NSW BAR ASSOCIATION

SUCCESSION AND ELDER LAW COMMITTEE

PROBATE LAW AND PRACTICE: AN INTRODUCTION

by

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INTRODUCTION

1 Any deep understanding of the probate jurisdiction of the Supreme Court of NSW requires an appreciation that it is historically, and functionally, distinct from any other branch of the Court's jurisdiction.

2 Although it is presently administered in the Equity Division of the Court, and the influence of equitable principles can sometimes be discerned in its operation, the probate jurisdiction cannot not be simply equated with the Court's equitable jurisdiction. Nor can it be treated as part of the domain of the Court's common law jurisdiction even though, in years gone by, some probate suits were the subject of a jury trial.

3 The Court's probate jurisdiction is derived from the Ecclesiastical Courts of England. Until enactment of the *Probate Act* 1890 NSW it was expressly called, not the "probate jurisdiction", but the "ecclesiastical jurisdiction".

4 The probate jurisdiction has an affinity with both the protective jurisdiction and the family provision jurisdiction of the Court. That is because all three involve the administration (management) of the estate (property) of a person who, by

reason of incapacity or death, is unable to manage his or her own affairs. In each jurisdiction, this "absent person" is the central personality.

5 The probate jurisdiction of the Court 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.

6 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. For that reason alone, importance attaches to the conceptual framework for problem solving in probate cases. Probate "rules" are generally governed by the purpose they serve. Pedantic disputes about the operation of rules of practice upon an exercise of probate jurisdiction often dissolve if confronted with questions such as, "What is the point of this dispute? How can the purpose of the due administration of this estate best be achieved?"

NSW's LEGISLATIVE REGIME

"Probate" Legislation

7 In NSW the core legislation consulted on an exercise of probate jurisdiction comprises the following:

(a) The *Succession Act* 2006 NSW;

(b) The *Probate and Administration Act* 1898 NSW ("PAA"), formerly, the *Wills*, *Probate and Administration Act* 1898 NSW; and

(c) The *Supreme Court Rules* 1970 NSW ("SCR"), Part 78, often referred to as "the Probate Rules".

Routine Estate Planning

8 In practice, a broader understanding of the probate jurisdiction must take into account that, in preparing for incapacity for self-management on the road to death, modern Australians commonly execute a package of independently operating instruments. That package ordinarily comprises:

(a) An enduring power of attorney, governed by the *Powers of Attorney Act* 2003 NSW;

(b) An enduring guardianship appointment, governed by the *Guardianship Act* 1987 NSW;

(c) A will, the formal requirements of which are governed by the *Succession Act* 2006 NSW.

9 At the time of execution of such a package, a thoughtful testator will also need to consider the prospective operation of the Court's family provision jurisdiction (governed by Chapter 3 of the *Succession Act* 2006 NSW) after his or her death. Testamentary arrangements that fail to anticipate the possibility of an application for a family provision order may be displaced by such an application made after the death of the testator.

Intestacy: A Default Option or Choice

10 Some (but not most) people prefer not to make a will, but to leave their estate to be administered as an intestate estate, and to be distributed, in accordance with Chapter 4 of the *Succession Act* 2006 NSW. To make, or to refrain from making, a will is to exercise a choice. In many cases an intestacy is a default option, a consequence of a failure to make a will. In some cases it is a deliberate choice. A testator may prefer to allow the "intestacy rules" to govern distribution of his or her estate rather than to choose between competing claims on his or her bounty.

11 In recent years, the rigidity of those "rules" (in Chapter 4 of the *Succession Act* 2006 NSW) has been modified to allow the Court to make discretionary "distribution orders" in the case of "multiple spouses" or an "indigenous estate". For the most part, however, the intestacy rules reflect a standardised pattern of family relationships, presently favouring (in turn) a spouse, children, parents, brothers and sisters, grandparents, and aunts and uncles.

12 In the absence of any person entitled to an intestate's estate, the whole of the estate passes to the State (*Succession Act* 2006 NSW, section 136), leaving those who may have a moral claim on the estate to make an application to the Minister, in writing to the Crown Solicitor (under section 137 of the Act) for a waiver of the State's rights. In days gone by, in these circumstances, an estate was said to have passed *bona vacantia*.

Managing Incapacity

13 Incapacity for self-management can afflict any person at any age. Principles discussed under the rubric of "Elder Law" generally apply in equal measure to minors as well as adults, due allowances being made for the person's age and personal circumstances.

14 The importance of noticing this is that a person who is incapable of managing his or her affairs (that is, his or her "estate" or "person") may be the subject of:

(a) An order made by the Court (under section 41 of the *NSW Trustee and Guardian A*ct 2009 NSW) or the Guardianship Division of the NSW Civil and Administrative Tribunal, "NCAT" (under the *Guardianship Act* 1987 NSW and the *NSW Civil and Administrative Tribunal Act* 2013 NSW) for the appointment of a "financial manager", thereby subjecting his or her estate to protective management under the *NSW Trustee and Guardian Act* 2009 NSW;

(b) An order by the Guardianship Division of NCAT (under the *Guardianship Act* 1987 NSW) for the appointment of a guardian;

(c) An order by the Court for the appointment of a "committee of the estate" or a "committee of the person", those being offices governed by the Court's inherent protective jurisdiction; the former, the equivalent of "financial manager", and the latter the equivalent of a "guardian" (neither of which appointments engages the executive regime administered by the NSW Trustee and Guardian for the purpose of supervising a financial manager or a guardian); or

(d) Orders for a court-authorised "statutory will" (under the *Succession Act* 2006 NSW) predicated upon a finding of an absence of testamentary capacity.

