THE COLLEGE OF LAW

ADVANCED WILLS AND ESTATES CONFERENCE

6 August 2014

CURRENT ISSUES IN PROBATE LAW ADMINISTRATION : LIFE, DEATH, FORM, FUNCTION AND HISTORY

By Justice Geoff Lindsay
Probate List Judge, Supreme Court of NSW

I. INTRODUCTION

1. Practitioners of a certain vintage will, I hope, remember the days of their youth when I remind them of idiosyncratic encouragement offered to the profession by one of my illustrious forebears as the Probate Judge of the Supreme Court of NSW.

2. Two gems of Mr Justice PE Powell, both dating from 1992, recently came to my attention in such a way as to suggest that I should foreswear all hope of complacency in my pursuit of knowledge about probate law and practice.

3. In *Boland v Nahkle; Re Estate of Talbot* (unrep, 6 April 1992) BC 9203240 at 1, Powell J introduced his Judgment with the following paragraph:

> "The circumstances of the present application serve, yet again to highlight first, what appears to be a widespread lack of knowledge among members of the legal profession about proper practice and procedure in matters in this [Probate] Division of the Court; and, second, the inordinate delays to the due administration of, and the unnecessary costs to which, the estates of deceased persons are regularly subjected as the result of the failure to abide by the appropriate rules of practice and procedure."

4. On 12 June 1992 his Honour's lament rose a little higher. On that date he commenced his judgment in *The Public Trustee v Mullane; Estate of Mullane* (unrep) BC 9201821 at 1 with the following introductory paragraph:

> "Although I suppose that, after 18 months as Probate Judge, I should have become inured to the fact, I never cease to be amazed by the fact that each Friday's Probate List presents me with multiple examples of the almost total lack of knowledge and understanding on the part of a large proportion of the legal profession as to the proper practice and procedure in matters in this [Probate] Division of the Court. In the circumstances, I can but assume it to be true that, as I have been recently informed is the case, Succession and Probate Practice are no longer compulsory subjects in any law school in this State."

5. All these years later the first reaction of a member of the profession who practised before Powell J, on re-reading such words of encouragement, is to check the record of appearances to see whether they should be read with pleasure or pain. The discomfort suffered by any person to whom such words may have been addressed personally is, however, offset by knowledge that none of us were Robinson Crusoe.

6. One is reminded of the execution of the Royal Navy officer, Admiral John Byng, on 14 March 1757 following England's loss of Minorca in 1756 at the beginning of the Seven Year's War with France. He was court marshalled and found guilty of failing to "do his utmost" to prevent Minorca falling to the French following the Battle of Minorca. He was sentenced to death and shot by firing squad. On the quarterdeck of HMS Monarck in the presence of all hands and men from other ships of the fleet in boats surrounding Monarck.

7. Byng's execution was immortalised, for posterity, by Voltaire in his novel *Candide*. Upon witnessing the execution of an officer by firing squad, in Portsmouth, Candide is told that "in this country, it is good to kill an admiral from time to time, in order to encourage the others".

8. Thankfully, in 2014, I apprehend no necessity for disciplinary action of this nature to encourage excellence in those members of the legal profession who practise in the probate jurisdiction. There is a significant group of barristers, and solicitors, whose expertise in probate law and practice facilitates the work of the Court, maintains standards across the profession, educates less experienced practitioners, and keeps the judiciary within proper bounds.

II. SUCCESSION LAW AS A FIELD OF STUDY

9. Nevertheless, it remains true today, as it was in 1992, that, on the whole, university law schools have given the study of succession law a wide berth. It is not one of the areas of knowledge required to be studied as a prerequisite for admission to practice. The compulsory "Priestley 11" are Criminal Law and Procedure; Torts; Contracts; Property both Real (including Torrens system land) and personal; Equity; Administrative Law; Federal and State Constitutional Law; Civil Procedure; Evidence; Company Law; and Professional Conduct. Succession Law does not rank amongst these.

10. The requirements for admission to legal practice are unlikely, in the foreseeable future, to be revised so as to include a mandatory requirement for the study of the law of succession or that area of law increasingly related to it, the law relating to protection of people in need.

11. The pity of this is that these areas of law (no longer fashionable in academic circles) are thoroughly interesting; bound to become increasingly important to a country with an aging population, and an increasing demand for care of people incapable of managing their own affairs; and in need a critical, analytical reassessment to enable them to serve the present and future generations.

III. A NEED FOR EXPOSITION OF LAW IN MODERN, ANALYTICAL TERMS

Technical, Descriptive Language as an Impediment to Understanding

12. At least some of the difficulties the uninitiated have in understanding probate law and practice, without a formal course of study, is that some basic concepts are shrouded in technical language and encumbered with traditional forms of procedure capable of concealing the nature of what is required to be done to solve particular problems.

