

THE BLUE MOUNTAINS LAW SOCIETY

2025

SUCCESSION CONFERENCE

12-14 September 2025

**SUCCESSION LAW: RECOGNITION AND MANAGEMENT OF CHANGE;
What can change (and should or should not) and what must remain the same**

by

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INTRODUCTION

- 1 The topic the subject of this paper (“Succession Law” and “Change”) is deceptively simple and intrinsically complex.
- 2 That is particularly so for a serving judge bound, by the nature of the judicial office, to decide particular cases according to the law as it “is”, not as somebody might believe it “ought to be”.
- 3 The distinction between what “is” and what “ought to be” may be difficult to maintain in a dynamic world but, it needs to be honoured aspirationally if judicial decisions are to be respected by the community served by law as administered by the courts.
- 4 The subtitle of this paper (“What can change (and should or should not) and what must remain the same” in the law of succession) should properly be expressed as a series of questions, rather than as a statement. And it is back to front. It is easier addressed if a first consideration is “what must remain the same”, leaving the topic of “change” as a subsidiary one. And any constructive response to the question requires prudence in dealing with what “can” change, what “should” or “should not” change and what “must” remain the same. A

constructive treatment of the topic needs to rise above subjective opinion, even if objectivity is but an elusive aspiration.

- 5 It needs also to address questions about the meaning and processes of change: what is change and how and why does it occur or should occur?
- 6 What emerges from a consideration of the questions stated for attention in this paper is that the law of succession (including practice and procedure) is constantly evolving, adapting to changed circumstances which require management. There is much about the law of succession that is stable and enduring; but it is a mistake to regard it as unchanging or unchangeable.
- 7 Contemporary Australian "Succession Law" (however defined) is very much affected by fundamental changes: (a) in the way an individual prepares for incapacity before death; and (b) in the expectations of an individual's community about the distribution of his or her wealth in anticipation of death, especially during an extended lifespan and in any event upon death.
- 8 The law of succession (however defined) is, at least in part, a function of concepts of "family" and "property", each of which have been the subject of significant change since the 1970s or thereabouts.
- 9 Family relationships have become increasingly fluid. Personal relationships generally have become more transactional. Testamentary arrangements have become increasingly informal, particularly with "informal wills" and "estoppel claims" against a deceased estate, and community expectations have found expression in family provision claims in an expanding cohort of persons eligible to make a claim.
- 10 By far the most fundamental change affecting the meaning and operation of the law of succession in Australia has been the introduction, and widespread use, of enduring powers of attorney and enduring guardianship appointments as a means of privatising management of the affairs of a person incapable of managing his or her own affairs. In combination with a will (and possibly an

advance care directive) they comprise a suite of documents routinely executed in anticipation of incapacity before death.

- 11 Execution of these documents as a suite of documents often means that, although each instrument has a distinct field of operation, taken together they may, in practice, confer on an enduring attorney or an enduring guardian ostensible authority beyond any actual authority to manage the affairs of an incapacitated principal.
- 12 In the interests of a third party dealing with an enduring attorney, if not in the interests of an incapacitated principal, an enduring power of attorney generally confers on an attorney plenary powers without restriction or, at least, with restrictions that might go unnoticed by both an attorney and a third party dealing with an attorney.
- 13 A potential for conflict between the fiduciary obligations owed by an enduring attorney to an incapacitated principal and the interests of the attorney is at the core of what has become known as “elder abuse” or “financial abuse” as (uninstructed by Meagher, Gummow and Lehane on *Equity: Doctrines and Remedies*) enduring attorneys transact business in breach of their fiduciary obligation to act only for the purpose of serving the interests, and for the benefit, of the incapacitated principal.
- 14 It is in this environment, viewed from the perspective of a judge exercising the jurisdiction of the Supreme Court of NSW (or any other Australian Supreme Court) that “the law of succession” has come to be identified with an exercise of the protective, probate and family provision jurisdictions (the “welfare jurisdictions”) of the Court, underpinned by an exercise of the Court’s equity jurisdiction.
- 15 I have adopted the term “welfare jurisdiction” from that used by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258 in describing the *parens*

patriae (protective) jurisdiction of a superior court of record such as the NSW Supreme Court.

- 16 What the welfare jurisdictions have in common is that they are concerned with the welfare of a central personality who (by reason of incapacity or death) is unable to manage his or her own affairs. In the conduct of proceedings in the Court an incapacitated person is not, or may not be, wholly present and able to protect his or her own interests in the same way as a fully competent person may be able to do in adversarial proceedings.
- 17 A person who is unable to manage his or her own affairs may be in need of a manager (by whatever name known) empowered to manage, or assist in management of, the incapable person's affairs.
- 18 The focus on *management* of the affairs of a person incapable of self-management makes the purposive character of the welfare jurisdictions more manifest than they are when the law engages with a person who is capable of managing his or her own affairs in adversarial proceedings.
- 19 Succession Law is essentially concerned with "management" (commonly described as "administration") of an estate and "management" of the affairs (be it the person's "estate" or "person") of a person incapable of self-management. This involves a symbiotic relationship between "law" and "practice" in which the conduct of proceedings may be governed by available remedies and desired outcomes rather than competing claims of right. The concept of "Succession Law" is inherently changeable with changes in law and society.
- 20 Before the advent of enduring powers of attorney and enduring guardianship appointments, the protective jurisdiction of the Supreme Court of NSW was not commonly thought of as part of "Succession Law". Now it is necessarily an integral part of any discussion of "Succession Law".
- 21 It is within this conceptual framework that this paper has been prepared, accepting that "Succession Law" is constantly evolving and that the challenge

for the Court, and those who practise in the area of succession law, is to recognise and manage change in a constructive way.

