lawyers have not taken up the High Court's challenge probably reflects, at least in part, a confidence that the justice of a case can generally be dealt with (for example, by raising the issue of "knowledge and approval") within the parameters of orthodox probate law.

Elder Abuse

83 Widespread use of enduring powers of attorney has given rise to abuses of authority that often result, after the death of the principal, in a claim by a representative of the deceased's estate that orders be made for the restoration to the estate of property or, in lieu of property, equitable compensation.

84 The critical features of an enduring power of attorney that facilitate abuse are:

(a) first, it authorises a conferral of authority on an attorney in plenary terms in a standard, short form of instrument.

(b) secondly, it contemplates, in a standard form of power of attorney, that the attorney might be authorised "to execute an assurance or other document, or do any other act, whereby a benefit" is conferred on the attorney.

(c) thirdly, as an "enduring" instrument it authorises a continuing operation of the power in the event of a loss of mental capacity on the part of the principal.

85 In *Taheri v Vitek* (2014) 87 NSWLR 403, the Court of Appeal held that a third party is entitled to rely upon such a power of attorney, containing a benefits clause, without inquiry as to whether a transaction effected by the attorney is beneficial to the principal.

86 That an attorney may have authority (actual or ostensible) to bind a principal to a third party, does not mean that the attorney cannot be liable to account to the principal (or the deceased estate of the principal) for a breach of fiduciary

obligations owed to the principal: *Estate Tornya, Deceased* [2020] NSWSC 1230. In particular, an attorney who acts under an enduring power of attorney, after his or her principal has become incapable, necessarily stands in a fiduciary relationship with the principal, a relationship in which the principal is at a special disadvantage *vis-à-vis* the attorney in the event that the attorney acts otherwise than conscientiously in the exercise of his or her powers.

Common Grounds relied upon for Equitable Intervention

87 Upon an exercise of equity jurisdiction, the Court recognises subtly, but important, different paths to a finding that a person (notionally a "stronger party" has, against good conscience, received or retained property of another (notionally, a "weaker party") in circumstances in which the stronger should be held liable to account to the weaker for that property.

88 Representatives of a deceased estate who seek to recover property or equitable compensation, arising from a diversion of property away from the deceased during his or her lifetime, commonly rely on one or more, or all, of the principles governing:

(a) equitable undue influence, usefully summarised by McLelland J in *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675, informed particularly by the observations of Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 at 134-136.

(b) "unconscionable conduct" (commonly described by reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447) in the nature of a "catching bargain", a construct of English legal history explained in *Bridgewater v Leahy* (1998) 194 CLR 457 at [75].

(c) a breach of the obligations of a fiduciary arising from a "fiduciary relationship" of the kind conventionally described by reference to the judgment of Mason J in *Hospital Products Ltd v United*

States Surgical Corporation (1984) 156 CLR 41 at 96-97, in the absence of the fully informed consent of the fiduciary's principal (*McGuire v Makaronis* (1997) 188 CLR 449 at 466-467.

89 "Undue influence" looks to the quality of the consent or assent of the weaker party. "Unconscionable conduct" looks to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person under a special disadvantage. Although "undue influence" may be established by means of a presumption in some cases (arising from the nature of the relationship between the stronger and weaker parties), no presumption is available in support of an allegation of "unconscionable conduct".

90 The critical feature of a fiduciary relationship is that a person (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 such that the fiduciary has a special opportunity to exercise the power or discretion to the detriment of the other person who is accordingly vulnerable to abuse by the fiduciary of his position. Because the principal is at the mercy of the fiduciary, the fiduciary comes under a duty to exercise his, her or its power or discretion in the interests of the principal, the person to whom it is owed.

Fiduciary Obligations of the Legal Personal Representative of a Deceased Person

91 The office of an executor, administrator or trustee of a deceased estate is inherently that of a fiduciary. Accordingly, as a general proposition, it may be said that such an officeholder may have a liability to account to the estate of the deceased for any benefit obtained or received by the officeholder in circumstances in which there existed a conflict of personal interest and fiduciary duty or the officeholder obtained or received a benefit by reason of or by use of his, her or its fiduciary position or of an opportunity or knowledge resulting from it: *Chan v Zacharia* (1984) 154 CLR 178 at 198-199.

92 As a fiduciary office, the office of an executor, administrator or trustee is a gratuitous one. Such an officer cannot, for example, receive or retain remuneration for services rendered without either:- (a) express authorisation by a testator or all interested beneficiaries; (b) statutory authority; or (c) a court order: *Re Estate Gowing; Application for Executors' Commission* [2014] NSWSC 247.

CONCLUSION

93 Although this paper endeavours to provide a conceptual framework for an understanding of the probate jurisdiction, and practical advice on a number of particular topics, it has but scratched the surface. The law of succession (in particular, the law of probate) can involve much routine work, but a seemingly infinite number of unusual problems that can arise without warning. It is for that reason that, although familiarity with probate "rules" is to be sought, a broader understanding of concepts is essential.

GCL
22 February 2022