15 Each of an "enduring power of attorney", an "enduring guardianship appointment" and a "statutory will" is a product of legislative reforms to the general law in recent decades. The essence of an "enduring" instrument is that it continues in operation despite a principal's loss of mental capacity. The essence of a statutory will is that, in the absence of testamentary capacity, the Court can make a will for an incapacitated person based upon an attribution of testamentary intentions to him or her. All three of these types of instrument sit at the intersection of the protective and probate jurisdictions of the Court.

16 In common experience, the various means by which a person can experience incapacity for self management as a precursor to death require a lawyer to have an understanding of the probate jurisdiction. That is because, upon the death of a person who has experienced incapacity during his or her lifetime, a person charged with administration of the deceased's estate (typically, an executor or administrator) has to consider whether an asset of the estate includes a right to recover property or equitable compensation from a person who may have breached fiduciary obligations owed to the incapable person in exercise of the functions of an attorney, a guardian, a financial manager, a carer or the like.

17 Estate administration, in this context, requires an appreciation of equitable principles, particularly those relating to undue influence, unconscionable conduct and a breach of fiduciary obligations.

PROBATE LAW LITERATURE

18 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.

19 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 and 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.

20 *Janes, Liebhold and Studdert* is a second edition of *Geddes, Rowland and Studdert* (LBC Information Services, Sydney, 1996). It, in turn, was based upon Hastings and Weir, *Probate Law and Practice* (Lawbook Co, Sydney; 1st ed, 1939; 2nd ed, 1948). A supplement to the 2nd edition (edited by D.L. Mahoney, later President of the Court of Appeal) was published in 1957. The importance of knowing these things is that there is sometimes a need to refer back to older texts for research purposes.

21 "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).

22 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 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.

23 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.

24 A compendium of papers on the topic at hand is the special issue of the *Australian Bar Review* entitled "Estate Administration in Probate, Family Provision and Protective Cases" (2016) 43 Aust Bar Rev.

25 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.

26 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

27 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*.

28 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.

29 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?

30 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

31 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

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

33 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.

34 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.

35 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).

36 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

37 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.

38 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].

39 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

40 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.

41 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).

42 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. A practical difference between the two types of procedure is that an undertaking as to damages is routinely required as a condition for the appointment of a receiver and manager, but rarely required as a precondition for a special grant of administration.

43 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.

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

45 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

46 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.

47 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.

48 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.

49 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

50 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.

51 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.

52 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.

53 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

54 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.

55 At least three different types of case require attention.

56 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.

57 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.

58 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.

59 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.

60 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"

61 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.

62 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".

63 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.

64 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).

65 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

66 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.

67 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

68 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.

69 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.

70 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

71 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

72 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.

73 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.

74 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”.

75 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.

76 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.

77 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.

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

79 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

80 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 Ac*t 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

81 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.

82 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.

83 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.

84 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.

85 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

86 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.

87 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.

88 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.

89 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.

90 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

91 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.

92 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

Introduction

93 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.

94 An allegation of "soundness of mind" is not normally pleaded in a statement of claim. It is generally sufficient to plead: the testator's death; the (jurisdictional) fact of property left in NSW; execution of the will in a manner and form prescribed by section 6 of the *Succession Act*; the standing of the plaintiff (eg, as an executor named in the will); and publication of notice of intention to apply for probate on the NSW On-line Registry. It is not generally necessary to anticipate a defendant's grounds of challenge to the will.

95 A manifestation of the distinctive features of probate litigation is the form of pleadings generally encountered in a probate suit.

96 Most probate pleadings follow a similar form whatever be the type of allegation made as a ground for challenging the validity of a will. There is generally a bare statement of the ground, not elaborated by a pleading of material facts but simply particularised.

97 On the whole, the standard form of particulars is at such a high level of generality that the particulars might be thought to be a generic description of a model aged, feeble will-maker.

98 Generally, to come to grips with the real questions in dispute in a modern probate suit one needs to read *written submissions* filed and served in anticipation of a contested hearing, *together with the parties' contentious affidavits.*

99 Probate pleadings are reminiscent of the "cause of action" or "issue" pleading found in common law proceedings before the adoption of a *Judicature Act* system of court administration (in the case of NSW, on 1 July 1972, upon commencement of the *Supreme Court Act* 1970 NSW) when a narrative form of "fact" pleading, characteristic of old style equity proceedings, became the norm for civil proceedings generally.

100 Care needs to be taken to focus upon what is necessary, and appropriate, for an exercise of probate jurisdiction – focusing upon due administration of an

estate – without being diverted by collateral disputation that attracts other heads of jurisdiction.

101 If not properly case managed, a claim for family provision relief can, for example, disrupt administration of an estate. However, the type of collateral disputation that more often disrupts probate proceedings is an invocation of general equity jurisdiction in a demand that accounts be taken, or that competing claims to "estate" property be determined, in advance of a determination as to who represents an estate.

In a Probate Suit, "Issue" Pleading Survives a Judicature Act System of Court Administration

102 This style of pleadings has continued (on the whole, efficiently) despite the fact that the current form of *Probate Rules* (SCR Pt 78) no longer has a rule to the following effect (a rule applied to probate litigation throughout the preceding century):

> "In a suit for probate, the statement of defence shall consist of the following defences alone, unless by leave of the Court, obtained on summons:-
>
> (1) That the paper writing, bearing date, etc, and alleged by the plaintiff (or defendant) to be the last will and testament (or codicil to the last will and testament) of AB, late of etc, deceased, was *not duly executed as required by law, in manner and form* as alleged.
>
> (2) That AB, the deceased in this cause, at the time his alleged will (or codicil) bears date, to wit, on the, etc, was *not of sound mind, memory and understanding.*
>
> (3) That the deceased at the time of the execution of the said alleged will (or codicil) *did not know and approve of the contents* thereof.
>
> (4) That the execution of the said alleged will (or codicil) was obtained by the *fraud* of CD and others acting with him (setting out the fraud alleged).
>
> (5) That the execution of the said alleged will (or codicil) was obtained by the *undue influence* of CD and others acting with him…." [Emphasis added].