- 22 The protective and probate jurisdictions of the Court each in their own way lend themselves to change via “case management” procedures of the Court because much that may have been passed off as “law” in the past has really been “practice” and has been exposed as such when tested against the purpose for which each head of jurisdiction exists.
- 23 The family provision jurisdiction also lends itself to change because the statutory criteria for the making of a family provision order are broad and evaluative. It is not by legislative reform alone that the jurisdiction has been transformed over a century from a focus on provision for widows and children to a focus on provision for adult children as they approach retirement.
- 24 In addressing any question of “change” in the law (particularly a proposal for “change” or “no change”) a serving judge is well advised to eschew the role of an advocate. Although a judge can, and should, participate in a conversation about the law, in action or repose, care needs to be taken to remember that the primary function of a judge is to exercise judicial restraint consistent with an orderly determination of legal proceedings conducted in a regular manner, with the benefit of evidence and submissions by particular parties in particular factual settings. It is for that reason, and not to be misunderstood, that I reserve a right to abandon or repudiate any views expressed in this paper if they conflict, or may conflict, with judicial duty in a particular case.

ANSWERS TO QUESTIONS STATED

- 25 My topic involves a series of discrete questions (in the order in which I apprehend they must be considered) and, at the risk of over simplification, I propose to answer them at the outset, subject to a deeper consideration of the nature of “Succession Law” and “change” in the balance of the paper.

26 **QUESTION 1: What is “Succession Law”?**

- 27 **ANSWER:** There is no ready, timeless, comprehensive definition of the expression “Succession Law”. It is dependent for meaning upon historical, social and institutional context. It might be commonly thought to be focused upon the transmission of property on death of an individual, with a focus upon administration of a deceased estate, but it can involve broader questions such as directions for the disposal of a dead body (in which there is no property) and the appointment of a testamentary guardian for a child. In that sense, it is concerned generally with the affairs of a deceased person, both his or her “estate” and his or her “person” and family relationships.
- 28 *Tomlins’ Law Dictionary* (London, 1810) contains no definition of “succession law” but an entry for “Probate of Testaments” (which focuses on “[the] exhibiting and proving wills and testaments before the Ecclesiastical judge, delegated by [a] bishop” and refers to an entry for “Executor”). There is a longer entry for the title “Executor” as befits what would be characterised in modern times as an entry in an encyclopaedia.
- 29 A book still worthy of notice is WS Holdsworth and CW Vickers, *The Law of Succession: Testamentary and Intestate* (Oxford, 1899), demonstrating both an early use of the expression “Law of Succession” and a definition of its scope by reference to wills and intestacies.
- 30 The classic probate text published a century after *Tomlins’ Law Dictionary* (Mortimer, *The Law and Practice of the Probate Division of the High Court of Justice* (London, 1911)) contains no reference to “succession law” in its index and, as its title demonstrates, focuses its attention on the law and practice of “the Probate Division” of a Court equivalent to the Supreme Court of New South Wales.
- 31 A classic NSW text, based upon earlier texts and the basis for later editions of similar texts was Hastings and Weir, *Probate Law and Practice* (Sydney, 2nd

ed, 1948). A transition had not been made at that time to “the law of succession” as a descriptive label.

- 32 A current successor to *Hastings and Weir* is the second edition of *Wills, Probate and Administration Law in New South Wales* (Sydney, 2020) edited by Dr Stephen Janes, David Liebhold and Paul Studdert. In the Preface to that text, the editors wrote the following:

“Almost a quarter of a century has passed since the first edition of this book was published under the authorship of Robert (Harry) Geddes, Charles Rowland and Paul Studdert in 1996. As the authors of that edition observed, almost 50 years had passed since the ancestor of the book; *Hastings and Weir: Probate Law and Practice* was last published in its second edition in 1948, having first appeared in 1939.

The pedigree of the book extends even further. As the present Probate Judge, Lindsay J, observed in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [162]-[164], *Hastings and Weir* was the successor to an earlier work, RE Kemp, *Wills, Probate and Administration*, published in several additions between 1906 and 1926; the early years of what was then known as the *Wills, Probate and Administration Act 1898* (NSW).

As the authors of the first edition acknowledged in their preface, much of the material and some of the flavour of *Hastings and Weir* had been retained. So too with the present work, care has been taken to retain everything of value from the first edition. ...”

- 33 A student’s casebook entitled *Succession: Commentary and Materials* was first published in 1967, edited by FC Hutley and RA Woodman. Justice Mary Gaudron provided a Foreword to the fourth and last edition, published in 1990. In that Foreword she wrote the following:

“ ...

In his foreword to the first edition Sir Bernard Sugerman noted that the subject of Succession was “sometimes esteemed a dull and difficult one”. Whether for this reason or for some other reason the study of Succession has become optional in a number of Australian universities. However, its general importance is undiminished. Changed patterns of cohabitation and changes in family structure have not rendered the subject irrelevant; rather they serve to emphasise the importance of its study as the foundation for extension of principle to changed circumstances, whether by legislative change or by the process of judicial decision. The recent years have seen some legislative changes. A number of the legislative changes as well as changed social patterns will pose problems requiring judicial solution. The solutions will manifest themselves over time, but the solutions will ultimately depend upon legal practitioners having a sound knowledge of the law of Succession, an

understanding of its origins and principles and its relationship with other fields of the law. Its study is to be commended, as are the authors for their scholarship and enthusiasm for a subject which seems, for the moment at least, to have waned in popularity.”

