

STEP NSW

SEMINAR

20 November 2024

CURRENT ISSUES AND ROUTINE PATTERNS IN ESTATE LITIGATION, ACROSS JURISDICTIONAL BOUNDARIES AND IN SOCIAL CONTEXT

by

Justice Geoff Lindsay AM

Equity Division

Supreme Court of NSW

INTRODUCTION

- 1 The work of lawyers and other professionals engaged in the specialty commonly, but over simply, called “wills and estates” involves much that is routine. It also unpredictably throws up problems of special difficulty not easily anticipated by anybody.
- 2 In my experience, nobody has all the answers and a collegiate approach to problem-solving, when encountered in a world accustomed to adversarial thought patterns, is to be highly valued.
- 3 Although much of the law relating to “wills and estates” is statutory, and overlays the inherent jurisdiction of the Court in many cases, the jurisdiction of the Supreme Court of NSW remains, in NSW, a central focus for understanding the law governing the administration of estates.
- 4 The law relating to “wills and estates” calls upon more than the Court’s probate jurisdiction. As the law has developed in tune with societal changes, it routinely calls upon the Court’s protective and equity jurisdictions, as well as the interrelated family provision jurisdiction conferred by statute, in dealing with the

estate of a person who, by reason of incapacity or death, is unable to manage his or her affairs.

- 5 For want of a better generic expression these branches of the Court's jurisdiction are in this paper collectively called the "welfare jurisdiction(s)" of the Court because their central focus is on the welfare and interests of a vulnerable person not wholly present before the Court.
- 6 An object of this paper is, by reference to current issues and routine patterns in estate litigation, to draw to attention the vital importance of understanding the "purpose" of the law relating to "wills and estates" (the "why" things are done or not done) in principle and in practice.
- 7 A subsidiary object is to notice the role of the equity jurisdiction in establishing and maintaining standards of conduct in the administration (management) of estates of persons who are not able (by reason of incapacity or death) to manage their own affairs.
- 8 In his seminal work, *Fiduciary Obligations* (Law Book Co, 1977; Federation Press, 2016) Paul Finn acknowledged the foundational importance of "purpose" in the development and analysis of the "fiduciary" concept and in the establishment and maintenance of standards by an exercise of equity jurisdiction directed to keeping fiduciaries to their purpose. However, as he makes clear in Chapter 1 of his book, Finn's principal concern was to outline the law "as it is today" rather than to give direct attention to the evolution of Equity's obligations. He also expressly disavowed any substantial engagement with "the fiduciary aspects of the family relationship, and of guardianship".
- 9 In Chapter 1 of *Fiduciary Obligations* the following observations (omitting footnotes) appear:

"[7] One of the major preoccupations of the Chancery Courts over the centuries has been to ensure that a person who has had trust or confidence reposed in him by another, does not abuse that trust or confidence either for his own benefit or to the detriment of that other relying upon him. The trustee and the agent, for example, have long

felt the force of Equity's dictates of 'conscience' in this regard. By the turn of the 19th century this protective jurisdiction began to assume the form of a distinct, though ill-defined, body of law prescribing minimum standards of acceptable conduct for those bound by 'fiduciary' ties. These were evolved largely by analogy with the standards extracted from a trustee ... The 19th century was ... the truly formative period in the development of this jurisdiction over '*fiduciaries*'. By the process of repeated applications vague rules born of analogy were transformed into quite distinct general equitable obligations. ...

[8] ... [In this work the writer] has made it his principal concern to outline the law as it is today. Consequently very little direct attention is given to the evolution of Equity's obligations. But the stamp of history is very strong on the cases. The milestones stand out, as does the influence of a handful of judges. Indeed, much of the law discussed will be seen through the judgments of Lords Eldon, Brougham, Lindley and Upjohn, and of Sir Owen Dixon of the High Court of Australia.

[9] ... [In] this survey of the law the writer has all but totally disregarded the fiduciary aspects of the family relationship, and of guardianship. These branches of the law have moved largely out of the realms of common law and Equity, and are increasingly being regulated by legislation. Pockets of the old law doubtless remain, as for example the guardian's trusteeship of his ward's property. But save for the rules relating to misuse of influence, it has been thought unnecessary to devote much attention to such a large body of law which is rapidly becoming of little practical significance ..."

- 10 These observations do not reflect the experience or everyday focus of lawyers who routinely practice in "wills and estates" or the welfare jurisdictions of the Court. In my experience, far from being subsumed in legislation, an exercise of the Court's welfare jurisdiction involves a rich exposure to the role of the equity jurisdiction in Australian society.

THE NEED FOR A FUNCTIONAL CONCEPTUAL FRAMEWORK

- 11 Because much controversy has historically attended conflict between "common law" and "equity" mindsets, and comparatively little attention has been given to other heads of jurisdiction (particularly the probate and protective jurisdictions), interconnections between those jurisdictions and the equity jurisdiction have not been explored as profitably as they might have been.
- 12 Implicit in this approach is an acceptance that the various heads of the jurisdiction of the Court each have a functional significance that reflects the reason for their existence and the purpose that they serve, illustrated (but not

limited) by their historical origins and procedural norms. Recognition of this is important in both the theory and practice of the law relating to “wills and estates”.

- 13 In a world characterised by constant change there is a need for a conceptual framework to maintain standards of conduct in the administration (management) of estates, staying constant to what is essential, to accommodate change as may be necessary or convenient, to serve a purpose beyond mere rules, and to see through the limitations of rule-bound reasoning.
- 14 A level of generality is required in analysis of “current issues” and “routine patterns” in estate litigation because the due administration of law requires a conceptual framework that can accommodate the law “as it is” and as it is tending “to be” both when stated in terms of “rules” and “principles” and when viewed in action. Such a framework is necessary to facilitate an appreciation of the significance of developments in the law, in legal practice and in the society served by law and legal practice. A coherent understanding of the field of operation of “wills and estates” law, and the effective assimilation of changes in legal thought relating to “wills and estates”, demands a jurisprudence that rises above rule-bound thinking.
- 15 An illustration of the need for a conceptual framework that maintains standards and accommodates both a “macro” and a “micro” perspective of problems that engage the welfare jurisdictions of the Court (the protective, probate, family provision and equity jurisdictions) across jurisdictional boundaries is a tension between public policy advocacy which campaigns against both “elder (or financial) abuse” and the “paramountcy principle” (the principle that, under the general law, insists that decision-making on behalf of a person who lacks capacity for self-management, a “vulnerable person” by another name, must be guided by the idea that “the welfare and interests” of the vulnerable person are “the paramount consideration”).
- 16 A push by disability advocates for displacement of the paramountcy principle seeks to elevate above “the welfare and interests” of a vulnerable person his or

her “wishes or preferences” and, at least implicitly, to diminish the independent office of a “financial manager” by adoption of an artificial binary distinction between “assisted (or supported) decision-making” and “substitute decision-making” in the discharge of a financial manager’s functions.

- 17 Under the general law a financial manager is a fiduciary, with an obligation to act in the interests of his or her principal, in an office which is unique, governed by the purpose for which the protective jurisdiction exists and attended by principles of accountability that accommodate that purpose.
- 18 Under the general law, a financial manager cannot simply “substitute” his or her views for those of a person under his or her protection but must consult the vulnerable person and his or her best interests. However awkward it may be for a conscientious financial manager to privilege a vulnerable person’s “wishes and preferences” above the paramountcy principle, a regime in which transactional authority is given to a “manager” or “attorney” on the basis that he or she will simply “assist” a vulnerable person to make his or her own decisions is an invitation to elder abuse.
- 19 Experience teaches that an errant financial manager or enduring attorney commonly abuses his or her authority in a self interested way on a pretext that, by accepting a personal benefit, he or she is simply assisting in execution of a decision voluntarily made by the vulnerable person nominally under his or her protection, or simply accelerating implementation of what are asserted to be the testamentary intentions of the vulnerable person, even if that deprives the vulnerable person of material wealth necessary for his or her proper maintenance and makes him or her dependent upon the “charity” of the errant manager or attorney.
- 20 A widespread embrace of subordination of the paramountcy principle and a binary distinction between “assisted” and “substitute” decision-making will require a firm appreciation of the role of the Court’s equity jurisdiction in the maintenance of the standards required of a fiduciary and in holding defaulting fiduciaries to account. It may require a realignment of our understanding of the

nature and scope of the fiduciary obligations of a “guardian” (to use a general expression), recognising (as the High Court of Australia did in *Countess of Bective v FCT* (1932) 47 CLR 417 at 420-423) that the accountability of a guardian depends upon his or her fulfilment of the purpose of his or her office as a guardian.

- 21 What is required above all is a conscientious enforcement of fiduciary obligations informed by the obligation of a financial manager and an enduring attorney to work with a vulnerable person empathetically.
- 22 Elder abuse that involves a failure to meet the obligations of a fiduciary attached to the office of a financial manager or enduring attorney engages the Court’s protective jurisdiction (sadly, often too late for an effective remedy of past breaches except by the appointment of a new manager empowered to recover estate assets) and, in due course, carries over to an exercise of probate or family provision jurisdiction when the administration of a deceased estate requires a review of the availability of equitable relief in the recovery on behalf of the estate of property or compensation.
- 23 How that comes about requires an appreciation of the conceptual framework of the Court’s welfare jurisdictions overall, jointly and severally, and an understanding of their application to the facts of a particular case.

THE IMPORTANCE AND DOMAIN OF “RULES”

- 24 Much of “wills and estates” routine work is governed by “rules”. Some of those rules are found in statutes (centrally, the *Probate and Administration Act* 1898 NSW and the *Succession Act* 2006 NSW). Some are found in rules of court: the provisions of the *Supreme Court Act* 1970 NSW Part 78, “the Probate Rules” come to mind. Some are found in Practice Notes published by the Chief Justice: eg, Practice Note SC Eq 7. Some, perhaps not as easily recognised as written rules, are found in the practice decisions of judges: eg, *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 (subpoenas); *Reeves v Reeves (No 2)* [2024] NSWSC 386 (representative orders and costs).