103 This rule can be found as rule 68 in the *Probate Rules* reproduced in Hastings and Weir, *Probate Law and Practice* (Law Book Co, Sydney, 1948, 2nd ed) at pages 524-525, a standard text superseded in 1996 by *Geddes, Rowland and Studdert.*

104 Rule 68 appears to have been based on rule 40A of the English *Probate Rules* (promulgated in 1865), as reproduced in HC Mortimer, *The Law and Practice of the Probate Division of the High Court of Justice* (Sweet and Maxwell, London, 1911), page 913.

105 Note that the traditional grounds of defence do not include any allowance for a pleading of "suspicious circumstances".

106 Within the boundaries of an exercise of probate jurisdiction, the traditional grounds might well be thought to cover the field of challenges that could conceptually be made to the validity of a will. That depends upon them being given a broad and flexible operation, in the context of the ultimate question for determination.

107 They are specific forms of denial of the general proposition that a particular will propounded as the last will of a free and capable testator does not bear that character. That general proposition ultimately defines, and limits, the grounds upon which a will can be challenged.

108 Probate pleadings, kept within traditional limits, do not traverse issues which might result in the legal personal representative of a deceased person (or perhaps a beneficiary of the deceased) being found to hold estate property on trust. If equity is to intervene then, strictly, it is likely to intervene only after a grant of probate or administration has been made.

109 The grounds upon which equity might intervene are commonly those involving an allegation of a "contract to make a will", an estoppel to similar effect or (reflecting both those concepts) mutual wills: eg, *Barnes v Barns* (2003) 214 CLR 169.

110 To date, the suggestion of the High Court of Australia that *equitable* principles relating to undue influence might be applicable in a *probate* context (*Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63], discussed in *Boyce v Bunce* [2015] NSWSC 1924) has not been taken up.

BEWARE OF DISTRACTION BY PREMATURE "ACCOUNTING" DISPUTES

111 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

112 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"

113 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].

114 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.

115 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.

116 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.

117 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

118 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.

119 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.

120 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.

121 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

122 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.

123 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.

124 "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”.

125 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

126 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.

127 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.

PRECEDENT DOCUMENTS AND ORDERS

128 The Schedule to this paper provides some insight into the types of orders that might be made in case management of probate proceedings. It is based upon "Guidelines" reproduced in the Probate Section of the Court's website and in *Mason and Handler*, paragraph [6082]. It should not be taken as definitive of current practice in circumstances in which the Probate List is case managed, with the Family Provision List, by the Succession List Judge (Hallen J). Although there is much continuity in case management of probate proceedings there is, equally, a need for the List Judge to adapt procedures to deal with the exigencies of current business.

CONCLUSION

129 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
2 March 2022

SCHEDULE

I. PROCEEDINGS IN WHICH THE VALIDITY OF A TESTAMENTARY INSTRUMENT IS IN DISPUTE (on an application for a grant, or for revocation of a grant, of probate or administration)

(A) Grounds of Challenge to the Validity of a Testamentary Instrument

1 Where the validity of a will or codicil is in dispute, the central question for the Court's determination is whether it is satisfied that the instrument propounded is the last will of a free and capable testator: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44].

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

(a) an allegation that the instrument propounded as the last will of the deceased was **not duly executed** in the manner and form required by law.

(b) an allegation that, at the time the propounded instrument was made, the deceased **lacked testamentary capacity**.

(c) an allegation that, at the time of execution of the propounded instrument, **the deceased did not know and approve** of the contents of the instrument.

(d) an allegation that the instrument propounded was obtained by **undue influence (in the sense of coercion).**

(e) an allegation that execution of the instrument propounded was obtained by **fraud**.

(f) an allegation that the instrument was **revoked** by the deceased.

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

4 An allegation that a testamentary instrument was executed in "**suspicious circumstances**" is not, of itself, a ground upon which the validity of a testamentary instrument can be challenged; but such an allegation may be made in order to identify particular factors which counsel caution on the part of the Court in approaching a finding that a testamentary instrument is the last will of a free and

capable testator. An allegation of suspicious circumstances, if made, must be made, and particularised, distinctly.

5 If and to the extent that a party to probate proceedings asserts a case unrelated to an application for a grant, or re-grant, of probate or administration (eg, a derivative claim for recovery of property on behalf of an estate; a claim for an order that accounts be taken; a claim that estate assets are held on a trust other than that for which a testamentary instrument provides; or a family provision claim), the Court may, on the application of a party to the proceedings or on its own motion, make an order (under the *Uniform Civil Procedure Rules* 2005 NSW (UCPR), r 28.2) that probate questions (particularly, questions directed to identification of the person or persons entitled to administer an estate) be heard and determined separately and before any other question in the proceedings.

(B) Arrangements for Preliminary Disclosure of Estate Information:

6 (a) An order may be made by the Court that each party file and serve a **disclosure statement** (to the effect of the form as **Annexure "A"**). If it is to be useful, a disclosure statement should disclose, *inter alia*, all known testamentary instruments and all known assets and liabilities of the deceased.

(b) The Court may give consideration at an early stage of proceedings to whether it is necessary or desirable for provision to be made for the return of subpoenas for the production of documents, notices for the production of documents to the Court, or applications under UCPR r 33.13, *limited to bringing within the control of the Court* (with or without liberty to apply for access to any documents produced to the Court):

(i) all known testamentary instruments of the deceased.

(ii) the file of any solicitor or other person known to have prepared, or supervised the execution of, a testamentary instrument of the deceased.

(iii) clinical records of a treating doctor of the deceased (*not* medical, hospital or nursing home records generally).

(iv) any orders, and supporting reasons for decision, of NCAT relating to the welfare of the deceased (*not* the whole NCAT file).

(c) The Court may also give consideration to whether orders should be made for provision to the Court, and service on all parties, of an affidavit, or affidavits, deposing to the circumstances in which a testamentary instrument was prepared or executed.