13. Probate lawyers have traditionally been pragmatic in outlook, but governed by **action-based thought** rather than any **analytical theory**.

14. They have been outcome driven, property lawyers on the whole.

15. Close attention to what they have done, rather than merely what they may have said, can be important in identification of the functional significance of the terms they have traditionally used.

16. Having absorbed the lessons of practice, experienced practitioners tend to do many things intuitively. That is natural and, generally, productive of efficiency in both process and outcomes.

17. However, it can give rise to problems in the longer term if teaching of law, and principles of practice, falls into abeyance.

18. That may be a difficulty confronting the law of succession. There is much there – known to the highly trained few – that is unnecessarily obscure to the many, unfamiliar with opaque terminology routinely used, and without the necessary academic and practical training to master it.

19. Three examples may be offered as illustrations of a disconnection between how succession law concepts are articulated and how, analytically, they operate.

20. In presentation of these examples I refer to two judgments of my own: *Estate Kouvakis* and *Re Estate Gowing.* I refer to them, not because they

are to be regarded as authoritative, but because they provide an elaboration of particular ideas. For anybody who disagrees with them, they may best be viewed as an invitation to a conversation about the law which is symptomatic of our common law tradition and vital to the ongoing health of principles, and practice, of succession law.

Grants of Probate and Administration in Common and Solemn Form

21. First, imprecision in the criteria for decision governing grants of probate and administration in common or solemn form is a topic recently explored in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786.

22. A problem with **descriptive** text book treatments of the distinction between a grant in common form and a grant in solemn form is, not uncommonly, a failure to identify the **criteria** for a determination that a grant in solemn form be made. A mere description of each form of grant falls short of an exposition of criteria for decision.

23. The prevalence of merely descriptive expositions of the law (such as a common form grant is a non-contentious grant and a solemn form grant is a contentious one) has, in its turn, led to uncertainty in the principles to be applied on an application for revocation of a grant.

24. Both the principles governing the making of a grant, and the principles governing revocation of a grant, are informed by the purposive nature of the probate jurisdiction and the nature of a grant as an instrument of title.

25. The central object of the probate jurisdiction is the due and proper administration of the particular deceased estate before the Court, having regard to any testamentary intention of the deceased and the interests of parties beneficially entitled to the estate.

26. The criteria for determining whether a grant in solemn form should be made are greatly influenced by the character of probate proceedings as "interest litigation", and the rule of practice (generally described in Australia by reference to *Osborne v Smith* (1960) 105 CLR 153 at 158-159) that binds a non-party to orders made in probate proceedings provided that he, she or it had notice of the proceedings and an opportunity to intervene.

27. A grant in common form and a grant in solemn form, both, are essentially orders of the Court that confirm, or confer, title to estate property.

28. A grant expressly issued by the Court "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.

29. No grant can be revoked as of right; but the principles governing them are essentially the same.

30. The reason why a grant in solemn form is generally, and should be, more difficult to set aside than a grant in common form is that:

(a) the Court can reasonably be taken to have investigated questions about parties, evidence and the due administration of justice *before* making the grant; and

(b) an applicant for a revocation order can reasonably be taken to have, at least, a forensic onus to displace findings expressly or impliedly made by the Court as a foundation for the grant.

31. *Estate Kouvakas, Lucas v Konakas* [2014] NSWSC 786 provides an extended discussion of these topics.

32. In paragraphs [249]-[267] it elaborates the criteria for decision affecting a prospective grant in solemn form. In paragraphs [275]-[283] it explains the procedure leading to a grant in analytical terms, by reference to the need for the investigation of title to estate property, and building an estoppel against those who acquiesce in a grant being made. In paragraphs [293]-[317] it adopts, with exposition, observations made by Powell J in *Neilson v The Public Trustee* (unrep, 8 May 1992) BC 9201888 at 14-15 and *Bramston v Morris* (unrep, 20 August 1993) BC 9303644 at 19-20. In paragraphs [318]-[321] it sets out a check list of topics for consideration on an application for revocation of a grant.

Remuneration of Executors, Administrators and Trustees

33. Secondly, the practice of assessing claims for "executor's commission" as a percentage of accounting entries (notably, the amount of capital realised, the amount of income collected, and the value of any assets transferred *in specie*), **without overt reference to the underlying standard of a "fair and reasonable allowance" for work done**, is a topic explored in *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247.

34. The law governing the remuneration of executors, administrators and trustees is grounded in their status as holders of a fiduciary office: not entitled to profit from the office of a fiduciary; and not allowed to occupy a position where personal interest and duties of the office conflict.

35. The powers of the Court to allow remuneration to executors, administrators and trustees exist as a means of granting to those fiduciaries relief against the rule that, generally, a fiduciary may not derive any profit or advantage from the fiduciary office if not duly authorised to do so.