- 25 The indispensable work routinely, and conscientiously, performed by registrars working in the Court's Probate Registry, under the direction of the Probate Registrar, is necessarily governed by "rules" as the registry strives to bring order and consistency of treatment to the large number of applications made each year to the Court for a grant of probate or administration of a deceased estate or interlocutory applications.
- 26 "Requisitions" are the bane of the life of a registrar no less than for practitioners. It should be the aim of practitioners, in particular, to anticipate, and render unnecessary, requisitions directed to compliance with customary requirements of the registry.
- 27 Without "rules" the administration of deceased estates would collectively descend into chaos.
- 28 In practice, because of the nature and volume of the work routinely done by registrars some difficult cases are dealt with on a referral by a registrar to a judge who, by the nature of his or her office, has more time and greater opportunities for engagement with advocates to resolve problems through dialogue.
- 29 Even in this, it is not always remembered that judges are generally dependent upon the expertise and experience of registrars in the identification of problems and for guidance towards purposeful decisions.

"PURPOSE DRIVEN", NOT "RULE BOUND"

- 30 The probate jurisdiction is ultimately not "rule bound" but "purpose driven". "Rules" must be construed, and applied, with the object of giving effect to the purpose for which the probate jurisdiction exists.
- 31 What is true of the Court's probate jurisdiction is true also of the other heads of the Court's "welfare" jurisdiction: the protective jurisdiction, the family provision jurisdiction and the equity jurisdiction. I have written about this at length in earlier papers published in the "Speeches" section on the Court's website: eg

Lindsay, “Profoundly Different Ways of Thinking” (15 November 2023), paragraphs [35]-[39].

- 32 The purposive nature of the Court’s jurisdiction needs to be borne in mind in every case.
- 33 In practice, a failure to consult the purpose for which the Court’s jurisdiction exists generally results in unnecessary costs and delay, if not also unproductive and frustrating excursions into collateral disputation.
- 34 Recent cases dealing with disputes about the disposal of a dead body (colloquially known as “burial cases”) demonstrate that this is as true for an invocation of the inherent jurisdiction of the Court based on its status as a superior court of record or section 23 of the *Supreme Court Act* 1970 as it is for the traditional heads of jurisdiction (principally, the common law, equity, protective and probate jurisdictions, sometimes themselves described as “inherent jurisdiction”) originally granted to the Court by reference to English institutions by the *Imperial New South Wales Act* 1823; the *Third Charter of Justice* published pursuant to that Act; and the *Australian Courts Act* 1828.
- 35 Section 23 is in the following terms:

“23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.”

- 36 Section 23 was inserted in the *Supreme Court Act* 1970 NSW as a safeguard against gaps in the Court’s jurisdiction that might be perceived to exist when defined by reference to the jurisdiction of scattered English institutions or procedural rules which historically attended those institutions: *Re AAA* [2016] NSWSC 805 at [22]-[27]; *Estate Polykarpou* [2016] NSWSC 409 at [185]-[189]. Its breadth has been recognised in many cases. It has, for example, been cited as a source of the Court’s protective jurisdiction (*Fountain v Alexander* (1982) 150 CLR 615 at 633) and a source for the Court’s jurisdiction to regulate the

costs of legal practitioners (*Hartnett v Bell* [2023] NSWCA 244 at [123]; *Alexiou v Alexiou* [2024] NSWSC 1340 at [140]-146)).

CASE MANAGEMENT ELEVATES FOCUS ON “PURPOSE”

- 37 The importance of maintaining a purposive perspective of the Court’s jurisdiction is reinforced by the Court’s embrace of a “case management philosophy” in civil proceedings, progressively adopted by the Court following the commencement of the *Supreme Court Act* 1970 NSW and the *Supreme Court Rules* 1970 NSW, culminating in the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW, shifting the focus away from court procedures that privileged parties’ control of proceedings in case preparation towards active management of case preparation by judges and registrars.
- 38 The shift towards a case management system of court administration was reinforced, in NSW, by enactment of the *Evidence Act* 1995 NSW which, in civil proceedings, dispensed with many of the “rules of evidence” (such as those governing the admission of evidence of business records) formerly thought indispensable to the conduct of a trial or final hearing in civil proceedings. Current day practitioners have, perhaps, lost sight of the significance of those and other procedural changes.
- 39 A tendency of all these changes, viewed collectively, has been to focus attention on substance over form in the conduct of civil proceedings.
- 40 Identification of “substance” over “form”, requires a focus on the purpose for which proceedings have been instituted or are maintained and in service of which they must be managed by the Court.
- 41 Effective advocacy requires skill in bringing the advocate’s purpose into alignment with the purpose for which the Court’s jurisdiction exists.

A SHIFT TOWARDS INFORMALITY IN ESTATE ADMINISTRATION ELEVATES THE ROLE OF THE COURT IN RESOLVING TRANSACTIONAL UNCERTAINTY

- 42 The origins of probate law and practice can still be seen in the characteristics of a valid will and in the action-based (rather than narrative) form of pleadings routinely found in a probate suit. Nevertheless, the probate jurisdiction has been quietly revolutionised by the frequency with which “informal wills” (under the *Succession Act* 2006 NSW, section 8) are now propounded, all the more revolutionary because of the expanded definition of a “document” implicitly incorporated in section 8 by reference to the *Interpretation Act* 1897 NSW.
- 43 The embrace of informality in the administration of a deceased estate is not confined to the concept of an “informal will”. The ubiquity of applications for a family provision order under Chapter 3 of the *Succession Act* 2006 NSW represents, perhaps, the most obvious challenge to the “traditional” concept of testamentary freedom.
- 44 In recent times in family provision proceedings orders have been sought for either a “special grant” (for the purpose of the family provision proceedings) under section 91 of the *Succession Act* 2006 NSW, or for a “representative order” under the *Uniform Civil Procedure Rules* 2005 NSW, rule 7.10, for the purpose of bypassing formal probate procedures.
- 45 Expedient though such orders might appear, they operate best if all parties interested in a deceased estate are party to the family provision proceedings and no third party dealings are required. If third party dealings are required, one might suspect, some parties seek to circumvent the formalities of an application for a general grant of probate or administration by filing a stand alone summons for a special grant which, in time, is assimilated with family provision proceedings. For my part, when I have encountered that possibility, I have made orders which have, in effect, consolidated an application for a special grant with an application for a general grant, treating the former as an interlocutory application in connection with the latter.

- 46 A further manifestation of the tendency towards informality in estate administration is a common resort to the equity jurisdiction on a claim that an estate is held on trust (binding a legal personal representative of the deceased notwithstanding the terms of a will) based on an allegation of a “contract to make a will” or a “proprietary estoppel”, leaving aside the less common concept of “mutual wills”.
- 47 In conceptual terms, perhaps more significantly in social terms, a more revolutionary change has occurred, and continues to occur, in the law’s understanding of the “incapacity” of a person and how incapacity can be managed. The meaning of the concept of “incapacity” depends on context, implicit in the question “incapacity for what?”
- 48 Straddling the protective and probate jurisdictions of the Court is the availability of a Court-authorized “statutory” will: *Succession Act* 2006 NSW, sections 18-23.
- 49 Perhaps more profound has been the legislative authorisation given to the concept of an “enduring agent” (whose agency endures beyond the onset of a principal’s mental incapacity) in the form of an enduring power of attorney (authorised by the *Powers of Attorney Act* 2005 NSW) and an “enduring guardian” appointment (authorised by the *Guardianship Act* 1987 NSW). Those instruments have ostensibly empowered individuals to plan for the onset of an incapacity for self management (which is generally seen as a positive social good), but at the risk of an exposure to financial abuse at the hands of an enduring agent (a social, as well as a personal downside).
- 50 Similar, but perhaps fewer, risks attend the appointment of a “financial manager” or a “guardian” by the NSW Civil and Administrative Tribunal (Guardianship Division) under the *Guardianship Act* 1987 NSW, a forum for much of the State’s protective jurisdiction, supplementing that of the Court.

THE EVER PRESENT, EVOLVING ROLE OF THE COURT'S EQUITY JURISDICTION

- 51 A once fashionable idea that “law” and “equity” might be fused, or that “equity” should not seriously be regarded as a separate field of study, needs to be treated with reserve in an Australian setting, not so much because of an abstract controversy about a “fusion fallacy”, but because, as the law relating to wills and estates demonstrates vividly, there is a continuing, pressing need for the Court’s equity jurisdiction to be available not only to address “unconscionable conduct” or to fill gaps in the administration of justice but also to maintain standards of behaviour in a world in which “informality” reigns in social relationships cf, Lindsay, “Equity’s Challenge: Maintenance of Standards in Deployment of Enduring Powers of Attorney and Enduring Guardianship Appointments” (Supreme Court website, Speeches, 16 November 2022).
- 52 The close relationship between the probate and equity jurisdictions is sometimes obscured by different terminology and different forms of pleadings but their common experience of “estate administration” (management of property) and representative orders to accommodate interests beyond parties present before the Court invites parallel thinking, and equitable principles and remedies are commonly encountered in the identification and recovery of the estate of a deceased person.
- 53 The law of succession, broadly defined, is a major field of operation for an equity mindset, more so perhaps than for a commercial mindset predisposed to rights based thinking in the law of contract and statute law. The probate law and the equity jurisdiction more often require a managerial way of thinking in which discretionary judgements are explicitly informed by the purpose served.
- 54 The concept of fiduciary obligations predates the 19th century, but it emerged as a distinct concept in that century and it has continued to spread its wings: LS Sealy, “Fiduciary Relationships” [1962] Cambridge Law Journal 69; [1963] Camb LJ 119, cited by Finn, *Fiduciary Obligations* (1977; 2016 republication), page 1.