34 The looseleaf service *Mason and Handler*, Succession Law and Practice in New South Wales (whose editors include Richard Neal) boasts a publication date of 1985.

35 The first edition of Certoma’s *The Law of Succession in New South Wales* was published in 1987. A transition from “probate law” to “succession law” was marked by inclusion of a chapter on “Testator’s Family Maintenance”. In her Foreword to that book Justice Gaudron wrote the following:

“Death, being the great certainty, affects us all. It should therefore be a matter of some surprise that there has not before been published a text book on the law of Succession specifically for New South Wales.

Although but few escape the effects and curiosities of the law of Succession, it is no longer a required subject of study in all Law Schools. In itself this is justification for the publication of this book.

By comparison with other fields of law, the law of Succession has remained remarkably static, at least since 1925, when realty and personalty were for all practical purposes assimilated. The major change in recent years has been the enactment of the *Family Provision Act* 1982 extending the categories of persons eligible to seek provision from the estate of a deceased person, and enlarging the concept of a deceased estate to include “notional estate” from which provision may be made.

The *Family Provision Act* was in large part a response to changing family and domestic arrangements. Perhaps the law of Succession should be more responsive to these changes. Why, for example, should a will be revoked by subsequent marriage, and not by subsequent divorce? Doubtless, the full impact of these changes on the law of Succession still awaits realisation. The *Family Law Act* 1975 now enables claims for the adjustment of property rights to be continued after the death of a partner to the marriage. This may necessitate reconsideration of aspects of the law of Succession, and acceptance, as the author suggests, that the law of Succession is an integral part of Family Law. However, these considerations are for the future. In the meantime, the lawyer and the law student will have the great benefit of this very convenient exposition of a most important area of our law.”

36 The *Succession Act* 2006 NSW confirmed the brand “Succession Law” in modern parlance.

- 37 Lexis Nexis' *Concise Australian Legal Dictionary* (in its 6th ed, 2021) has an entry for "succession":

"Succession The transmission or redistribution of the property of a deceased estate on the death of its owner to the person or persons entitled, either by will or by operation of law. The law of succession is concerned with the legal consequences flowing from death on the deceased person's property, both real and personal, whether the deceased died testate (having made a will) or intestate (not having made a valid will). In English and Australian law, the property of a deceased person vests in the personal representative (executor or administrator) who administers the estate according to law and then distributes it to those entitled. See also **administration; intestacy rules; personal representative.**"

- 38 To define the concept by reference to the law of wills and intestate succession is to speak only of the probate jurisdiction and to ignore peripheral areas of the law associated with "will substitutes", as well as the modern concept of an "informal will". In truth, the "Law of Succession" regularly engages with other areas of law that warrant separate characterisation, including particularly "the law of trusts", "property law", "contract law" and "principles governing estoppel".
- 39 In practice, "Succession Law" may best be described (if not defined) today by reference to the several heads of the inherent jurisdiction of the Supreme Court of New South Wales respectively known as "the protective jurisdiction", "the probate jurisdiction" and "the equity jurisdiction", coupled with "the family provision jurisdiction" conferred on the Court by Chapter 3 of the *Succession Act* 2006 NSW. Collectively, the welfare jurisdictions of the Court.
- 40 This reflects experience of the law as individuals now routinely commence planning for death with the execution of an "enduring power of attorney", an "enduring guardian appointment" and a "will", if not also an "advance care directive".
- 41 Death in the eyes of a lawyer must be viewed as a process, not merely a physical event. It must be viewed prospectively in the context of estate planning and retrospectively in the context of identification of the assets of a deceased person, having regard to the possibility that property or compensation may be recoverable on behalf of the estate from an enduring attorney who may have

breached the obligations of a fiduciary in managing the estate of an incapacitated principal.

42 **QUESTION 2: Succession Law: What must remain the same?**

43 **ANSWER:** In my opinion, there are not many things within the field of “Succession Law” that “must” remain the same. The basic concepts of “life”, “death”, “family”, “social relationships” and “property” are the subject of constant change, but there are some “fundamentals” of “law” that are changed at our peril.

44 It is not so much that they are inherently “unchangeable” but that they reflect values that underpin a liberal democratic society and the rule of law as traditionally enjoyed in Australia.

45 In my opinion it is important to recognise that “Succession Law” (however defined) focuses upon the affairs of an individual living, and dying, in community, and that the starting point in analysis of “Succession Law” should be the perspective and welfare of “the individual”. To proceed otherwise would place at risk the freedom of every individual, not merely a single individual the subject of immediate concern.

46 However much qualified by considerations of “community”, testamentary freedom is a freedom to be valued.

47 Even in a case in which the interests of “community” are privileged (such as in the determination of a family provision claim, the statutory rules for the distribution of an intestate estate or engagement with “customary law” in the administration of an indigenous intestate estate), the central personality is an individual, not the community.

48 An individual’s testamentary intentions must be respected, even if displaced by a family provision order. The intestacy rules might occasionally be *chosen* in anticipation of death by a deliberate decision not to make a will, or they can be

avoided completely by an individual's choice to make a will. An Indigenous man or woman may choose to submit to a decision of the Court about the operation of "customary law", or might choose, in common with other Australians, to avoid or adapt "customary law" by making a will.