36. The starting point for consideration of an application for executor's commission remains that the office of an executor, administrator or trustee is, *prima facie*, a gratuitous one. However, the jurisdiction of the Court to award commission (upon an exercise of inherent jurisdiction or under s 86 of the *Probate and Administration Act* 1898 NSW) requires a preparedness on the part of the Court to move beyond that point and to do so by reference to the particular circumstances of each case.

37. Although it is customary to describe the remuneration sought by, or allowed to, an executor, administrator or trustee as a percentage rate on figures taken from estate accounts, and although references to such rates may be convenient modes of calculation of remuneration, they are no more than a useful guide to decision making.

38. There is a logical difficulty in pretending that precision attaches to any particular **range** of percentages in an environment in which the remuneration allowed to an executor, administrator or trustee is assessed or moderated by selection of a particular rate as applicable to the facts of a particular case. The process of assessment or moderation by reference to any expressed range of "usual" or "ordinary" percentage rates is subsumed in the selection of a particular rate, not articulated in terms of an adjustment of the lump sum aggregation of intermediate percentage calculations referable to categories of dealings in estate property.

39. Whatever intermediate calculations may be made by reference to those categories (now described in the *Supreme Court Rules* 1970 NSW, Pt 78 r 84(2)) an assessment of remuneration to be **allowed** to an executor, administrator or trustee is ultimately governed by the principle that no more should be allowed than is "just and reasonable", a standard that requires a dollar amount to be weighed in the balance.

40. Such an allowance is one made **out of estate property**. It is a discretionary allowance. It is not in the nature of a *quantum meruit* claim (a claim of right) at common law.

Special Grants of Administration

41. Thirdly, notice should be taken of discussion of different types of limited, or conditional, grants of administration by reference to descriptive labels, with Latin tags, comprehensible only to specialists – see Mason &

Handler, *Succession Law and Practice (NSW)* (Lexis Nexis, Butterworths), paragraph [1181.4] and RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in NSW* (LBC, 1996), paragraphs [40.74]-[40.86]:

(a) Administration *cum testamento annexo* (with the will annexed).

(b) Administration *de bonis non administratis* (where an executor or administrator dies without having fully administered an estate and a replacement is necessary).

(c) Administration *durante minore aetate* (during the minority of an executor or other person entitled to a grant).

(d) Administration *durante absentia* (during the absence from the jurisdiction of an executor or other person entitled to a grant).

(e) Administration *durante dementia* (during the incapacity of an executor or administrator).

(f) Administration *pendente lite* (granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending).

(g) Administration *ad litem* (granted to provide a person to represent an estate in litigation).

(h) Administration *ad colligenda bona defuncti* (granted for the protection of an estates assets pending delay in making a general grant).

42. Convenience attaches to these descriptive labels because, on closer examination, they provide illustrations of common occurring cases for the appointment of an administrator.

43. However, they should not be allowed to obscure the general proposition that a grant of administration can be made, with limitations of time and purpose or on terms, designed to accommodate the special needs of a particular estate.

A Need for Analytical, Management Principles

44. In practical reality, the probate jurisdiction is, as it must be, flexible and adaptable to the needs of the moment in the management of property so as to give effect (so far as effect can be given) to testamentary intentions, accommodating the interests of those (principally beneficiaries, but also creditors and claimants for family provision relief) who have, or may have, an interest in estate property or an interest in the due administration of an estate.

45. That this is so is sometimes obscured by discussion of probate law and practice in terms of traditional "forms of action" (to use a common law analogy) notwithstanding procedural reforms and fundamental shifts in the way death is perceived and deceased estates are administered.

IV. DEATH, IN LAW, BECOMING A PROCESS,NOT MERELY AN EVENT

46. There is, perhaps, a need to redefine the whole subject area. "Probate law and practice" is no longer entirely apposite in an environment in which the Supreme Court and statutory tribunals administer an expanded form of "protective" jurisdiction before death and applications for family provision relief dominate an increasing number of post-death disputes.

47. The expression "elder law" genuflects in the direction necessary, but it does not accommodate the jurisdiction of the Court to authorise a minor to make a will (*Succession Act* 2006 NSW, s 16) or the jurisdiction of the Court to authorise a "statutory will" to be made for a minor lacking testamentary capacity (*Succession Act*, s 18(4)).

48. There is no great utility in devoting time to the selection of an all encompassing, pithy description of the subject area once the point has been made that there is need of a fresh look at what we do and why we do it.

49. Culturally, death has become more of a process, and less of an event, than it once was.

50. As a process, with different dimensions for "person" and "property", death requires different but interrelated approaches to management before and after the event of "physical death".