(d) Access to documents produced to the Court may not be granted unless and until a party seeking access has demonstrated a proper forensic purpose for access (not mere "fishing" for a case).

(C) Proof of service of notice of proceedings should generally be in the form of an **affidavit sworn in the Court's approved form**, UCPR Form 151

7 This affidavit confirms that service has been effected, and how it has been effected. It provides a summary of primary service evidence. It is not a substitute for evidence proving service.

II. SUBPOENAS AND NOTICES TO PRODUCE

8 Commonly, in case management of probate proceedings no subpoena for the production of documents may be issued, no notice to produce documents to the Court may be served and no applications may be made under UCPR r 33.13 for documents in the custody of a court or tribunal, in probate proceedings without the leave of a judge.

9 Upon proper cause being shown, leave may be granted for the issue of subpoenas for the production of documents, for the service of notices for the production of documents to the Court or for UCPR r 33.13 applications to be made (notwithstanding that pleadings have not closed or all evidence has not been served) directed to bringing within the control of the Court:

(a) all known testamentary instruments of the deceased (*Cf, Probate and Administration Act* 1898 NSW, section 150; *Succession Act* 2006 NSW, section 54).

(b) documents evidencing the circumstances in which a testamentary instrument was prepared or executed;

(c) contemporaneous medical records relating to the medical condition or treatment of the deceased; or

(d) the record of proceedings relating to the deceased in the NSW Civil and Administrative Tribunal (NCAT).

10 In deciding whether to make a general grant of leave for the issue of subpoenas for the production of documents, for the service of notices for the production of documents to the Court or for the deployment of UCPR r 33.13, and upon a determination of any application made for a subpoena, notice to produce or like process to be set aside, the Court may attach importance to:

(a) whether there is clarity in *identification of the real questions in dispute* in the proceedings.

(b) whether *a proper forensic purpose* has been identified justifying a deployment of the Court's processes for the compulsory production of documents at the time of decision.

(c) whether the deployment of those processes involves an element of *oppression*.

(d) whether *considerations of reasonableness*, in the application of case management principles to the particular case, should govern deployment of the Court's processes.

(e) whether the Court's processes for the compulsory production of documents might be displaced, or supplemented, by *an order for the provision of an affidavit or affidavits* directed to identified topics.

11 Access to documents produced to the Court on subpoena, in response to a notice to produce or a letter of request or otherwise in the custody of the Court, may not be granted to any party unless and until that party has demonstrated a proper forensic purpose for inspection of the records. Establishment of a proper forensic purpose ordinarily requires that a party has, to the best of his or her knowledge, information and belief, pleaded a case and supported that case by affidavit evidence or, at least, articulated a case that satisfies the Court that the applicant for access is not simply "fishing" for a case.

12 In accordance with case management principles, the Court may, on the application of an interested party or on its own motion, order that a solicitor (or other person) who prepared, or arranged for or supervised execution of, a will explain the circumstances in which the will was prepared and executed (*Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [98]-[102]):

(a) Such an order might require that the person to whom it is addressed attend before the Court for examination; however, in most instances, it is likely to be made, at least in the first instance, in the form of an order for the provision of an affidavit or affidavits.

(b) If such an order is made on the application of a party to proceedings, the Court may condition the making of an order upon an undertaking, or order, if necessary supported by an order for the provision of security for costs, that ensures that that party will, in the first instance, pay the reasonable costs of compliance with the Court's order, such costs to be assessed by the Court if not agreed.

(c) In making such orders, the Court may require that any affidavit directed towards provision of an explanation of the circumstances in which a will was prepared, or executed, be filed in the Court, without service on any party, so as to ensure that the Court controls

deployment of the affidavit, emphasising that it is in the nature of a report to the Court.

(d) If an order (for the provision of an affidavit explaining the circumstances in which a testamentary instrument was prepared or executed) is made against a person who is not a party to the proceedings before the Court, or a solicitor for such a party, the Court may reserve to the person to whom the order is addressed liberty to apply to the Court for an order that the order be discharged or varied. On such an application, a party who supports the order for disclosure may bear a forensic onus of persuading the Court that the order for disclosure should be maintained.

III. CLAIMS OF LEGAL PROFESSIONAL PRIVILEGE IN RESPONSE TO A SUBPOENA FOR THE PRODUCTION OF DOCUMENTS OR A NOTICE TO PRODUCE

13 In the ordinary course, a claim for legal professional privilege (and opposition to such a claim) should be supported by a short written outline of submissions and, where necessary, affidavit evidence.

14 Where a claim of privilege relates to a question whether a will was or was not duly executed:

(a) Parties should take into account "the rule in *Re Fuld*" (attributed to *Re Estate of Fuld, deceased* [1965] P 405 at 409F-411B), discussed in *Re Estate Pierobon, deceased* [2014] NSWSC 387 at [44]-[74] and *Boyce v Bunce* [2015] NSWSC 1924 at [145]-[148]. In case management of probate proceedings the Court is able to make orders designed to ensure that the evidence of an attesting witness is preserved, and made available to interested parties, in an orderly way, in the service of the proper administration of justice.

(b) The Court may supplement any determination of questions of privilege, by an order that a solicitor or other person who prepared, or arranged for or supervised the execution of, a will explain the circumstances in which the will was prepared and executed (*Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [98]-[102]).

IV. CAVEATS

15 In probate practice, a caveat is a notice to the Court not to allow proceedings to be taken with respect to a particular deceased estate without notice to the caveator: *Estate Kouvakis; Lucas v Konakis* [2014] NSWSC 786 at [242]. A person who lodges a caveat without proper cause may be liable to a costs order.