- 49 Another "fundamental" concept not commonly thought of as an element of "Succession Law" is the freedom of association allowed to individuals, living and dying in community, by the general law governing voluntary associations.
- 50 I had occasion to consider that in *Re Estate of Abou-Khalid* (2024) 114 NSWLR 166 in the context of an intersection between "Sharia law" and the general law of succession, drawing attention to parallels between "Sharia law", "Jewish law" and the "Ecclesiastical law" of Christian Churches.
- 51 I have since wondered whether the law of voluntary associations, which facilitates "freedom of religion", could provide a template to meet perceived needs of Indigenous "customary law", earlier the subject of consideration by me in *Re Estate Wilson, Deceased* (2017) 93 NSWLR 119.
- 52 As accepted in that judgment, the concept of an "Indigenous person" generally entails a requirement for *Indigenous descent, self-identification as Indigenous* and *acceptance* as an Indigenous person *by an Indigenous community*. There is a sense in which, to fall within the character of an "Indigenous person" one has to be, and want to be, a member of a voluntary association.
- 53 All people resident in Australia live in a community governed by Australian law, in a system of justice administered by courts such as the Supreme Court of New South Wales, with a recognised constitutional status as an independent judiciary.
- 54 A fundamental safeguard of the freedom and security of each individual depends, in my opinion, on preservation of the inherent jurisdiction of an Australian Supreme Court to administer justice in what (with the accumulation of legislation and the growth of executive government) has become what some

commentators describe as an “administrative state” and which, in the context of the law of succession, I prefer to call a “managed society”.

- 55 In my opinion, of particular importance in the context of the Australian legal system, is recognition and maintenance of a strong “equity tradition”. I have endeavoured to convey that thought in a number of papers published on the Supreme Court website (under the heading “Speeches”), most recently in a paper entitled “Equity’s Challenge: Maintaining Standards in Management of the Affairs of a Vulnerable Person” (STEP Australia Conference, 3-5 August 2025).
- 56 The legislation and institutional framework involved in the administration of the protective, probate and family provision jurisdictions of Australian Supreme Courts are necessarily adapted to local conditions in a federal system of government. A uniform law of succession may remain as an aspiration, but is an unlikely proposition in a federal system of government.
- 57 What all Australians enjoy, wherever they live, is a court system that has in common at a superior court level an equity jurisdiction that serves to maintain standards in deciding cases in the exercise of a “welfare jurisdiction”.
- 58 Each of the “welfare jurisdictions” involves management of the affairs of “an incapable person” of some type. Each of the jurisdictions is governed by the purpose for which it exists. It is fundamental to the operation of the law of succession (however defined) that the purpose of each head of jurisdiction be identified and be the guiding light upon any exercise of jurisdiction. Each jurisdiction needs to be purpose driven, not rule-bound.
- 59 **The protective jurisdiction** of the Court exists for the purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. The Court focuses, almost single-mindedly, upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or not done is or is not in the

interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 QdR 1 at [48].

60 **The probate jurisdiction** of the Court looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

61 The probate jurisdiction gives effect to a perspective which transitions from that of a person at the end of his or her life to that of members of his or her community (family) recognised as entitled to enjoy his or her inheritance. The interest of a beneficiary before completion of executorial duties in administration of a deceased estate is an entitlement to due administration of the estate, rather than an interest in particular assets of the estate: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 717C-F, upholding *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411 at 435, 451 and 459. Once the character of a legal personal representative passes from that of an executor to that of a trustee, his or her obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229 at [20].

62 **The family provision jurisdiction** of the Court, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (for relief out of a deceased estate or notional estate) in whose favour an order for provision "ought" to be made.

63 In the exercise of its statutory powers in the determination of an application for a family provision order the Court must generally endeavour to place itself in

the position of the deceased, and to consider what he or she *ought* to have done in all the circumstances of the case, in light of facts now known, treating the deceased as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221, *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 107 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally, consulting specific statutory criteria so far as they may be material: *Bassett v Bassett* [2021] NSWCA 320 at [170-[171].

- 64 **The equity jurisdiction** of the Court, generally, serves the purpose of maintaining standards of conduct (including protection of the vulnerable) by restraining conduct that is against good conscience and enforcing duties where non-performance of a duty would be unconscionable. The jurisdiction defies simple definition because it may be called in aid to fill a gap in the general law and because, as illustrated by adoption legislation (and, more recently, legislation such as the *Surrogacy Act* 2010 NSW and the *Voluntary Assisted Dying Act* 2022 NSW), equity judges often have assigned to them statutory jurisdiction in particular areas of the law involving management decisions, reflecting their historical connection with proceedings involving questions of administration.
- 65 Implicit in these observations is that, in my opinion, it is fundamental that an Australian Supreme Court be free to exercise its “purposive” welfare jurisdiction(s) unconstrained, if guided, by excessive encroachments of legislation or executive government policy.
- 66 The common law remedies historically associated with “prerogative writs” (now subsumed in a 19th-20th century concept of “administrative law”) and equitable principles combine to protect “individuals living and dying in community” in ways beyond any Benthamite reduction of law to a written code or all-encompassing legislation. The effect of reduction of law (through inflexible rules which may be changed at will by an authority bound to be obeyed) may be to disempower, rather than to empower, an individual vis-à-vis his or her community.