51. The legal process of passing property from one generation (or, more broadly, from one person) to the next may commence during a period of incapacity before the arrival of physical death. That is something specifically contemplated by the concept of a "statutory will" (*Succession Ac*t, ss 18-26) and, within the limits of the protective jurisdiction, the interests of an incapable person's family might be taken into account in the deployment of an enduring power of attorney or during the course of protected estate management.

52. Not uncommonly, families plagued by disputation about a protected person's estate, fall naturally into "probate" litigation after that person's death.

53. The character of "probate litigation" has changed fundamentally.

54. Whether or not there was an Orwellian significance in the year "1984", it was in that calendar year that Justice Frank Hutley wrote the following in a foreword to the third edition of Hutley, Woodman & Wood, *Cases and Materials on Succession* (Law Book Co):

> "… since the first [1967] edition, the law of succession on death has been simplified by the abolition of death, estate and succession duties by the Commonwealth, and the States of Queensland, New South Wales and Victoria. It has been complicated by the extension of claims against the terms of the will or rights on intestacy to persons outside the traditionally accepted legal family, that is, spouses, nuptial children and some descendents and to property not part of the actual estate of the deceased. The most radical complications have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982' [.] the Act might have been more properly entitled 'The Act to promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982'. Technological developments, such as in vitro fertilisation are putting accepted ideas under strain. These are as yet the concern of law reformers rather than the courts. More significant still is the weakening of the family as an instrument for the support of the aged, the upbringing of the young and for productive work. The weakening of the family has meant that the will as an instrument for effectuating the care of dependents has declined in importance."

55. One does not have to embrace, or to reject, sentiments of this character in order to acknowledge that they reflect profound social change. What Hutley JA spoke of as coming has come. Law and society have continued to interact, with plenty of scope for debate about cause and effect, the chicken and the egg.

V. ESTATE LITIGATION AS A SPECTRUM ACROSS JURISDICTIONAL DIVIDES

56. The prospect of "estate litigation" might now require a litigation lawyer to survey potential claims or defences over several fields:

    (a) The law of trusts, including principles governing a contract to make a will (*Horton v James* (1935) 53 CLR 475), and mutual wills (*Barns v Barns* (2003) 214 CLR 169) and general principles relating to estoppel (*Giumelli v Giumelli* (1999) 196 CLR 101).

    (b) A search for an expression of testamentary intentions may require an examination of formal wills (compliant with the *Succession Act*, s 6), informal wills (governed by s 8) grounds for rectification of a will (ss 27-28) and statutory wills (ss 18-26).

    (c) A claim for family provision relief (under chapter 3 of the *Succession Act*) may require not only a search for estate property but also for transactions able to support a designation of property as notional estate and a search for prospective "eligible persons" (within the meaning of s 57).

(d) Where a deceased person was incapable of managing his or her estate (and whether or not a financial management order was made for management of that estate or an enduring power of attorney granted or purportedly granted in respect of the particular person) consideration may need to be given to the recovery of property for the benefit of the estate.

57. One can see, here, potential for a blurring between the probate and protective jurisdictions of the court. In each realm, there may be large concerns about the **management of property** in the context of public interest (**not merely adversarial) litigation** and concern about the **rights of interested persons not represented before the court**.

58. In each realm, also, due notice must be taken of pressure towards commercialisation of management of estates that are large and may involve financial investments, not merely real estate.

59. Anybody who works, or aspires to work, in the "probate" jurisdiction must have, and constantly seek to review, a conceptual framework about how the various ideas associated with estate management and succession fit together.

VI. THE IMPORTANCE OF IDEAS THAT INFORM DECISIONS

60. However far we may stray from the touchstone of a particular individual's testamentary intentions under the lure of appeals to "community standards" (*Andrew v Andrew* (2012) 81 NSWLR 656) or objective standards (*Re Fenwick* (2009) 76 NSWLR 22), , we must remain connected with the perspective of the autonomous testator.

61. For that reason, alone, there remains merit in retention of the concept of a "wise and just" testator (to adapt *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19-20 and related cases) as an idea capable of informing decisions made in exercise of probate jurisdiction.

62. "Wisdom" and "Justice" are aspirational ideas that inform the administration of law generally. They may themselves be informed by current community standards, or appeals to objective reasoning, but they are not readily displaced by such notions.

VII. CONCLUSION

63. Experience of probate litigation, across its manifold forms, engenders respect for the experience of others in similar litigation long since past.

64. The due administration of deceased estates can be greatly aided by an appreciation of the importance of tradition and the functionality of routine concepts.

65. In an era in which many practitioners have not studied estate management and the law of succession, one challenge to which all practitioners in the area may be required to rise is articulation of the law, and principles of practice, in terms capable of speaking to the current generation.

GCL