16 Where a caveat is lodged in respect of a deceased estate, proceedings for a grant of probate or administration generally depend upon:

(a) the caveat lapsing (after the expiry of its six months duration) without lodgement of a further caveat;

(b) an order being made by the Court (by reference to SCR Pt 78 rule 71(4)) that the caveat cease to be in force; or

(c) the filing of a statement of claim for a grant naming the caveator as a defendant.

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

18 Upon an application for an order that a caveat cease to be in force:

(a) the applicant *and* the respondent caveator may *both* be ordered to file and serve an affidavit, or affidavits, identifying the nature of the relief to be sought on an application for a grant and the grounds upon which such relief is to be sought; and

(b) if the respondent caveator identifies a reasonably arguable interest in the deceased's estate, or a reasonable need for further investigation, an order that the caveat cease to be in force will not ordinarily be made, allowing for the proceedings to proceed in the ordinary course as a contested application for a grant of probate or administration.

V. PROOF OF SERVICE OF NOTICE OF PROCEEDINGS

19 The due service of notice of proceedings on all persons interested in the outcome of a contested application for a grant of probate or administration is foundational to the admission of a will to probate "in solemn form" (*Estate Kouvakas* [2014] NSWSC 786 at [249]), having regard to the principle enunciated in *Osborne v Smith* (1960) 105 CLR 153 at 158-159. The fact that a probate suit is contested does not, of itself, justify the making of a grant in solemn form.

20 A grant expressed to have been made “in solemn form” may, notwithstanding its designation as a solemn form grant, be as amenable as a common form grant to an order for revocation if the prerequisites for a solemn form grant have not been satisfied. They include, importantly, due service of notice of proceedings on all persons interested in the outcome of proceedings for a grant.

21 The interests of justice, affecting both a will-maker and his or her true beneficiaries, require that a contested probate suit may not be listed for hearing without evidence capable of supporting a solemn form grant.

22 A party’s responsibility to ensure that due notice of probate proceedings is given to all interested parties cannot be discharged simply by posting a letter or sending an email without proof of receipt by the intended addressee. Strictly, personal service is required, or an alternative form of proof (eg, by an acknowledgement of service or evidence capable of supporting an application for substituted service) that all interested parties have been given due notice of the proceedings.

23 A failure to effect due service of notice of proceedings in a timely manner might be attended by costs orders.

VI. APPLICATIONS FOR APPROVAL OF SETTLEMENT AGREEMENTS: Passing over a Will

24 Where settlement of a probate suit invites the Court to make a grant of probate or administration passing over a will, it is generally necessary for the Court to consider whether to make a grant of probate of an earlier will in solemn form or to grant a declaration that the will passed over was not validly made.

25 An application for such an order should be supported by:

(a) A short written outline of the orders and notations sought, submissions in support of those orders and notations, and evidence relied upon; and

(b) A bundle of any affidavits and documents relied upon in support of the application.

26 An effective admission of a will to probate in solemn form cannot be granted unless and until the Court is provided with proof that all persons with an interest in the outcome of proceedings in which a grant in solemn form is sought have been duly served with notice of the proceedings and allowed a reasonable opportunity to intervene.

VII. APPLICATIONS FOR A SPECIAL GRANT OF ADMINISTRATION

27 A grant of administration may be "general" or "special". A "general" grant of administration is most commonly made when a person dies intestate. "Special" grants of administration are classified according to whether they are special: (a) by reason of the nature of the estate which is to be administered; and (b) by reason of the limited nature of the grant.

28 The most common form of grant which is special by reason of the nature of the estate to be administered is a grant of administration "with the will annexed", made when the deceased has made a will but has appointed no executor who is able or willing to act.

29 Grants which are "special" by reason of the limited nature of the grant may be classified on whether they are limited in respect of: (a) the time for which they endure; (b) the property to which they extend; or (c) of the purpose for which they are granted.

30 In practice, when an application is made for a "special grant of administration" what is generally sought is a limited, interim grant (made to protect an estate in some way prior to a full grant) in the character of:

(a) a grant *pendente lite* (ordinarily pursuant to section 73 of the *Probate and Administration Act* 1898 NSW), limited to protection of an estate during contested probate proceedings which go to the validity of a will or a grant of probate.

(b) a grant of *ad litem* (commonly pursuant to section 74 of the *Probate and Administration Act* 1898), limited to the commencement and conduct of proceedings other than probate proceedings, and ancillary business.

(c) a grant *ad colligenda* (commonly pursuant to section 74 of the *Probate and Administration Act*) limited to the collection and preservation of estate assets (including the conduct of a business) pending anticipated delays in obtaining a full grant.

31 These "special grants" are analogous to an order for the appointment of a receiver and manager of property upon an exercise of general equity jurisdiction or under legislation such as section 67 of the *Supreme Court Act* 1970 NSW. The powers of a "special administrator" must be specifically defined by an order of the Court. The nature and extent of powers conferred on a special administrator will depend upon the circumstances of the particular case.

32 An applicant for a special grant should ordinarily provide to the Court a draft form of orders, in an electronic (WORD) format and a hard copy, setting out the

terms upon which a grant is sought, together with evidence justifying such a grant.

33 Use of a Latin tag to describe the type of special grant sought, or made, is no substitute for an express elaboration of the powers of a special administrator.

34 In an appropriate case, an alternative form of procedure may be to invite the Court to order that a will be admitted to probate (expressly in common form) upon an undertaking that the executor or administrator to whom a grant is made will not dispose of any assets of the deceased otherwise than in the ordinary course of business, or distribute any estate property, without the prior leave of the Court.

35 Although the Court might authorise an administrator to make an interim distribution of estate assets in exceptional circumstances, a grant of such authority cannot lightly be made in case persons who may be found to have an entitlement against, or in respect of, an estate in the course of its due administration might be prejudiced. An order for special administration is unlikely, therefore, to extend to authorisation of any form of "final" distribution.