- 67 What is significant beyond these “fundamentals” is a strong tradition of legal literature, legal education and qualified and experienced professionals, each a touchstone of the rule of law in a liberal democracy. Cf, G.C. Lindsay, “Building a Nation: The Doctrine of Precedent in Australian Legal History”, Chapter 11 in Volume 1 of Gleeson, Watson and Higgins, *Historical Foundations of Australian Law* (Federation Press, Sydney, 2013).
- 68 **QUESTION THREE: Succession Law: What Can Change?**
- 69 **ANSWER:** In theory, it might be said, almost anything about “Succession Law” *can* change except those things which a society, implicitly or otherwise, accepts as “fundamental”.
- 70 Viewed analytically, the question “what *can* change?” might be viewed through the prism of a dichotomy between “substantive law” and “adjectival (procedural) law and practice”, a distinction that did not clearly emerge in English law until, in pursuit of a “scientific” approach to law in the 19th century, law and legal texts began to be conceptualised in terms of “principles” rather than remedies and forms of action.
- 71 The utility of a distinction between substantive and adjectival law is, however, limited by the fact that court proceedings involving an exercise of a welfare jurisdiction are often action-based (driven by available remedies and traditional common law “issue pleadings” rather than the “narrative fact pleadings” characteristic of an exercise of equity jurisdiction) and decisions which are essentially managerial in nature.
- 72 An historical example of a blurred distinction between law and procedure might be the legislative reforms of the 19th Century and early 20th Century that rendered (almost) obsolete an order for general administration of a trust (explained by Young J in *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623) introducing what we now recognise as a “partial administration order” (currently rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW) and “judicial advice” (currently, generally identified with the *Trustee Act* 1925 NSW,

section 63). Other, related reforms introduced the power to excuse breaches of trust currently found in the *Trustee Act* 1925, section 85; a provision which has in recent times provided an analogue for breaches of fiduciary duty in the context of an exercise of protective jurisdiction: *C v W (No 2)* [2016] NSWSC 945 at [45]-[47].

- 73 Many succession law practitioners may have their own “shopping list” of things they would like to see changed, if only (for example): (a) to minimise the irritation of confronting “Latin tags” for interim (or limited, no longer really “special”) administration orders in a society now not familiar with Latin; or (b) to eliminate distinctions between “real and personal property” in legislation yet to come to grips with the demise of feudal concepts.
- 74 Even if essentially cosmetic, changes of this character could have unintended consequences in encouraging “consequential” changes in practice or the way the probate jurisdiction is perceived. That may not be a bad thing, but the possibility of unintended consequences cannot prudently be overlooked.
- 75 However, there are some topical concerns about “change” in the law of succession that might be thought to be of greater significance than comparatively “cosmetic” proposals for change.
- 76 The most prominent of these may be whether (by a decision of the High Court of Australia or legislation) equitable principles governing undue influence on a challenge to the enforceability of an *inter vivos* transaction should be available to challenge the operation, if not validity, of a will in probate proceedings. Debate on this topic arises from an oblique *obiter* statement made by the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63] and, more recently, a judgment of the Court of Appeal in *Schwanke v Alexakis* [2024] NSWCA 118 in which the Court, in *obiter*, emphatically rejected the proposition (seemingly favoured by the High Court) that the validity, or operation, of a will can be challenged on equitable principles, including “undue influence”.

- 77 In refusing special leave to appeal from the Court of Appeal the High Court left open the possibility of a future appellate review of the question (recognising it as one of “public importance”) if a “suitable vehicle” emerges: *Schwanke v Alexakis* [2024] HCSL 246; *Camilleri v Alexakis* [2024] HCSL 247 (5 September 2024).
- 78 In two subsequent papers I have offered commentary on the controversy, both published on the Supreme Court website: “Current Issues and Routine Patterns in Estate Litigation, Across Jurisdictional Boundaries and in Social Context” (20 November 2024); and “Equity’s Challenge: Maintaining Standards in Management of the Affairs of a Vulnerable Person” (3-5 August 2025).
- 79 Another question of topical concern might be whether (by legislation or judicial decisions) a greater measure of regulation should be deployed in “estoppel claims” against a deceased estate.
- 80 In a paper on the Supreme Court website entitled “Evaluation of a Proprietary Estoppel Claim to a Family Farm: Text, Context and Purpose” (6 October 2023) at [92] *et seq* I extracted passages from a classic paper of LL Fuller and WR Perdue, “The Reliance Interest in Contract Damages” (1936) 46 Yale Law Journal 52 and 373 which provide a philosophical insight into why estoppel claims have a resonance, focusing on concepts of “reliance”, “restitution” and “expectation” in dealings with property.
- 81 Three relatively recent judgments of the Court of Appeal demonstrate the flexible interplay between principles of estoppel and the welfare jurisdictions of the Court.
- 82 *Slade v Brose* [2024] NSWCA 192 (following *Q v E Co* [2020] NSWCA 220) demonstrates that a proprietary estoppel claim arising from a family’s succession plans may be relied upon in anticipation of a death, not only post-mortem; it might have scope for application if a promisor descends into mental incapacity with a will that does not reflect promises earlier made (and doubt exists about prospects on a statutory will application).

- 83 *Soulos v Pagones* [2023] NSWCA 243 demonstrates that a proprietary estoppel claim may (by reference to testamentary expectations) be crafted in combination with a claim for family provision relief.
- 84 Yet another question of topical concern might be whether there is some means of reining in “elder abuse” associated with misuse of an enduring power of attorney that confers plenary powers on an attorney. This might be done, although not easily, by an express limit on the purposes for which an enduring power of attorney can be deployed. Or perhaps legislation could be enacted for a presumption of undue influence if an enduring attorney, an enduring guardian or a person associated with them receives a prescribed form of property (such as land) of a principal, whether or not an enduring instrument has been specifically deployed in effecting a transaction.
- 85 Perhaps a statement of objects (similar to an old style “long title” or “preamble”) might be inserted in the *Probate and Administration Act* 1898 NSW to keep parties involved in probate disputes from straying too far in adversarial contests. It might operate to change culture in much the same way as section 56 of the *Civil Procedure Act* 2005 NSW has purposively done.
- 86 **QUESTION 4: Succession Law: What should (and should not) change?**
- 87 **ANSWER:** The question of “What should, or should not, change in Succession Law?” invites a subjective response which, if taken up, could serve little constructive purpose. Better, then, to look for objective factors that might bear upon an evaluation of proposals for change in the community served by succession law and those entrusted with administration of it.
- 88 Experience teaches that, in every generation, there are different mindsets to be found, if not in the general community, then in the community of lawyers responsible for administration of the law.
- 89 Those mindsets often come in contrasting pairs. Some lawyers prefer inductive reasoning, others prefer deductive reasoning. Some lawyers focus on rules