- 55 Fiduciary obligations lie at the heart of the law of wills and estates. This is seen most vividly when, upon the occurrence of a death, transmission of the deceased person's estate (whether testate or intestate) generally depends upon a legal personal representative charged with obligations directed to collection and distribution of the estate.
- 56 In the modern era statutory reforms bearing upon management of the affairs of a person who is, or may be, incapable of managing his or her own affairs mean that often, in practice, the process of making a will is intimately connected with the process of executing an enduring power of attorney and an enduring guardianship appointment, both of which establish, if not also evidence, a fiduciary relationship between principal and agent.
- 57 Disputes about the validity or otherwise of a will are now not uncommonly accompanied by a claim that an enduring attorney is bound to account to the deceased's estate for breaches of fiduciary obligations grounded upon a threefold suite of documents (a will, an enduring power of attorney and an enduring guardianship appointment), perhaps accompanied by an advance care directive.
- 58 Prospective or expectant beneficiaries sometimes engage in a battle of forms, imposing upon a testator/principal living on the edge of mental incapacity, a competition for control of the vulnerable person's affairs. Even if that does not occur, some prospective or expectant beneficiaries deploy the three principal documents in self-interested property transfers justified as an acceleration of what is ostensibly a statement of testamentary intentions.
- 59 Another illustration of equity's increasing engagement with probate law is found in the proliferation of probate cases in which a major feature is a claim that, whatever grant of probate or administration is made, an estate is held in whole or part on trust for a person to whom the deceased allegedly made a promise or representation of testamentary benefit, grounding a claim that the estate is bound by a "contract to make a will" or a "proprietary estoppel". Those cases routinely require forensic inquiries beyond a focus upon whether a particular

will was duly executed and represented the last will of a free and capable testator.

THE PARADIGM OF IDEAS THAT INFORM “WILLS AND ESTATES” LAW AND PRACTICE

The significance of a party not wholly present upon an exercise of “Welfare Jurisdiction”

- 60 A unique feature of the law relating to wills and estates (upon an exercise of the protective, probate, family provision or equity jurisdictions of the Court) is that, by reason of incapacity or death, a central personality is not wholly present before the Court.
- 61 This affects the way which the Court must manage its business. Advocates need to accommodate their case presentations to that reality. Surprisingly, not everyone does.
- 62 That fact is often manifest in something as routine as a failure to serve a “notice of proceedings” on persons who are, or may be, interested in a probate suit or a “notice to eligible persons” in a family provision claim, or to consult the significant others of a person in need of protection.
- 63 Some advocates proceed as if their clients have an entitlement to estate property in jurisdictions in which there may be no present entitlement beyond an expectation of an opportunity to make a claim or to be heard in the due administration of an estate.
- 64 The range of problems that present themselves upon an exercise of the Court’s protective, probate, family provision and equity jurisdictions defies description in a single label.
- 65 Although the management of property (an estate) is often of central concern the Court is often required to reflect upon “the person” as well as “the estate” of a person who, by reason of incapacity or death, is not wholly present before the Court.

- 66 A common feature of those cases is that the Court must, at one level or another, focus upon the welfare and interests of the central personality who is not wholly present. Even in death there is a public interest, affecting all living persons, in insisting that the central personality's wishes, preferences and familial relationships be respected.
- 67 For want of a better term, I have taken to describing these cases as an exercise of the Court's "welfare jurisdiction" to distinguish them from cases in which the Court entertains an adversarial contest between autonomous parties who are fully present before the Court and presumed able to protect their own interests.
- 68 There is a special public interest in the conduct of proceedings affecting:
- (a) the welfare and interests of a person who, by reason of incapacity or death, is not wholly present; and
 - (b) persons who may have an interest (of whatever type) in the conduct or outcome of proceedings although they are not named as parties in the proceedings and, according to custom, may never be parties, whether or not a "representative order" is made to facilitate the Court's recognition of their interests.
- 69 Several ideas inform an exercise of the Court's welfare jurisdiction although, in form or characterisation, they fall short of a governing principle or rule. They may be better viewed as indicative of the paradigm within which the Court generally exercises jurisdiction.
- 70 They are to the law of wills and estates what "maxims of equity" have been historically to an exercise of equity jurisdiction and what in "the law obligations" are concepts such as "unjust enrichment (benefits)", "detrimental reliance (burdens)" and "expectation interest".

The autonomous individual

- 71 The paradigm for an exercise of welfare jurisdiction by the Court is that of an autonomous individual living and dying in community.
- 72 The starting point for most decision-making is the perspective of the individual, not the community, recognising nevertheless that the identity of an individual may be most visible in the context of his or her community, if not dependent upon the community. An individual's conception of "self" may be a function of his or her "community".

Death as a process

- 73 For a lawyer, death is a process rather than an event. It may commence at the time a person prepares for death or incapacity preceding death by the execution of an enduring power of attorney, an enduring guardianship appointment, a will and an advance care directive. It may end only at the time, after a physical death, when it is unlikely that the Court will entertain an application for a family provision order.
- 74 A lawyer must be able, at the point of commencement, to anticipate the course of future events in estate planning; and, at or about the end point, to view events as they have happened in order to facilitate the due administration of a deceased estate, focusing upon the identification, collection and distribution of estate assets and the working out of competing claims to those assets of creditors, beneficiaries and persons eligible to make a family provision claim.
- 75 The process of death increasingly requires consideration of whether an enduring attorney or a financial manager (appointed by the Court or the Guardianship Division of NCAT upon an exercise of protective jurisdiction) has breached fiduciary obligations in the diversion of property (assets or income) during the lifetime of the deceased so as to give rise to a claim for a recovery of property or equitable compensation on behalf of his or her estate.

Different stages of life and experience of vulnerability

- 76 At different stages of life a person may engage each of the welfare jurisdictions of the Court with a shifting balance of emphasis on “the individual” and “the community”.
- 77 The Court’s protective jurisdiction includes what was once called the “infancy” or “wardship” jurisdiction and (in NSW) is still often described as its “*parens patriae*” jurisdiction; and, whatever a person’s age, it embraces incapacity for self-management, incorporating what was once called the “lunacy” jurisdiction.
- 78 On the boundary between the protective and probate jurisdictions an application can now be made on behalf of a person lacking testamentary capacity for a court authorised (“statutory”) will to be made, perhaps as part of a family settlement in which a release of a right to apply for a family provision order is approved by the Court.
- 79 In a modern society in which assets are routinely held by institutions or in the form of a registered title few estates can be administered without a grant of probate or administration by the Court upon an exercise of probate jurisdiction.
- 80 The Court’s family provision jurisdiction has expanded over a century from a safeguard for widows and children to a means for effecting a family-driven distribution of a deceased estate amongst ageing adult children, pressing the boundaries of the Court’s jurisdictional boundaries and catering to expectations of senior members of family.
- 81 The Court’s focus upon the “autonomy” of an individual serves three purposes. The first is to command respect for the wishes and preferences of an individual able to manage his or her own affairs, the competent person able to protect his or her own interests. The second is to recognise that a person who is incapable of self-management may require protection ranging from “assistance” to “substitute decision-making”. The third is to serve as a reminder that, for each person “independent living” is a common aspiration.

The Administrative State and a managed society

- 82 However capable a person may be every individual “living and dying in community” lives in an increasingly “managed society” in which an “administrative State” regulates life from cradle to grave and beyond. A secular State is now routinely engaged with processes of birth, death and marriage which, in a pre-industrial (feudal) common law setting, were routinely the province of ecclesiastical authorities.
- 83 The administrative State is increasingly called upon (if only in aid of health concerns and medical services) to be involved at both ends of life’s spectrum: at the beginning, in the regulation of IVF treatments, surrogacy arrangements, abortion and adoption; at the end of the spectrum, the regulation of retirement villages, nursing homes and “voluntary assisted dying” (euthanasia).
- 84 A standard model for an administrative State’s regulatory systems is the enactment, or recognition, of a “prohibition” of identified conduct, coupled with a system of conditional licences to engage in otherwise prohibited conduct, administration of licences facilitating management of social behaviour. This model of social regulation is apparent in legislation governing medical procedures or institutional care at the beginning and end of an ordinary life cycle.
- 85 In this context, preservation of the Court’s inherent jurisdiction so far as it engages with a need for the protection of those who cannot protect themselves may be of critical significance.

Perspectives of “Community”

- 86 In our managed society the State is not the only manifestation of “community” which bears upon the life and death of an autonomous individual.
- 87 **Family Provision Proceedings.** When the Court makes a family provision order, albeit by reference to what a wise and just testator would have done in the present circumstances, the order (whether or not reflective of “community

standards”) is an expression of a communal qualification on the concept of “testamentary freedom” which is foundational to the probate jurisdiction.

- 88 **Voluntary Associations of One Type of Another.** Although testamentary freedom is foundational a particular community to which a person chooses to belong may have a role in the administration of his or her estate. This may be seen in the discretionary “distribution orders” that can be made in the administration of an intestate estate where the deceased left “multiple spouses” (*Succession Act 2006 NSW*, ss 122-126; *Bailey v Palombo* [2020] NSWSC 1209) or belonged to an indigenous community (*Succession Act 2006 NSW*, ss 133-135; *Re Estate Wilson* (2017) 93 NSWLR 119; *Re Estate Tighe* [2018] NSWSC 163; *Re Estate Jarrard* [2018] NSWSC 781); and in the construction, if not the operation, of the will of a person who was a member of a voluntary association (generally a religious community) embracing “rules” in the nature of “customary law” (*Re Estate of Ahmed Abou-Khalid* [2024] NSWSC 253; (2024) xxxx NSWLR xxxx).
- 89 **Burial Cases.** Tension between the perspectives of an “individual” and his or her “community” can also be seen in disputes about the disposal of a deceased person’s mortal remains.
- 90 In a seminal judgment in *Smith v Tamworth City Council* (1997) 41 NSWLR 680 Young J drew heavily upon a “rights based” view of probate law and practice as a means of resolving a burial dispute in the context of the High Court of Australia’s fundamental determination (in *Doodeward v Spence* (1908) 6 CLR 406) that, save in exceptional circumstances, there is no property in a dead body.
- 91 As recognised by Meek J in *Damon v Damon* [2024] NSWSC 838, and confirmed by myself in *State of New South Wales v Gill* [2024] NSWSC 1263, the law in this State has moved away from a rights-based analysis to one of purposive management. That shift is, in large part, a response to the needs of Indigenous families with life experience across cultural bounds requiring the

operation of guideline principles rather than the application of rules based upon an imperfect analogy with the probate jurisdiction.