36 Procedurally, a distinction between a grant of probate or letters of administration with the will annexed (on the one hand) and (on the other hand) a special grant of administration is that, whereas a judge who authorises the former does so by orders which provide for a reference to the Probate Registrar "to complete the grant", a judge who appoints a special administrator simply makes the order effecting the grant of special administration without referring proceedings to the Probate Registrar.

VIII. COSTS IN PROBATE PROCEEDINGS

37 No party to probate proceedings has an unqualified entitlement to costs out of the deceased's estate or is immune from exposure to an order for costs.

38 A party who fails to comply in a timely manner with the Court's orders may be visited with a costs order, including (as the nature of the case might require) a lump sum costs order enforceable at an interlocutory stage of the proceedings, coupled with an order that there be no recourse to an estate for payment or reimbursement of costs ordered to be paid.

IX. STANDARD FORMS OF ORDERS

39 **Annexure "B"** to this paper provides examples of **Standard Forms of Orders** that might be made in probate proceedings.

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ANNXURE "A"

DISCLOSURE STATEMENT

NOTE: Unless the Court otherwise orders, this Statement is to be completed (to the best of the knowledge, information and belief of the party) by each party to proceedings in which an application for a grant of probate or administration (or for revocation of a grant, coupled with a fresh grant) is contested.

1	Case Name: Case Number:	…… …… ……..
2	Full name of deceased:	…… ……
3	Date of death of deceased:	……..
4	Age of deceased at death:	……...
5	Is the deceased alleged to have died intestate?:	……..
6	Who would be entitled to the deceased's estate under Chapter 4 of the *Succession Act* 2006 NSW if the deceased died intestate?:	…… …… …… …… …… …….

7	Identify each known testamentary instrument of the deceased (by date or other description): (a) Wills: (b) Codicils: (c) "informal wills"(*Succession Act* 2006 NSW, section 8): (d) statutory wills (*Succession Act* 2006 NSW, section 18):	…….. …… …… …… …… …… …… …… …… …… …… …… ……
8	So far as known, identify the whereabouts of each original testamentary instrument of the deceased thus identified:	…… …… …… ……
9	Identify each testamentary instrument of the deceased propounded in these proceedings (and the party propounding same):	…… …… …… …… …… ……

10	Has there been publication of notice of intention to apply for a grant of probate or administration (and, if so, by whom and when)?:	…… …… …… …… …… ……
11	Is there a dispute as to the validity of any testamentary instrument propounded?:	…… …… ……..
12	If so, in respect of each instrument the subject of a challenge to its validity, specify the grounds upon which validity is challenged by the party whose disclosure statement this is: (a) a want of due execution: (b) a lack of testamentary capacity: (c) a lack of knowledge and approval: (d) probate undue influence (coercion):	 …… …… …… …… …… …… …… …… ……..

	(e) fraud: (f) the instrument was revoked by the deceased (as and when here described): (g) other (specify):	…… …… …… …… …… ..... …… ……
13	Describe the size and nature of the deceased's estate: (a) estimated gross value of estate: (b) estimated net value of estate: (c) principal asset(s) of estate:	…… …… …… …… …… …… …… …… …… ……
14	Identify the relationships to the deceased of each party to these proceedings: (a) Plaintiff(s):	…… …… …… ……

(b) Defendant(s):	…… …… …… …… …… …… …… …… …… …… ……
15 Identify known relationships of the deceased: (a) number of marriages of the deceased (and divorces, if any): (b) spouse/*de facto* spouse of the deceased who survived the deceased: (c) children of the deceased (of each marriage), including children who predeceased the deceased leaving children:	…… …… .... …… …… …… …… …… …… ……

	(d) siblings of the deceased who survived the deceased:	.... ……. ……. ……. …….
	(e) parents of the deceased who survived the deceased:	
16	Has there been previously a grant of probate or administration in respect of the estate of the deceased?	……. ……. …….
17	If so: (a) identify each grant:	……. ……. …….
	(b) is there an application for revocation of any grant?:	……. ……. …….
	(c) if there is an application for revocation, specify the grounds upon which a revocation is sought:	……. ……. …….

(i) a later testamentary instrument: (ii) alleged invalidity of the instrument the subject of grant: (iii) alleged mal-administration of executor/ administrator:	…… …… …… …… …… …… …… ....
18 As to claims for family provision relief under Chapter 3 of the *Succession Act* 2006 NSW: (a) Have any proceedings been instituted claiming family provision relief? (b) If so, identify each proceeding in which a claim has been made:	…… …… …… …… …… …… …… …… …… …… ……..

	(c) Identify any anticipated claims for family provision relief not yet the subject of proceedings:	…… …… …… ……
19	Has a special administrator of the estate of the deceased been appointed?:	…… …… ……..
20	If so, identify the administrator, the date of the administrator's appointment, and the proceedings in which the administrator was appointed:	…… …… …… …… ……
21	If no special administrator has been appointed, is an application for the appointment of a special administrator anticipated (and, if so, upon what grounds)?:	…… …… …… …… ……
22	Was the deceased a "protected person" or a "person under guardianship" (within the meaning of section 38 of the *NSW Trustee and Guardian Act* 2009 NSW): (a) at the time of death?:	…… …… …… …… …… ……..

	(b) if not, at any time within the last five years of life?:	…… …… ……
23	If so, so far as known provide details of proceedings in which a financial management order or guardianship order was made affecting the deceased:	…… …… …… …… …… ……
24	Is the deceased known to have executed: (a) an Enduring Power of Attorney? (b) an Enduring Guardianship Appointment?	…… …… …… …… …… …… ……
25	If so, provide details of each known Power of Attorney/Enduring Guardianship instrument:	…… …… …… …… …… ……

26	So far as known, identify each treating doctor of the deceased:	…… …… …… …… …… …… …… ……
27	Was the deceased resident at a nursing home at the time of death or within the last year of life (and, if so, where)?:	…… …… …… …… ……
28	So far as known, identify each hospital at which the deceased was a patient during the last year of life:	…… …… …… …… …… ……
29	Were any of the known testamentary instruments of the deceased prepared by a solicitor (and, if so, by whom)?:	…… …… …… …… …… …… ……

30	So far as may be known, identify each person who may have an interest in the outcome of any application for a grant of probate or administration:	…… …… …… …… …… …… …… ……
31	Identify any caveat known to have been filed in respect of the estate of the deceased:	…… …… …… ……
32	Are there any (and, if so, what) other facts or circumstances bearing upon the Court's determination of these proceedings that are the subject of a disclosure?:	…… …… …… …… …… ……

Date: ……..