and what can be done with the rules. Others focus on the purpose of the law and of rules. Some lawyers favour strict adherence to rules, with minimal scope for discretionary decisions. Others are more comfortable with the exercise of discretionary powers and favour those. Some lawyers are more comfortable with explaining law in terms of propositions. Others convey meaning through narrative. Some lawyers want as much law as possible to be reduced to writing. Others prefer case-by-case precedential processes of decision-making. Some lawyers value “judicial restraint”. Others embrace “judicial activism”. Put another way (as it once was), some lawyers imagine that judges do not “make” law but “find” it and that their judgments are simply “evidence” of what the law “is”. Others insist that judges routinely “make” law and should do so.

- 90 Tension between inductive and deductive reasoning is sometimes clothed in a contrast between Common Law and Civil Law national systems of law.
- 91 Tension is sometimes on display between those who prefer judge made law based on precedential reasoning and those who prefer law to be written down, in legislation if not a code. Exemplars of this are Sir William Blackstone (whose *Commentaries on the Laws of England* achieved fame throughout the Common Law world in the late 18th century and early 19th century) and Jeremy Bentham (an eminent philosopher and law reformer in England of the early 19th century whose influence continues to be felt today).
- 92 In Australian political history it is also on display in the different temperaments of the eminent lawyers Sir Robert Menzies and Dr HV Evatt. Conflict between those temperaments finds expression in disputes about whether the general law should be constrained by a declaration of “human rights” or “anti-discrimination” prohibitions.
- 93 If there continues to be merit in speaking of an Anglo-Australian legal tradition (following enactment of the *Australia Acts* of 1986), Australia’s adherence to a preference for inductive reasoning (resisting Benthamite tendencies) might be thought to set it apart from the direction taken in England under the gravitational

pull of an administrative state and the European Civil Law tradition of codified law.

- 94 This can be seen in a recent report of the English Law Commission which, amongst other proposals, recommends that the concept of “testamentary capacity” be defined by legislation and, moreover, assimilated with a general concept of “capacity for decision-making” embodied in legislation administered by the Court of Protection, abandoning the test in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565.
- 95 Although there may be some sympathy in Australia for a legislative definition of testamentary (in)capacity (but not following an English model: *Carr v Homersham* (2018) 97 NSWLR 328 at [131]), my personal view is that our law should retain the logic and nuances available via the *Banks v Goodfellow* test, tried and effective.
- 96 **QUESTION 5: HOW IS CHANGE (OR A NEED OF CHANGE) IN THE LAW OF SUCCESSION RECOGNISED AND MANAGED?**
- 97 **ANSWER: Institutional Context:** The managerial nature of the law of succession (defined by reference to the welfare jurisdictions of the Supreme Court), and the public interest element inherent in management of the affairs of an individual unable (by reason of incapacity or death) to manage his or her own affairs lend themselves to engagement of all branches of government (the legislature, the executive and the judiciary) and with affected interests, including the legal profession.
- 98 In this context, “law” assumes the character of a conversation about what is happening, what (if anything) needs to happen or should happen, and what is likely to happen. It is in this context that judicial restraint is generally valued. Judges are part of the conversation, but only part of the conversation, and not necessarily the major part.

- 99 It needs to be remembered also that, at least upon an exercise of the Court's protective and probate jurisdictions, a judge depends upon executive government (with or without a legislative framework) to assist in his or her decision-making processes and to enforce his or her orders.
- 100 Upon an exercise of protective jurisdiction (in relation to the functional incapacity of an individual), the Court depends heavily upon the assistance it receives from the NSW Trustee and the Public Guardian.
- 101 In relation to an exercise of *parens patriae* jurisdiction, the Court is largely dependent upon the assistance it receives from the Secretary for Families and Communities and Disability Inclusion. In relation to its adoption jurisdiction (distinct from its *parens patriae* jurisdiction but generally concerned with minors), the Court is largely dependent upon the services of the State Crown Solicitor.
- 102 Upon an exercise of probate jurisdiction, the Court is heavily indebted to the work of its registrars and, to a lesser extent, the NSW Trustee.
- 103 Each of the protective, probate and family provision jurisdictions enjoys an element of procedural informality that reflects their managerial nature and the fact that much routine work is performed in chambers. Most idiosyncratically, but with a long history, a Protective List judge can, and often does, act upon a "report to court" made by the NSW Trustee without the institution of proceedings. In each jurisdiction, again with a long history, a judge can refer matters to a registrar for decision, a registrar can refer matters to a judge and, upon a review by a judge of a registrar's decision, a judge can call for a report from a registrar explaining his or her decision.
- 104 Every so often the office of the State Crown Solicitor invites the Chief Justice to bring to attention any need perceived by the judges of the Court for a review of particular statutes.