PARTIES AND PROCEDURAL NORMS

The Primacy of Purpose

- 92 The procedure of a court in the exercise of any distinct head of jurisdiction (including its approach to “rules of evidence”) is generally adapted to, if not governed by, the purpose of the jurisdiction required to be exercised. This holds true even though court practice may vary over time.

The Common Law Tradition

- 93 An adversarial civil trial between parties (including a tutor appointed to represent an incapacitated party) each present in court and able to protect his, her or its own interests, has its origins in the “trial” of a common law action by judge and jury in which a binary verdict (guilty or not guilty, verdict for the plaintiff or verdict for the defendant) was routine as a means of determining a contest on issues defined by the pleading and denial of an established cause of action. Historically, the purpose of this common law procedure was dispute resolution.
- 94 The basic common law mode of a trial remains a dominant feature of civil proceedings although much modified by the abolition of civil jury trials, the conduct of trials by judges sitting alone, modification of the general law by conferral on judges of statutory jurisdiction to grant discretionary remedies, and the embrace of a case management philosophy according to which the course of proceedings is managed by a judge rather than parties who call upon the judge as an arbitrator.

The Equity Tradition

- 95 Historically, an exercise of equity jurisdiction involved different procedures because the course of proceedings was managed by a judicial officer in a series of “interlocutory” hearings which culminated in a “final hearing” (not a “trial”)

before a judge sitting alone, proceeding principally upon documentary evidence assembled after a process involving “narrative” pleadings (as opposed to the “issue” pleadings on a common law cause of action), discovery of documents, the administration of interrogatories (“discovery of facts”), and evidence served in the form of affidavits (rather than the common law norm of oral evidence) as a primary source of evidence.

- 96 Other than a grant of prerogative relief (now conceptualised as an “administrative law” remedy), a common law remedy (usually a judgment in debt or for damages) is generally granted in vindication of a contested right. By way of contrast, equitable remedies have always been discretionary, albeit commonly available in routine cases.
- 97 Depending upon the nature of equitable relief claimed, an equity suit might be adversarial in so far as it requires an adjudication of competing claims of right and inquisitorial in so far as the Court is required to perform a management function in the administration of an estate or in the exercise of a protective jurisdiction.
- 98 As with an exercise of common law jurisdiction, an exercise of equity jurisdiction has been much modified by the embrace of case management theories which, for example, have abolished routine procedures for general discovery. Nevertheless, the historical origins of equity procedures remain recognisable.

The Protective Jurisdiction

- 99 The historical origins, and purposive nature, of the protective jurisdiction remain in full view of those familiar with the jurisdiction. Parties unfamiliar with the jurisdiction or bent upon an endeavour to force an adversarial contest on the Court tend to overreach in their provision of lengthy and argumentative affidavits which generally, unnecessarily raise temperatures and incur unrecoverable costs, apparently unmindful of the inquisitorial nature of the jurisdiction and the importance of its administration with a minimum of fuss.

The Probate Jurisdiction

- 100 For the most part, an exercise of the Court's probate jurisdiction follows equity procedures save that standard pleadings are generally "issue pleadings" in a common law tradition (identifying established grounds of challenge to a will) and the nature of the jurisdiction requires that a reasonable opportunity be allowed to interested persons to investigate the existence and validity of testamentary instruments by forms of discovery of documents idiosyncratic to the jurisdiction.
- 101 This is reflected in the Court's relatively recent embrace of procedures for the filing and service at an early stage of a probate suit of "Disclosure Statements" and "Discovery Affidavits", followed by a grant of leave to issue subpoenas for the production of documents limited to particular classes of documents of central relevance to what appear to be the real questions in dispute.

The Family Provision Jurisdiction

- 102 Family provision proceedings generally follow equity procedures but they too are adapted to the purpose served by the Court's family provision jurisdiction. Adaptations include a need for early service of an administrator's affidavit (designed to disclose the existence or otherwise of a will, a grant of probate or administration, the available estate, notional estate and known beneficiaries) and affidavits directed to the statutory criteria for which sections 58-60 of the *Succession Act 2006 NSW* provide.

A Consequence of Case Management Philosophy

- 103 All forms of civil proceedings in the Supreme Court, governed by the case management provisions of the *Civil Procedure Act 2005 NSW* and the *Uniform Civil Procedure Rules 2005 NSW*, are routinely subject to what were once described as "alternative dispute resolution procedures" (principally a compulsory mediation or reference out to an expert or arbitrator) as a matter of course, generally depending upon the practice in the Court's specialist lists.

- 104 In combination, the abolition of civil jury trials and the embrace of case management procedures (including routine directions hearings before a judicial officer and ADR) have undermined the traditional idea of an adversarial “trial” as a standalone event on an appointed day and progressively replaced it with a dominant idea of a series of “directions hearings” culminating in a “final hearing” after which ancillary hearings may be encountered in the working out of “final orders”.
- 105 Although this may be presented as a triumph of traditional equity procedures over those of the common law, the reality is that all traditional procedures have been displaced by the idea that Court proceedings should be purposefully managed.

NOTICE OF PROCEEDINGS

- 106 Although the common law jurisdiction has experience of procedures requiring that notice be given to persons not formally joined in proceedings as parties (for example, in requiring that notice be given to an occupier of the premises the subject of an action for the recovery of possession of land), and an exercise of Corporations Law jurisdiction may require the publication of notices, each of the Court’s welfare jurisdictions has an idiosyncratic requirement for the service of “notice of proceedings” and the “representation” of interests other than those of parties present before the Court. This reflects the purposive nature of each head of jurisdiction.
- 107 The distinctive nature of the Court’s welfare jurisdictions manifests itself in idiosyncratic requirements that people who are not named as parties to proceedings be given notice of the proceedings and an opportunity, if not an invitation, to intervene or otherwise to be heard in the proceedings.

The Protective Jurisdiction

- 108 Upon an exercise of protective jurisdiction persons with a social interest in proceedings (because of a personal relationship with a person in need of protection, often described as a “significant other”, or because of their familiarity

with the welfare needs or interests of the person in need of protection) are generally given notice of proceedings (not in a prescribed form), so far as the practicalities of the proceedings may allow, in order to provide information to the Court and to facilitate the implementation of such orders as may be made by the Court.

- 109 Although it may be necessary for the Court to understand the property or other interests of all participants in protective proceedings, the focus of the proceedings is single-mindedly on the welfare and interests of the person in need of protection. Sadly, participants in protective proceedings often need to be reminded of that fact and that there is no guarantee that any costs they incur will be met out of the estate of the person in need of protection.
- 110 This approach to the question of “notice of proceedings” upon an exercise of protective jurisdiction is consistent with the open approach to assessment of the “standing” of a person to make an application for protective orders (*Re W and L* [2014] NSWSC 1106) and a general rule that costs orders made by the Court do not “follow the event” but are determined in answer to the question, “What, in all the circumstances, is the proper order to be made?” (*Small v Phillips (No 3)* [2020] NSWCA 24 at [2]).

The Probate Jurisdiction

- 111 Classically, probate proceedings are said to be “interest proceedings”, reflecting the purpose of an exercise of probate jurisdiction, directed to the due administration of a deceased estate.
- 112 What is required to have “standing” to participate in a probate suit is an interest (usually a proprietary interest) in the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631; *Nobarani v Mariconte* (2018) 265 CLR 236 at 251 [49].
- 113 The requirement of the Court that all interested parties be given notice of a probate suit lies at the heart of the distinction between a grant of probate in solemn form and a grant in common form and reflects the fact that a grant of

probate or administration is both an order of the Court and an instrument of title intended to “bind the world” as a means of effecting an orderly succession to property: *Estate Kouvakis*; *Lucas v Konakis* [2014] NSWSC 786. A person who is given notice of a probate suit and a reasonable opportunity to intervene is bound by the outcome of the proceedings even if not joined as a party: *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

The Family Provision Jurisdiction

- 114 A similar, but different, requirement for the service of a notice of proceeding (a “notice to eligible persons”) in the conduct of family provision proceedings is governed by the purpose of those proceedings.
- 115 In making a decision to grant or withhold a family provision order, on conditions or otherwise, and in formulating the terms of a family provision order the Court must generally be informed of the size and nature of the estate of the deceased (and any property available for designation as notional estate); the terms of any testamentary instrument adopted by the deceased as his or her last will and any informal statement of his or her testamentary intentions; and the identity and circumstances of beneficiaries (whose interests might be affected by the making of a family provision order) and others who may have a claim on the bounty of the deceased.
- 116 The requirement that all persons eligible to make a family provision application be given notice of pending proceedings serves several purposes. First, it is intended to inform potential claimants on an estate of a right of which they might not otherwise be aware. Secondly, it is intended to give comfort to the Court that orders can be made in an orderly way, and at a single hearing of competing claimants, so as to facilitate the administration of an estate in a way that settles entitlements to estate assets: cf *Jurak v Latham* [2023] NSWSC 1318. Thirdly, it is intended to provide a means by which the Court may be better informed of the circumstances of a case than it would be if the information available to it were to be limited to that provided by an applicant and the personal legal

representative of an estate, whether or not the proceedings be collusive in character.

- 117 Although not a true reflection of the statutory criteria for the making of a family provision order, a common approach of parties to family provision proceedings is that the proceedings are used as a vehicle for the identification and administration of a deceased estate and a partition of the estate by court orders varying a testator's scheme of distribution. The requirement of the Court that proper notice of proceedings be given to all eligible persons is a safeguard against collusive proceedings and an abuse of the jurisdiction.