Certified as correct by (party/counsel/solicitor):

Name: ……

Signature: ……

****

ANNEXURE "B"
PROBATE
STANDARD FORM OF ORDERS

(I) CASE MANAGEMENT OF DISCOVERY AND SUBPOENA PROCESSES

A. SUBPOENAS AND NOTICES TO PRODUCE

1. ORDER, subject to further order, that no subpoenas for the production of documents be issued, no notices for the production of documents be served, and no requests under r 33.13 of the *Uniform Civil Procedure Rules 2005* NSW (UCPR) be made, without the leave of a judge.

2. ORDER, subject to further order, that no access to documents in the custody of the Court (produced to the Court on a subpoena, notice to produce, or available under UCPR r 33.13) be granted without the leave of a judge.

3. ORDER that the parties to these proceedings be at liberty to issue subpoenas for the production of documents, or to serve notices for the production of documents to the Court, or to make an application under UCPR r 33.13, returnable before a Registrar on ____ (or such other date as a judge or Registrar may allow), limited to:

    a) production by a party to the proceedings, or a (named) solicitor or other person, of documents being or purporting to be:

        i) a will or other testamentary instrument of the deceased;

        ii) documents relating to the preparation or execution of a will or other testamentary instrument by or on behalf of the deceased; or

        iii) documents relating to fees charged for services provided in connection with the preparation or execution of a will or other testamentary instrument on behalf of the deceased person;

    b) production by a (named) medication practitioner of clinical records relating to treatment of the deceased; or

    c) production by the Registrar of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) of a copy of orders made, and reasons for decision in support of orders made, in relation to the person or property of the deceased.

B. DISCOVERY AFFIDAVITS

1. ORDER that (a named party, solicitor or other person), no later than ____, file (or file and serve) an affidavit, or affidavits, deposing (to the best of his or her knowledge, information and belief) to the circumstances in which (an identified will or other testamentary instrument) was prepared and executed.

2. Where the person named in Order 6 is not a party to the proceedings:

    a) in the absence of an undertaking to the Court to the same effect, ORDER, subject to further order, that the reasonable costs of compliance with Order 6 (in a sum to be assessed by the Court, if not agreed with the person named in Order 6) be paid in the first instance by ____.

    b) In the absence of agreement with the person named in Order 6 otherwise, ORDER that (a named party) pay into court, no later than ____, the sum of $____ as security for the costs of compliance with Order 6.

    c) RESERVE to (the person named in Order 6) liberty to apply for Order 6 to be discharged or varied or for an order that money paid into court pursuant to Order 7(b) be paid out of court.

(II) NOTICE OF PROCEEDINGS IN PROCEEDINGS FOR A GRANT OF PROBATE OR ADMINISTRATION

1. ORDER that (a named person) file and serve on each person interested in the estate, no later than ____, notice of the proceedings in accordance with the Probate Rules (*Supreme Court Rules 1970* NSW, SCR Pt 78 rr 57 and 64).

2. ORDER that (a named person) file, no later than ____, an affidavit which:

    a) complies with SCR Pt 78 r 59(b) (which requires proof of service of notices of proceedings or an explanation for non-service of a notice of proceedings); and

    b) conforms in substance with Prescribed Form 151 (entitled “Affidavit Confirming Service of Notice of Proceedings”).

(III) CASE MANAGEMENT OF PROBATE PLEADINGS

1. ORDER that these proceedings proceeding by way of pleadings.

2. ORDER that (a named party) file and serve a statement of claim no later than ____.

3. ORDER that, unless the Court otherwise orders, the validity of a testamentary instrument, being a will or codicil, is to be challenged on no ground other than an allegation of:

    a) a want of due execution;

    b) a want of testamentary capacity;

    c) a want of knowledge and approval of the contents of the instrument (including any allegation of suspicious circumstances);

    d) undue influence (in the sense of co-ercion);

    e) fraud;

    f) revocation by the deceased.

(IV) A SPECIAL GRANT OF ADMINISTRATION (AN INTERIM GRANT)

1. ORDER (up to and including a specified date, usually six months hence, ____ or earlier grant of probate or administration) that administration of the estate of ____ (who died on ____) be granted to ____ ("the Administrator") limited to:

    a) collection and preservation of all assets of the deceased;

    b) payment of liabilities of the deceased, or of the estate of the deceased, incurred in the ordinary course of business, including insurance premiums;

    c) establishment, and operation, in the ordinary course, of a bank account or accounts in the name of the estate of the deceased;

    d) keeping an account of all receipts and disbursements in administration of the estate of the deceased;

    e) with the prior written consent of all known beneficiaries of the estate of the deceased or the leave of the Court:

        i. leasing (for a period of no more than six months) real estate comprising part of the estate of the deceased;

        ii. bringing or defending any legal proceeding on behalf of the estate;

    f) appointment of an agent (including a solicitor, accountant or real estate agent) to do any business that the Administrator is unable to do, or that it is unreasonable to expect the Administrator to do, in person;

g) doing all such other things as are incidental to the powers hereby conferred.

2. NOTE that nothing in Order 13 authorises the Administrator to make a distribution of the estate of the deceased, or any part thereof, without the leave of the Court.