- 105 Not uncommonly the views of the legal profession (generally expressed by the Law Society of New South Wales and the NSW Bar Association) are communicated to the Court or sought by the Court about the efficacy of current Court practices.
- 106 Engagement with public institutions such as the Law Society and the Bar Association at conferences (of which the Blue Mountains Law Society's Annual Succession Conference is an exemplar) often provides opportunities for education of judges, no less than other participants, about current issues and how to address them.
- 107 In my own experience, two "practice papers" have been helpful in establishing routine procedures. In the realm of the Court's protective jurisdiction, a paper entitled "The Incapacitated Plaintiff and Personal Injury Compensation Proceedings" (11 March 2017) has facilitated the conduct of business.
- 108 It has stood the test of time, although it now needs to be updated by inclusion of a reference to *Re Protected Estates Financial Advice Protocol* [2025] NSWSC 311, noted below.
- 109 Upon an exercise of probate jurisdiction, the "precedents" incorporated in a paper entitled "Probate Law and Practice: An Introduction" (3 March 2022) provide guidance to me, if not others, when I am called upon, particularly, to make orders for preliminary disclosure of estate information, orders for a special grant of administration or orders for a statutory will.
- 110 Most of those precedents were taken from "Probate Guidelines" published on the Supreme Court website, and some of them have been incorporated in Practice Note SC Eq 7.
- 111 Thus proceeds, almost continuously, a conversation about the operation of succession law and how things might be better done.

- 112 **Case Management.** The Court’s management of business upon an exercise of welfare jurisdiction is constantly subject to review. That is reflected in the publication by the Chief Justice of Practice Notes, and by individual judges publishing protocols, guidelines and standard forms of order or the like.
- 113 In the business conducted in the Protective List two “industry wide” protocols, prepared in consultation with the NSW Trustee and the legal profession, have been published under section 64 of the *NSW Trustee and Guardian Act 2009* NSW.
- 114 Following publication of reasons for judgment in *Ability One Financial Management Pty Limited and Another v JB by his tutor AB* [2014] NSWSC 245, a protocol was published as *Re Managed Estates Remuneration Orders* [2014] NSWSC 383, regulating applications for the appointment to a protected estate of a private manager for reward not being a licensed trustee company.
- 115 Following publication of *Re KT and JC, Protected Persons* [2025] NSWSC 306, a protocol regulating engagement of an external financial advisor by a financial manager was published as *Re Protected Estates Financial Advice Protocol* [2025] NSWSC 311.
- 116 In each of those cases, a problem was identified, potential solutions were canvassed and a change of practice was proposed and implemented in an orderly way.
- 117 The Court is presently exploring ways to address problems associated with excessive costs incurred in probate and family provision proceedings (in particular).
- 118 In *Alexiou v Alexiou* [2024] NSWSC 1340 I explored a possible regime for limiting lawyer-client costs as well as party-party costs and costs payable out of a deceased estate. In the event, nothing came of the procedure proposed because of intervening events. An appeal to the Court of Appeal was dismissed

(*Alexiou v Alexiou* [2025] NSWCA 164) but my observations about a scheme of orders for containing costs did not arise for consideration.

119 In more recent times, Slattery J as Probate List Judge has instituted a regime for “capping costs” in probate proceedings where the net value of an estate the subject of the proceedings is less than \$1.5 million. I have endeavoured to build on his Honour’s model by incorporating in the orders made in all probate proceedings a “protocol relating to costs and cost capping in probate proceedings” dated 21 July 2025.

120 That document is open for discussion.

121 Distinctive features of the protocol are that:

- (a) parties and practitioners are put on notice, from the outset of proceedings, that the Court reserves for consideration whether any (and, if so, what) limitations should be imposed upon the recovery of costs;
- (b) each party to proceedings in the Probate List is placed under a continuing obligation, from the commencement of the proceedings, to inform the Court in writing if the net value of an estate the subject of the proceedings is less than \$1.5 million;
- (c) parties are afforded an opportunity to participate formally in a process for quantifying a costs cap; and
- (d) the circumstances in which an application for revocation or variation of a cost capping order are addressed.

122 Upon an assumption that that protocol provides a way forward for containment of excessive costs, what is needed, I suspect, is a proposal from the profession for guidelines (falling short of costs scales) for assessing a fair and reasonable costs cap in routine probate proceedings.

- 123 In management of a List (such as the protective, probate and family provision lists) not all changes, or responses to change, take the form of a protocol.
- 124 A case in point which continues to have echoes in the management of probate proceedings is *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 in which I proposed case management orders for the control of the use of subpoenas for the production of documents, and notices to produce to court, in contested probate proceedings.
- 125 Echoes from that judgment can be found in routine orders for the filing in probate proceedings of verified “Disclosure Statements” and “Discovery Affidavits” designed to facilitate open disclosure of the existence of testamentary instruments, the circumstances in which such instruments were prepared and executed, the size and nature of a deceased estate, details of any enduring powers of attorney (and enduring guardianship appointments) that might have been executed by the deceased, the existence of proceedings that may have been conducted in the Guardianship Division of NCAT, and the existence of any potential or actual family provision proceedings.
- 126 The availability of orders for a verified disclosure statement and discovery affidavits might not only aid an early determination of real questions in dispute but have a bearing on what, if any, interlocutory procedures for the disclosure of information might be allowed on an application that a probate caveat cease to be in force.
- 127 Another area in which case management principles might be applied beneficially is in the deployment of “special” (“limited” or “interim”) grants of administration in aid of “next of kin” research by the NSW Trustee’s specialist genealogical team; filling a gap in time between an order for a will to be admitted to probate and the issue of a grant; and (unless it be regarded as an impermissible delegation of power by the Court) by inclusion in a grant of a “senior counsel/practitioner clause” that might be invoked in lieu of an application for judicial advice.