A Common Problem: Imperfect Compliance

- 118 A problem encountered with the service of "notice of proceedings" in all cases involving an exercise of the Court's welfare jurisdiction (but particularly upon an exercise of probate or family provision jurisdiction) is that parties who are under an obligation to serve, or otherwise give, notice to "interested parties" either do not do so or do so in a way which (by design or otherwise) is ineffective.
- 119 The classic, modern example of this is service of a notice of proceedings via an email address that is unverified or which elicits no response. There is, strictly, no substitute for personal service. Anything less than that generally constitutes an unauthorised form of "substituted service".
- 120 In practice, the Court is required to be more vigilant in policing the requirements for the service of notice of proceedings than it should be. Sadly, despite the critical importance of service of notice of proceedings some parties remain ignorant of it, or indifferent to compliance.

GREY ZONES IN THE ADMINISTRATION OF AN ESTATE

The Formal Norm of Estate Administration

- 121 In theory, when a person ("the central person" upon an exercise of welfare jurisdiction) loses the ability to manage his or her own affairs by reason of

incapacity or death the paradigm (formal) model for management of the person's affairs is:

- (a) in the case of a living person, the appointment of a "financial manager" (by whatever name known) by an order of the Supreme Court, NCAT or the Mental Health Review Tribunal exercising a form of protective jurisdiction (in the case of the Court by an exercise of inherent or statutory jurisdiction and, in the case of the Tribunals, upon an exercise of statutory jurisdiction);
- (b) in the case of a dead person, a grant of probate or (general) administration of the deceased's estate, operating as an order of the Court effecting, or at least confirming, the appointment of a legal personal representative of the deceased.

122 The effect of such an order is to identify and empower a known person to manage an estate (in the interests of the central personality or whoever may be beneficially entitled to the estate or at least entitled to its due administration, claiming through the central personality) and to represent the estate in dealings with third parties.

123 A person (whether a natural person or some other form of legal entity) appointed to the role of a financial manager of a protected estate or (to use a general expression) as the "administrator" of a deceased estate is generally subject to a formal regime (ultimately involving an exercise of the Court's jurisdiction) recognising that:

- (a) the offices of a financial manager and administrator are fiduciary in character; and
- (b) a specific object of an exercise of the Court's equity jurisdiction (if not also other heads of jurisdiction) may be to maintain standards of conduct of fiduciaries by holding them to account (by way of

orders for the recovery of property or equitable compensation) for breaches of the obligations of a fiduciary.

- 124 In practice, the paradigm model for the appointment of an estate representative (to use a generic expression) operates imperfectly if only because formal procedures take time and resources to be engaged, and a newly appointed representative may need access to resources and information in order to take control of an estate and to pursue third parties who may have a liability to the estate.
- 125 Although the appointment of an estate representative might be thought of in terms of a “final order” having been made, all such appointments are essentially “interlocutory” at least to the extent that an appointment may be revoked or varied in the interests of the due administration (management) of an estate going forward.
- 126 The “management” of a protected estate remains open to review by the Court until such time as the protected person dies, at which time management of the estate is spoken of as “administration” of a deceased estate. The due administration of a deceased estate is open to review until such time as the estate is finally administered.

Expedient “Interim” Forms of Estate Administration

- 127 In the absence of formal orders for the appointment of an estate representative, upon an exercise of protective or probate jurisdiction, there is a range of expedient procedures to fill a gap, or offer an alternative means to an end, in the management (administration) of an estate, some of which may be recognised as giving effect to “interim” arrangements but all of which need to be tested against the purpose for which they are deployed.
- 128 **An Often Overlooked Need for Articulation of Powers.** A problem sometimes encountered in the adoption of these expedient procedures for the appointment of an estate representative is imprecision in definition of the nature and scope of the powers of an appointee (and perhaps more importantly, the

appointee's obligations) because of the lack of an express articulation in an instrument of appointment.

- 129 **Plenary Authority of Enduring Attorneys.** This is a problem inherent in the conferral of plenary authority in a standard form enduring power of attorney. A conferral of plenary authority on an attorney operates to the benefit of third parties dealing with the attorney but exposes an incapacitated principal to what (as experience of financial abuse demonstrates) is an inherent risk of breaches of fiduciary obligations by the attorney, ostensibly empowered to do anything his or her principal could do.
- 130 **The Role of a Tutor.** The powers and obligations of a person appointed to act as a "tutor" for an incapacitated person are implicitly governed by the nature and scope of the proceedings and the exposure of a tutor to the risk of costs; but, in the absence of an articulated order for the appointment of a tutor, uncertainty may exist if, for example, the order for appointment exonerates the tutor from costs' liability and does not expressly provide for a liberty for the tutor to seek judicial advice or directions: *Reeves v Reeves (No 2)* [2024] NSWSC 386.
- 131 **Special Grants of Administration.** Upon an exercise of probate jurisdiction, the appointment of an administrator by a "special", "limited" or "interim" grant of administration has traditionally been by reference to Latin tags which do not, in terms, articulate the nature and scope of the powers and duties of an administrator. In a modern setting an administrator and those who deal with an administrator should have the benefit of a "speaking" order that defines the metes and bounds of an administrator's powers and duties by analogy with the usual practice in the appointment of a receiver and manager and manager.
- 132 **Receivers and Managers.** In practice, the appointment of a "receiver and manager" (of a protected estate or a deceased estate) is, by a speaking order, one which defines the purpose, powers and (at least implicitly) the duties of the appointee.

- 133 **Representative Orders:** The Court has jurisdiction (both in equity and under UCPR Part 7) to provide for representation of an estate with powers and duties that generally depend on the facts of the particular case: *Reeves v Reeves (No 2)* [2024] NSWSC 386 at [143]-[272].
- 134 It is in the interests of those who have an interest in the due administration of an estate (whether as a protected person, beneficiary or creditor) that an order for the appointment of an interim office-bearer take the form of a speaking order.
- 135 The Court also has an interest in it being done in the sense that a court order needs to be expressed in terms capable of orderly supervision or enforcement in the proper administration of justice.
- 136 **Family Provision Proceedings.** In recent days problems have been encountered upon an exercise of probate or family provision jurisdiction where:
- (a) a grant of special administration has been used to avoid the need for a general grant by effecting a distribution of estate assets without express authority to do so, or by submitting to family provision orders including a special grant under section 91 of the *Succession Act 2006* NSW or an order under UCPR rule 7.10 for representation of the estate in those proceedings without the Court's orders effectively finalising administration of an estate.
 - (b) in the making of a section 91 order or a UCPR rule 7.10 representative order without articulation of purpose, powers or obligations and upon an assumption that an appointee to an office of this character has authority to deal with third parties outside the parameters of the proceedings.
- 137 It is in the interests of everybody that the terms and intended effect of the Court's orders be directed to, and confined within, the purpose of the jurisdiction exercised by the Court. Otherwise, experience teaches, there is a risk of

confusion, overreach, injustice and unnecessary costs and delay in the due administration of an estate.

POINTS OF INTERSECTION BETWEEN THE EQUITY AND WELFARE JURISDICTIONS

Equitable Principles and Remedies underwrite the Welfare Jurisdictions

- 138 In a practical sense, the Court's equity jurisdiction underwrites the effective operation of each of the welfare jurisdictions: the protective, probate and family provision jurisdictions.
- 139 Central to equity's role as an underwriter of the welfare jurisdictions is its characterisation of relationships as "fiduciary", its enforcement of fiduciary obligations, its techniques for setting aside transactions tainted by unconscientious conduct and in the remedies available to it (including the imposition of constructive trusts) for the recovery of estate property or equitable compensation.

Standards of Conduct

- 140 An exercise of equitable jurisdiction in aid of an exercise of other welfare jurisdictions to recover estate property or equitable compensation implicitly identifies and enforces standards of conduct in dealings with a person who, by reason of incapacity or death, is unable to manage his or her affairs: a field of operation not limited to a formal regime of estate administration.
- 141 Equity's role in the establishment and maintenance of standards of conduct in and about estate administration should not be overlooked in debate about whether there is a role for equitable principles governing undue influence in a challenge to the "validity" of a will.
- 142 At the same time as the Court of Appeal upheld the validity of a vulnerable testator's will in favour of a medical practitioner who was perceived to have cultivated his friendship (*Schwanke v Alexakis* [2024] NSWCA 118), NCAT disciplined the practitioner for overstepping his professional boundaries:

Healthcare Complaints Commission v Alexakis [2023] NSWCATOD 99; [2024] NSWCATOD 82. That fact alone does not displace the Court's ultimate finding, on the facts of the particular case, that the will admitted to probate was the last will of a free and capable testator, but it does give pause for thought. On the facts of the case, the Court of Appeal was also satisfied that the practitioner had not misconducted himself professionally.

- 143 Equity's main field of operation in and about an exercise of the Court's welfare jurisdictions appears to be focused upon the identification of estate assets.
- 144 Equity's field of operation depends upon whether it intersects with an exercise of protective jurisdiction or an exercise of probate or family provision jurisdiction.
- 145 In the former realm it is principally concerned with the protection of a person in need of protection holding to account enduring attorneys, enduring guardians, financial managers and guardians (recognising, as established in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CL 417 at 420-423) the purposive nature of accountability upon an exercise of protective jurisdiction or the recovery of property or equitable compensation where resources of a person in need of protection have been diverted away from the person.
- 146 On the other hand, equity's engagement with the probate and family provision jurisdictions can operate either to augment or diminish what appears, at law, to be a deceased estate.
- 147 Although it is heresy to speak of an "equitable cause of action" (because the expression "cause of action" is characteristic of a common law claim, and a ground upon which the intervention of equity in the enforcement of strict legal rights is conventionally called "an equity") there are, in the practice of the law relating to wills and estates, patterns of conduct with pithy labels that routinely attract equitable intervention.