3. RESERVE for further consideration the question whether the Administrator should represent the estate of the deceased in any proceedings brought under Chapter 3 of the *Succession Act 2006* (NSW) in relation to the deceased.

4. ORDER that any requirement for:

   a) publication of notice of intention to apply for this interim grant of administration;

   b) an administration bond and sureties; or

   c) further compliance with the Probate Rules,

   be dispensed with.

5. ORDER, subject to further order, that the Administrator be authorised to retain out of the estate of the deceased remuneration that is just and reasonable (not exceeding $____ per hour or such other amount as may be approved by the Court) for performance of the office of administrator.

6. RESERVE to all persons interested in a due administration of the estate of the deceased (including the Administrator) liberty to apply as they may be advised.

(V) GENERAL GRANTS OF PROBATE OR ADMINISTRATION

A. A GENERAL GRANT OF PROBATE (TO AN EXECUTOR NAMED IN A WILL)

1. ORDER that the will dated ____ of ____ (who died on ____) be admitted to probate (expressly or by implication “in common form” or, if the Court is satisfied of the elements identified in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249], “in solemn form”).

2. ORDER that probate of the will of the deceased be granted to ____.

3. ORDER that the proceedings be referred to the Probate Register to complete the grant.

4. [If all interested persons agree] ORDER that any requirement for an administration bond or sureties be dispensed with.

5. [If all interested persons agree] ORDER that any requirement for further compliance with the Probate Rules (*Supreme Court Rules 1970* NSW, SCR Pt 78) be dispensed with.

[**Note**: If all interested persons, for consideration, consent to a grant of probate or administration, a grant in solemn form is not necessary to bind them to the outcome of probate proceedings.]

B. A GENERAL GRANT OF ADMINISTRATION WITH THE WILL ANNEXED

1. ORDER that the will dated ____ of ____ (who died on ____) be admitted to probate (in common form or solemn form, as the case may be).

2. ORDER that letters of administration, with the will of the deceased annexed, be granted to ____.

3. Orders otherwise as in the case of a general grant of probate to an executor named in the will, set out above.

C. A GENERAL GRANT OF ADMINISTRATION IN RESPECT OF AN INTESTATE ESTATE

1. DECLARE that the purported will dated ____ of ____ (who died on ____) is not a valid testamentary instrument of the deceased.

2. DECLARE that the deceased died intestate.

3. ORDER that letters of administration of the intestate estate of the deceased be granted to ____.

4. ORDER that the proceedings be referred to the Probate Registrar to complete the grant.

5. [If all interested persons agree] ORDER that any requirement for an administration bond or sureties be dispensed with.

6. [If all interested persons agree] ORDER that any requirement for further compliance with the Probate Rules (*Supreme Court Rules 1970* NSW, SCR Pt 78) be dispensed with.

(VI) REVOCATION OF A (GENERAL) GRANT OF PROBATE OR ADMINISTRATION

1. ORDER that the grant of probate (or administration, as the case may be) issued by the Court on ____ in respect of the estate of ____ (who died on ____) be revoked.

2. ORDER that ____ deliver up the (revoked) grant to the Probate Registry forthwith (if not earlier returned to the Registry).

3. ORDER that (the grantee of the revoked grant) by himself, his servants and agents be restrained from:

    a) acting or purporting to act as a legal personal representative of the deceased; and

    b) holding himself out as entitled to act as a legal personal representative of the deceased.

4. ORDER that ____ serve a copy of these orders on (the grantee of the revoked grant) no later than ____.

[**Note**: Upon revocation of a grant, orders are generally made for a fresh grant of probate or administration (as the case may be), with the proceedings referred to the Probate Registrar to complete the grant "forthwith", intending that (subject to payment of any filing fees) further compliance with the Probate Rules be dispensed with.]

(VII) NOTATIONS AND ORDERS ON THE MAKING OF A STATUTORY WILL

1. NOTE the summons filed ____.

2. NOTE the draft will for (the incapable person) propounded by the plaintiff (and other drafts, if any).

3. NOTE the written submissions dated ____ signed by ____ on behalf of ____.

4. NOTE the following affidavits read in support of the summons:

    a) affidavit of ____ sworn ____.

    b) affidavit of ____ affirmed ____.

5. NOTE the following affidavits read by ____ in response to the summons:

    c) affidavit of ____ sworn ____.

    d) affidavit of ____ affirmed ____.

6. ORDER, pursuant to section 19 of the *Succession Act 2006* NSW, that the plaintiff be granted leave to make an application for an order under section 18 of the Act on behalf of (the incapable person).

7. ORDER, pursuant to section 18 of the *Succession Act*, that a will be authorised to be made on behalf of (the incapable person) in terms of the draft will that is Exhibit ____.

8. ORDER that the Registrar be authorised and directed to sign, and seal with the seal of the Court, pursuant to section 23 of the *Succession Act*, a will in the terms of the draft will that is Exhibit ____.

9. [Where the incapable person is a "protected person" within the meaning of the *NSW Trustee and Guardian Act 2009* NSW, s 38]:

    a) NOTE that the NSW Trustee on ____ authorised the plaintiff to apply for a statutory will.

    b) ORDER, subject to further order, that the manager of the protected estate of (the incapable person), ____, provide to the Court, no later than six months after (the incapable person) attains the age of ____, or the death of (one or more identified significant persons in the life of the incapable person), whichever first occurs, a report as to whether (the incapable person's) will should be revised.

    c) NOTE that Order 9(b) is not intended, of itself, to require or prevent a further application for authorisation of a will, or codicil, for (the incapable person).

10. ORDER that the plaintiff's costs of these proceedings be paid out of the estate of (the incapable person) on the indemnity basis.

11. [Other orders for costs, if any, as appropriate to the particular case.]

12. RESERVE to the incapable person, and any other person with a sufficient interest, liberty to apply generally.

13. ORDER that these orders be entered forthwith.

14. NOTE that these orders have been made at ____am/pm on ____.