Equity in the Recovery of Estate Assets

- 148 The “equitable causes of action” commonly relied upon in *augmentation* of an estate are claims based on an allegation of:
- (a) undue influence;
 - (b) unconscionable conduct; and/or
 - (c) a breach of fiduciary obligations.
- 149 These concepts are subtly different but they often in practice operate together in identification of unconscientious conduct that warrants an equitable remedy.
- 150 **Undue Influence and Unconscionable Conduct.** Undue influence (explained in *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675, informed particularly by *Johnson v Buttress* (1936) 56 CLR 113 at 134-136) looks to the quality of the consent or assent of the weaker party to a transaction, whilst unconscionable conduct (commonly described by reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 or *Bridgewater v Leahy* (1998) 194 CLR 457 at [75]) looks to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person under special disadvantage.
- 151 Whereas undue influence may be established by means of a presumption of undue influence in some cases by reason of the relationship between parties (eg doctor and patient), no presumption is available in support of an allegation of unconscionable conduct. It must be proved without the benefit of a presumption.
- 152 Undue influence denotes an ascendancy by a stronger party over a weaker party such that an impugned transaction is not the free, voluntary and independent act of the weaker party; it is the actual or presumed impairment of the judgement of the weaker party that is the critical element in the grant of relief on the ground of undue influence.

- 153 Unconscionable conduct focuses more on the unconscientious conduct of a stronger party. It is a ground of relief which is available whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or conscientious advantage is taken of the opportunity thereby created: *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457.
- 154 **A Breach of Fiduciary Obligations.** A fiduciary has a duty of loyalty to his or her principal (sometimes described as a beneficiary) not to place himself or herself in a position of conflict with the principal, nor to obtain a profit or benefit from his or her fiduciary position, without first obtaining the fully informed consent of the principal: *Hospital Products* at 68, 96 and 141; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467. Where that duty is breached, the nature of the case will determine the appropriate remedy, moulded to the circumstances of the particular case.

Equitable Obligations Involving a Reduction in Estate Assets

- 155 The recognised patterns of conduct giving rise to an entitlement in a party to a declaration that an estate asset is held on trust for that party (thus *diminishing* an estate) are commonly known as “trust claims” based upon principles governing:
- (a) A contract to make a will (and not revoke it): GE Dal Pont, *Law of Succession* (Lexis Nexis, Australia, 3rd ed, 2021), paragraphs [1.29]-[1.39]; *Delaforce v Simpson-Cook*; (2010) 78 NSWLR 483, [2010] NSWCA 84 at [31]-[34].
 - (b) A common intention trust, based upon an actual intention that property be held on trust: *Clayton v Clayton* [2023] NSWSC 399 at [529]-[543].

- (c) A proprietary estoppel: Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (LexisNexis Butterworths, Australia, 5th ed, 2015), paragraphs [17.065]-[17.130].
- (d) A joint endeavour trust based upon a division of property the subject of a joint endeavour which is failed without attributable fault: *Baumgartner v Baumgartner* (1988) 164 CLR 137; *Clayton v Clayton* [2023] NSWSC 399 at [544]-[561].

156 Recent phenomena in cases involving a claim of proprietary estoppel are worthy of note:

- (a) where a promisor or representor engages in what, in contract law, would be described as “anticipatory breach of a contract” (and might fairly be called an “anticipatory breach of faith” in an estoppel by encouragement case), the Court may order acceleration of a remedy: *Q v E Co* [2020] NSWCA 220; *Slade v Brose* [2024] NSWCA 197.
- (b) an expectation of future benefits such as might give rise to an estoppel claim might be reinforced by a parallel claim for a family provision order where it bears upon an assessment of “proper and adequate” provision and what orders should be made for the purpose of sections 59(1)(c) and 59(2) of the *Succession Act* 2006 NSW: *Soulos v Pagones* [2023] NSWCA 243.

THE GROUNDS OF CHALLENGING A WILL IN A PROBATE SUIT

157 A lay discussion about “challenging a will” might reasonably be supposed generally to proceed by way of doubts about the “mental capacity” of a testator or an apprehension (as a lay person may understand it) that a testator executed a will under the “undue influence” of a person who stood to benefit from the will.

158 Lay people might generally also be familiar with the concept of “family provision” proceedings, but perhaps not the concept of estate property being held on trust

on the basis of an *inter vivos* promise or representation of the testator, however much a disappointed expectation fosters doubt about the propriety of the will.

- 159 Few lay people can reasonably be expected to understand the nuances in the meaning of “undue influence” as that expression is used upon an exercise of probate or equity jurisdiction.
- 160 Nor can they reasonably be expected to understand fully that, based on a foundational concept of “testamentary freedom”, probate law is not concerned (or, at least, primarily concerned) with the wisdom or fairness of a will: *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284.
- 161 The primary concern of probate law (focusing upon the “essential validity” of a will as distinct from its “formal validity”) is upon ascertaining the state of mind of a testator, not how that state of mind might have been formed.
- 162 The ultimate question for the Court in assessment of the validity of a testamentary instrument (a will, a codicil or, implicitly, an informal will) is whether it represents the last will of the deceased as a free and capable testator.
- 163 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" (sometimes called "coercion") 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.

- 164 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.
- 165 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.
- 166 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.

167 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 *mised* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

- 168 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.
- 169 Although the grounds upon which the validity of a will may be challenged are logically distinct, when applied to the facts of a case they blur at the edges.
- 170 An allegation that a will is invalid for a want of testamentary capacity is rarely unaccompanied by an allegation of a want of knowledge and approval.
- 171 An allegation of a want of knowledge and approval rarely stands alone. Whether it stands alone or not it is usually accompanied by an allegation of “suspicious circumstances” which is an allegation subsidiary to an allegation of want of knowledge and approval but is sometimes treated by advocates as if it grounds a finding of “undue influence” of a type recognised upon an exercise of equity jurisdiction. The two concepts sometimes overlap in a factual setting, but they are analytically distinct. In the probate context, a finding of “suspicious circumstances” displaces a presumption of “knowledge and approval” arising from the due execution of a will, nothing more.

- 172 Even if fully appreciated as distinct from “equitable undue influence” the nature and scope of “probate undue influence” is generally hampered by conventional statements that require proof of “coercion”.
- 173 In *Schwanke v Alexakis* [2024] NSWCA 118, the Court of Appeal emphatically rejected the proposition that the validity, or operation, of a will can be challenged on equitable principles including “undue influence”. In substance, the Court endorsed the approach of Powell J in *Winter v Crichton* (1991) 23 NSWLR 116 (for years a primary authority referred to by succession lawyers in NSW) that, upon an exercise of probate jurisdiction, “the undue influence which must be shown to avoid [a] will must amount to force or coercion destroying a free agency”.
- 174 In reaching that conclusion the Court canvassed policy considerations traditionally taken to bear upon differences between testamentary and *inter vivos* dispositions of property, including the different perspectives of “freedom of disposition” of a person making a will in contemplation of death and a person who might suffer in life from an improvident transfer of property.
- 175 The Court declined to act upon obiter of the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475 [62]-[63].
- 176 The nature of the challenge presented by *Bridgewater v Leahy* has been well summarised by Slattery J in here *Alexakis v Masters* [2021] NSWSC 158 at [26]-[32]:
- “[26] Long-standing statements of legal principle declare that the equitable doctrine of undue influence does not apply to testamentary gifts: *Boyce v Rossborough*; *Craig v Lamoureux* [1920] AC 349; *Winter v Crichton*; *Estate of Galieh* (1991) 23 NSWLR 116; *Trustee for the Salvation Army (NSW) Property Trust t/as the Salvation Army v Becker* (2007) 14 BPR 26,867; [2007] NSWCA 136.
- [27] But in *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66, at 474-475; [62]-[63], (“*Bridgewater*”) the High Court (Gaudron, Gummow and Kirby JJ) left open the possibility that principles of equitable undue influence might yet be held to apply in probate cases. Their Honours said the following on this subject, pointing at least to the possibility of

relief based on equitable undue influence subjecting property passing under a will to a constructive trust:

[62] The position taken by courts of probate has been that to show that a testator did not, by reason of undue influence, know and approve of the contents of the instrument propounded as a testamentary instrument, ‘there must be – to sum it up in a word – coercion’: *Wingrove v Wingrove* (1885) 11 PD 81 at 82-83. See also *Baudains v Richardson* [1906] AC 169 at 184-185; *Craig v Lamoureux* [1920] AC 349 at 357; *Winter v Crichton* (1991) 23 NSWLR 116 at [121]-[122]. The traditional view, repeated by Sir Frederick Jordan [in his ‘Chapters on Equity in New South Wales’, reprinted in Jordan, *Select Legal Papers* (1993), page 137], has been that a court of equity will not, on the ground of undue influence as developed by the Court of Chancery, set aside a grant made by a court of probate: *Allen v M’Pherson* (1847) 1 HLC 191 (9 ER 727); cf, *Birmingham v Renfrew* (1937) 57 CLR 666 at 674, 676, 683, 690].

[63] The approach taken in the probate jurisdiction appears to be concerned with the existence of a testamentary intention rather than the quality of that intention or the means by which it was produced. It is a concern of this latter nature which finds expression in the treatment by equity of dispositions inter vivos. In the present litigation, with respect to the dispositions made by the will, no party 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 beneficiary of the next kin”.

[28] The relationship between the operation of the doctrine of undue influence in probate and in equity raised in *Bridgewater* has received subsequent attention in this Court. In *Boyce v Bunce* [2015] NSWSC 1924 (“*Boyce*”), Lindsay J observed that:

“...the present proceedings appear to be an appropriate vehicle within which to test the interconnection, if any, between the historically different concepts of ‘undue influence’ in the probate and equity jurisdictions...As presently advised, I do not see any necessity, or justification, for assimilation of ‘equitable undue influence’ in the concept of ‘probate undue influence’; but neither do I apprehend that an application of equitable principles, as a supplement to an exercise of probate jurisdiction, in the manner contemplated by the High Court in *Bridgewater v Leahy* is beyond fairly arguable.”

[29] The present position was aptly summarised by Hallen J in *Blendell v Byrne & Ors; Estate of Noeline Blendell* [2019] NSWSC 583 at [498] (“*Blendell*”), where his Honour said there remains “difficult and, so far, unanswered, issues” on this question.

[30] Without further analysis of *Bridgewater*, *Boyce*, or *Blendell* it can safely be said that the application of equitable doctrines of undue influence to

dispositions under otherwise valid wills is an open and arguable question.

[31] There is no procedural obstacle to the Court trying questions of probate undue influence and equitable undue influence together. The Court has broad power to consolidate, order and organise the trial of proceedings involving common questions or transactions, or where the issues overlap: *Uniform Civil Procedure Rules 2005* (“UCPR”), r 28.5. And *Civil Procedure Act 2005*, ss 56 and 57 require the Court to facilitate the just quick and cheap resolution of the real issues in the proceedings and to manage proceedings to promote the efficient disposal of the business of the Court.

[32] It is common for questions of the grant of probate of a will to be decided separately from other issues. But the amalgamation of probate and non-probate issues occurs from time to time. Two quite lengthy cases that I have decided exemplify the amalgamation of probate and non-probate issues: *Calokerinos, Executor of the Estate of the late George Sclavos v Yesilhat*; *Yesilhat v Calokerinos, Executor of the Estate of the late George Sclavos* [2017] NSWSC 666; and *Mekhail v Hana*; *Mekail v Hana*; *In the Estate of Nadia Mekhail (No 3)* [2018] NSWSC 1452. And the parties gave the Court other recent examples where probate and equity proceedings had been consolidated: *The Estate of Stanislaw Budniak*; *NSW Trustee & Guardian v Budniak* [2015] NSWSC 934; *Stojic v Stojic* [2018] NSWSC 723; *Stojic v Stojic* [2018] NSWCA 28.”

177 The High Court dismissed two related applications for leave to appeal from the judgment of the Court of Appeal in *Schwanke v Alexakis* but it did so in terms that leave open the possibility of a future appellate review of the role of an exercise of equity jurisdiction in relation to the validity or operation of a will if a “suitable vehicle” emerges: *Schwanke v Alexakis* [2024] HCASL 246; *Camilleri v Alexakis* [2024] HCASL 247 (5 September 2024).

178 In dismissing each application the Court made the following observation:

“The proposed appeal raises a question of law of public importance. However, the proposed appeal is not an appropriate vehicle for this Court to determine that question”.

179 In the absence of the High Court’s identification of the question of law considered to be of public importance care should be taken not to conclude that the critical question necessarily related to the intersection of equity and probate law. It may have been the decision of the Court of Appeal (upon a consideration of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134]-

[135]) not to treat itself as bound by the obiter of the High Court in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475, although I think not.

- 180 Whatever the academic merits of competing views about the availability or otherwise an equity foundation for challenging the validity or operation of a will, a sufficient ground for dismissal of the special leave applications was that the appellants would have been confronted in the High Court with concurrent findings of fact, made by Henry J at first instance and the Court of Appeal, that there was no undue influence or unconscionable conduct such as to attract an intervention of equity. The conclusion to be drawn on the facts of the case was that the will under challenge was the last will of a free and capable testator.
- 181 Unless the Court of Appeal itself or some other intermediate appellate court departs from the reasoning of the Court of Appeal, or the High Court takes up a case, first instance judges are bound to proceed on the basis, put simply, that equitable principles governing undue influence (or other similar equitable principles) have no role to play in determining the validity or operation of a will.
- 182 Procedurally, if a party seeks to challenge that view the appropriate course may be to plead and formally advance a case of equitable undue influence at first instance, and perhaps in the Court of Appeal, recognising the precedential force of the Court of Appeal's judgment in *Schwanke v Alexakis*, expressly reserving a right to challenge the reasoning of that judgment in the High Court.
- 183 If Australian jurisprudence remains unreceptive to an application of equitable principles to a determination of the validity, or operation, of a will propounded in a probate suit there may be scope, within the realms of legal history and comparative law, for an understanding that proof of "knowledge and approval" of a will requires that a testator's "approval" be "fully informed". In any event, a survey of Anglo-Australian legal history suggests that the concepts of "knowledge and approval", "undue influence" and "fraud" might be more flexible than has sometimes been assumed.

- 184 A study of the history of the law of succession demonstrates the different meanings from time to time, and in different jurisdictions, attributed to elemental concepts such as “knowledge and approval” and “undue influence”.
- 185 I draw to attention an insightful paper of Daniel Yazdani, “Testamentary Undue Influence - A Historical Overview” (2023) 53 Australian Bar Review 182 and the observations of Leeming JA in *Lewis v Lewis* (2021) 105 NSWLR 487 at [131]-[136] about the evolution of “substantive” legal principles through the development of “procedural” norms when exploring the history of the concept of “knowledge and approval”.
- 186 If there has been any inflexibility in the application of these concepts (or the concept of testamentary incapacity) an antidote may simply be conscientiously to begin, and end, in any analysis of the validity of a will with the ultimate question, “Is this the last will of the free and capable testator?”
- 187 In approaching these types of questions through the lens of legal history notice should, perhaps, be taken of the fact that the judgments upon which Powell J principally relied in *Winter v Crichton* (1991) 23 NSWLR 116 at 121-122 (*Boyce v Rossborough* (1857) 6 HLC1; 10 ER 1192 and *Wingrove v Wingrove* (1885) LR 11 PD 81) were products of a 19th century English legal system far removed from contemporary Australian society and the legislation that informs an exercise of welfare jurisdiction in NSW.
- 188 In *Schwanke v Alexakis*, Gleeson JA counselled those who may seek a change in the law as found by the Court of Appeal to look to Parliament for remedial legislation. He is probably right; but whether what is sought is a “change in the law” or a natural development of Equity’s genius for adaptation to changing circumstances is at the core of an intriguing debate about the nature, purpose and functionality of the Court’s equity jurisdiction.

COSTS

- 189 Questions of costs loom large in cases involving an exercise of the Court’s welfare jurisdiction, one suspects, because there is often a fund from which

litigants live in hope to have applied in payment of their costs. From the Court's perspective claims for costs routinely made have the potential to undermine the utility of its jurisdiction.

- 190 In a recent paper I have drawn to attention the different approaches to the Court's making of costs orders and their connection in each case with the purpose for which the Court's jurisdiction exists: Lindsay, "The Dynamics and Dilemmas of Costs Orders Upon an Exercise of 'Welfare' Jurisdiction" (Blue Mountains Law Society 2024 Succession Conference, 7-8 September 2024).
- 191 I have since published a judgment which, as foreshadowed in the paper, proposes that consideration be given not only to orders capping costs and awarding lump sums (payable out of an estate or *inter partes*) but adopting a procedural regime to facilitate regulation of costs as between lawyer and client: *Alexiou v Alexiou* [2024] NSWSC 1340. Final orders have yet to be made because events subsequent to the Court's reservation of judgment are the subject of further consideration.
- 192 An alternative procedure to that which I have proposed can be found in Slattery J's practice, in management of the Probate List, of routinely making cost capping orders at an early stage of proceedings.
- 193 The idea of costs being "capped" may not be congenial to lawyers or clients, and it involves burden on the Court in its application, but if costs are capped at an early stage of proceedings, or there is an expectation that they may later be capped, lawyers and clients alike may have an incentive to focus attention on essential tasks. Lawyers might also be given the means for reining in the enthusiasm of a client whose mind is not sufficiently focused upon the cost consequences of litigation.
- 194 Whatever fate of these procedural regimes, the Court has been driven to look for ways of containing costs in a way that serves a proper exercise of the Court's jurisdiction and is fair to all affected parties, procedurally and in substance.

CONCLUSION

195 The “takeaways” of this paper are, first, there is a need for a conceptual understanding of the Court’s overall “welfare jurisdiction”, embracing, the protective, probate and family provision jurisdictions, underwritten by the Court’s equity jurisdiction. Secondly, although “rules” have an important part to play in the administration of estates, the welfare jurisdiction is purpose driven, not rule-bound. Thirdly, in approaching an exercise of the Court’s welfare jurisdiction the paradigm of ideas that inform decision-making (including, particularly, the starting point of “the autonomous individual living and dying in community”), and the social context within which the decisions are made, must be borne in mind. Fourthly, the role of an advocate is generally to know and understand the purpose for which the Court’s jurisdiction exists and, in service of that jurisdiction, to endeavour to bring a client’s purposes into an alignment with the Court’s jurisdiction.

GCL

19/11/24

ADDENDUM (26 November 2024)

196 The oral presentation of this paper included commentary (here summarised, with elaboration) on the *Bridgewater v Leahy* issue in light of both the judgment of the Court of Appeal and the special leave decisions of the High Court of Australia in the *Alexakis* proceedings.

197 The judgment of the Court of Appeal is to be welcomed as a serious engagement with deep jurisprudential questions about the respective functions of the probate and equity jurisdictions in estate administration.

198 In essence, the Court of Appeal embraced an orthodox view of “probate undue influence” law routinely described by reference to Powell J’s judgment in *Winter v Crichton* and extended it to a determination that equity has no role to play in a contest about the validity and operation of a will.

- 199 Implicitly, this means that the grounds upon which the validity of a will can be challenged are limited to a want of testamentary capacity; a want of knowledge and approval; “probate undue influence” (sometimes described as “coercion”); and fraud, and do not extend to the equitable “grounds” of undue influence, unconscionable conduct or a breach of fiduciary obligations.
- 200 The focus of an exercise of probate jurisdiction is on identification of the state of mind of a testator, not the manner in which that state of mind was formed. The ultimate question of fact in a probate suit is whether an identified testamentary instrument is the last will of a free and capable testator.
- 201 On this reasoning an essential point of difference between the probate and equity jurisdictions is that, upon an exercise of equity jurisdiction, the Court can focus on the formation of a testator’s state of mind for the purpose of declining to give effect to an instrument execution of which was procured by unconscientious conduct in the particular case. This enables the Court to identify and maintain standards of conduct in a way not open on an orthodox exercise of probate jurisdiction.
- 202 On the facts as found, and viewing those facts through the prism of the orthodox view of the probate jurisdiction adopted by the Court, the judgment of the Court of Appeal was correct. The Court found that there was no factual foundation for a finding of equitable undue influence or unconscionable conduct and, at least implicitly, no breach of fiduciary obligations and, consequentially, that the will admitted to probate was the last will of a free and capable testator.
- 203 A question of principle arising from the judgment is whether the prism through which the Court viewed the facts was correct.
- 204 The judgments of the Court of Appeal are informed by two features of the particular case going beyond a formal identification of the grounds upon which the validity of a will can be challenged. First, the Court privileged the idea (which can be found in *Banks v Goodfellow* (1870) LR 5 QB 549 at 563-565, but especially 564) that the concept of testamentary freedom serves to confer

power on an ailing testator to command attention when infirm, in the shadow of death. Secondly, on the facts of the case as found by the primary judge and the Court of Appeal itself, no impropriety either attached to the conduct of the medical practitioner who benefited from the testator's will or affected the independence of the testator's judgement.

205 The Court of Appeal would have had a more difficult case to decide had it not held that no impropriety attached to the medical practitioner's conduct or affected the judgement of the testator.

206 Although it might appear otherwise, there is no necessary inconsistency between the judgment of the Court of Appeal that there was no material impropriety on the part of the medical practitioner and the determination of NCAT that he had been guilty of misconduct in transcending proper professional boundaries. The respective decisions of the Court and NCAT were governed by the purpose of the jurisdiction they were called upon to serve, and the prism through which they were called upon to view the underlying facts. The question for the Court was not primarily concerned with the professional conduct of the medical practitioner but was directly focused on the state of mind of the testator.

207 An irony of the Court of Appeal's judgment is that the judgement of the Court that it should not apply the obiter of the High Court in *Bridgewater v Leahy* was itself obiter in so far as the Court held that there was in any event no factual foundation for an intervention of equity.

208 Nevertheless, the orderly administration of justice in a system based upon precedential reasoning in a hierarchical court structure requires that first instance judges apply (and parties respect) the reasoning of the Court of Appeal, reserving to appellate courts the question whether there should be a departure from that reasoning. In a practical sense, this reflects the reasoning of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* operative at a lower level of the hierarchy.

- 209 If equitable principles are to operate on a challenge to the validity or operation of a will cause needs to be shown for equitable intervention. That requires identification of some deficiency in probate law or practice in its application to a particular case. In principle, such a deficiency may lie in the focus of the probate jurisdiction on a testator's state of mind and not also on the manner in which that state of mind was formed.
- 210 A perceived need for the application of equitable principles on a challenge to the validity and operation of a will may need to be tested, in each case, against the sometimes unrecognised flexibility of the probate law concepts of testamentary capacity, knowledge and approval, undue influence and fraud, as well as the ultimate question whether a testamentary instrument was the last will of a free and capable testator. The probate jurisdiction is, in practice, not wholly unconcerned with the manner in which a testator's state of mind was formed (characteristically it allows opportunities for a person interested in a deceased estate to investigate a testator's mental capacity and the circumstances in which the will was made) but its focus on a testator's state of mind is implicitly confined by the grounds of challenge to the validity of a will traditionally recognised as informing the ultimate question.
- 211 The conceptual framework underlying the ultimate question is profoundly logical in its identification of questions subsidiary to the ultimate question. A common assumption in practice is that that logical framework is exhaustive of the factors to be taken into account upon a consideration of the ultimate question, leaving the Court no residual space for an evaluative judgment that a will was not the last will of the free and capable testator if factual findings demonstrate testamentary capacity and knowledge of approval untainted by undue influence or fraud. Orthodoxy does not permit, as would an exercise of equitable jurisdiction, a finding that a will was not truly the last will of a free and capable testator because his or her state of mind was formed by the conduct of another person which fell short of conduct regarded by the community as conscientious.

- 212 One way of framing the question raised by *Bridgewater v Leahy* is whether the subsidiary questions underlying the ultimate question necessarily control the factors that can be taken into account in deciding the ultimate question. That is, can the grounds upon which the validity or operation of a will can be challenged extend to the grounds upon which equity ordinarily intervenes to protect a vulnerable person led into an *inter vivos* transaction affected by undue influence, unconscionable conduct or a breach of fiduciary duty. Is a probate judge only concerned with the fact of a testator's state of mind, not its quality.
- 213 If this conceptual approach is taken to the substantive question whether an exercise of equity jurisdiction is available on a challenge to the validity or operation of a will it may be that debate about that question has been obscured by collateral concerns about the different approaches of the probate and equity jurisdictions to adjectival questions such as presumptions, shifting onuses of proof and remedies.
- 214 If differences about practice and procedure are put to one side the debate may more readily focus upon substantive conceptual questions about whether a will should be held valid and fully operative in a case in which a vulnerable testator's execution of the will was brought about by another party exercising unconscionable dominance over the testator (equity undue influence), taking an unfair advantage of the testator's vulnerability (unconscionable conduct) or acting in a self-interested way in breach of a duty owed to the testator (breach of a fiduciary obligation).
- 215 In a modern society where personal relationships are often more transactional and less familial than once was the case, and greater informality attaches to inheritance procedures than was once permitted by law, these types of "influence " (as a lay person might perceive them to be) may be very different in character from that accepted as reasonable upon a routine exercise of probate jurisdiction.
- 216 In large measure differences in the approach of the probate and equity jurisdictions to questions of presumptions, shifting onuses and remedies reflect

court practice and procedure before the adoption of a Judicature Act system of court administration and, more recently, a case management philosophy of court administration.

- 217 Modern court procedures no longer hinge upon interlocutory disputes about demurrers and applications for a non-suit or the like in proceedings largely determined on oral evidence. In virtually all cases, a judge (sitting alone) hears all the evidence (mostly in the form of affidavits served in advance of a hearing) before turning attention, not to presumptions or shifting onuses of proof but to inferences to be drawn from common experience on the whole of the evidence. Reasoning by reference to “presumptions” generally recognises that operative “presumptions” are presumptions of fact, not law: inferences from common experience by another name.
- 218 In practice, differences between the way the probate and equity jurisdictions are administered may not be (or, perhaps, should not be) significant factors in determining the question raised by *Bridgewater v Leahy*. Neither may be speculation about the different approaches of the probate and equity jurisdictions to questions of remedy. The purpose of an exercise of probate jurisdiction is directed to the due administration of a deceased estate. An exercise of equity jurisdiction, if permitted, could not operate otherwise than in aid of an exercise of probate jurisdiction. A finding that a will was, in whole or part, affected by an equitable ground of intervention could reasonably be expected to have consequences similar to those of a finding that a will is invalid for a want of knowledge and approval (a finding often accompanied by a finding of “suspicious circumstances”, in practice a near relative of equitable concepts).
- 219 A legitimate concern that acceptance of the High Court’s dicta in *Bridgewater v Leahy* could open “floodgates” invites a response that the way probate proceedings are currently conducted (in the light of social practices relating to enduring powers of attorney, enduring guardianship appointments and wills as contemporaneous instruments and routine hearings across jurisdictional boundaries) the floodgates are already open and the problem is how to maintain standards in processes for the inheritance of property.

- 220 Proceedings in the Court's Succession List commonly require, in the one set of proceedings, an exercise of probate, equity and family provision jurisdictions arising from current social practices and the manoeuvring of expectant beneficiaries within and outside the central personality's family (however defined). In any event, a concern about "floodgates" being opened needs to be assessed in the light of the distinctive procedural safeguards that characterise an exercise of probate jurisdiction.
- 221 Probate litigation is "interest litigation". Properly administered, all potentially interested persons in a probate suit are given notice of proceedings intended to bind them to the outcome of the proceedings whether or not they are joined as parties. A grant of probate or administration operates "against the world" and is presumed valid unless and until revoked. An exercise of equitable jurisdiction on a challenge to the validity or operation of a will of the type contemplated by *Bridgewater v Leahy* could be expected to arise only as an incident of a challenge based on one or more of the grounds of a want of testamentary capacity, a want of knowledge and approval, probate undue influence or probate fraud.
- 222 In practice, the policy imperative of upholding "testamentary freedom" with a robust disregard of influences brought to bear on a testator is not uncommonly counterbalanced by unconscientious influences brought to bear on a vulnerable person by a relative stranger who ingratiates himself or herself with a testator and, in the experience of the protective jurisdiction, proceeds to take control of the person and estate of a vulnerable person to the exclusion of people who have long been the testator's "significant others", who have a long standing claim on the bounty of the testator and who are badmouthed by a self-interested stranger. Short term relationships between a paid carer from outside the testator's family circle come to mind.
- 223 If there is a need for the law, at the intersection of the probate and equity jurisdictions, to maintain standards by reference to substantive equitable principles (rising above adjectival practice), it will very likely manifest itself not in an established category of "relationships of influence" (priest and penitent,

doctor and patient, lawyer and client amongst others) but in a short term relationship between a paid carer from outside “family” and a vulnerable, suggestible testator on the borderline of (in)capacity. A shift of government policy towards “home care” for the elderly may point in this direction.

224 Experience of privatisation of the management of the affairs of a vulnerable person via deployment of enduring agency and care arrangements suggests that privatisation (deinstitutionalisation) of the care of the elderly will come at the price of an increased risk of financial abuse by carers recognisable in equity, but not necessarily upon an exercise of probate jurisdiction.

225 A carer may be well-placed to isolate a vulnerable (often a suggestible) person from family (however defined), to ingratiate himself or herself with the vulnerable person and to turn the person away from those away from those who otherwise have a claim on the bounty of the vulnerable person, changing the narrative in favour of the carer.

226 What appears in *Banks v Goodfellow* at (1870) LR 5 QB 564 might usefully be compared with the following extract of Dixon J’s judgment in *Johnson v Buttress* (1936) 56 CLR 113 at 134 as indicative of the deep jurisprudential questions raised by the Court of Appeal’s judgment about the respective functions of the probate and equity jurisdictions in estate administration:

“The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor’s will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. ...”

227 These observations about “actual” undue influence, in contrast to “presumed” undue influence, focus attention on the conduct of parties rather than simply relationships, and they are not far removed from an inquiry about whether a

testamentary instrument was “the last will of a free and capable testator” or the concepts of “knowledge and approval” or “probate undue influence”. “Freedom of judgement” in the disposition of property is a virtue common to both the probate and equity jurisdictions.