LEGAL HISTORY CONTEXT

- 128 Like the principles and remedies of equity, the law of succession (however defined) is best understood with the benefit of a study of Anglo-Australian legal history, with an emphasis on both doctrine and practice.
- 129 That perspective opens the mind to an appreciation that, fundamentals aside, the law of succession is subject to constant change, often hidden in plain sight.
- 130 The real challenge is to acknowledge “fundamentals” (as few as they may be) and, in a manner consistent with them, to recognise and manage change in the service of the society served by law, balancing the rights, obligations and expectations of individuals living and dying in community.
- 131 Lying at the heart of Anglo-Australian “Succession Law” is probate law and practice, a derivative of the old Ecclesiastical Courts of England, which, over centuries, shared jurisdiction with the Courts of Common Law and Chancery.
- 132 Recognising that, and relying heavily on the work of FW Maitland in Pollock and Maitland, *The History of English Law before the time of Edward I* (Cambridge, 1st Ed 1895, 2nd Ed 1898) in 1899 WS Holdsworth and CW Vickers, in *The Law of Succession: Testamentary and Intestate* (Oxford), recorded that “[at] the present day it is clear that we mean by the law of succession the law which regulates the transmission upon death of the property of one individual to one or more individuals”, but “we cannot lay down any clear rules as to what a law of succession meant [in the Anglo-Saxon and early Norman period], partly for the lack of evidence, but chiefly because there were no clear ideas upon the subject”.
- 133 The insights of Holdsworth, Vickers (and Maitland) extended to the following more particular observations, still relevant to the way the law of succession operates and develops, even long distant from feudal times (with emphasis added):

“Family ownership in one sense there may have been; but in a sense that is not inconsistent with individual ownership. A man does not cease to own the land because he is a tenant in common, or a parcner; and so we find in Anglo-Saxon times that several persons hold land in ‘parage’. They are probably relatives who have not yet divided land which has descended to them. The dead man’s property goes naturally to a man’s nearest of kin. *There is no need of a law of succession till disputes arise*. But what if owing, eg to priestly exhortation, men try to dispose otherwise of their property in their lifetime or after their death? *Rules must be made where none before were needed; and those rules will take the shape of what once happened before men were tempted to break through the old accustomed order*. Thus we get what are called ‘birthrights’. The fact that a man’s child gets at birth a right to hinder the disposition of that, which in course of time, will naturally be his, is now put forth as a definite rule. We have traces of this in *Glanvil*; if a man’s land is divisible among his sons he cannot deprive any one of them of his reasonable share. Such rights imply, not family ownership, but the need to state and enforce rules once tacitly obeyed. *The period of unconscious practice is over. Opposing interests demand a law of succession*.

In modern times we divide the law of succession into the law of intestate and the law of testamentary succession. A will in ancient times is, as Maine [in Ancient Law] has shown, the exact opposite of what it becomes in later law. It is a species of conveyance; and wills of land, when sanctioned by Statute in 1540 was still regarded as present conveyances. But it was attempts to make conveyances which brought birthrights prominently into notice - which led to the existence of a law of succession. A will is one of the means by which the rights of children can be defeated; a conveyance inter vivos is another; and we find them for this reason, classed in the same category by Bracton. And ... we get many documents at this period which seemed to partake equally of the nature of conveyancers inter vivos and wills. If then a law of succession has become necessary because birthrights must be enforced, if a will is one of those instruments which tend to defeat them, our division of the subject must be:

(i) the law of intestate succession;

(ii) the law defining how much a testator may leave in spite of that law of intestate succession. ...

[As to the law of intestate succession] we know little as to actual rules at this early period. Every district had its different customs. *Glanvil* speaks of ‘they’re confused multitude’, and even when *Bracton* wrote there were in England ‘many and diverse customs in diverse places’. Moreover, it is probable that just as the customs which applied to different districts varied, so also the rules which applied to different parts of a man’s property varied. ...”

- 134 The concept of “ecclesiastical law” (a term used to describe the probate jurisdiction of the Supreme Court of New South Wales until enactment of the *Probate Act* 1890 NSW) is unfamiliar to modern Australians. A convenient

summary can be found in WS Holdsworth, *Sources and Literature of English Law* (Oxford 1925) at 228-230, with emphasis added:

"In the twelfth century the ecclesiastical courts claimed to exercise a wide jurisdiction. (i) They claimed criminal jurisdiction in all cases in which a clerk was the accused, a jurisdiction over offences against religion, and a wide corrective jurisdiction over clergy and laity alike 'pro salute animae'. A branch of the latter jurisdiction was the claim to enforce all promises made with oath or pledge of faith. (ii) *They claimed jurisdiction over matrimonial and testamentary causes. Under the former head came all questions of marriage, divorce, and legitimacy; under the latter came grants of probate and administration, and the supervision of the executor and administrator.* (iii) They claimed exclusive cognizance of all matters which were in their nature ecclesiastical, such as ordination, consecration, celebration of divine service, the status of ecclesiastical persons, ecclesiastical property such as advowsons, land held in frankalmoin, and spiritual dues. *These claims were at no time admitted by the state in their entirety; and, in course of time, most of these branches of jurisdiction have been appropriated by the state.* All that is left at the present day is a certain criminal or corrective jurisdiction over the clergy, and a certain jurisdiction in respect of some of the matters comprised under the third head. *But, while the ecclesiastical courts were active, they made a good deal of law upon which much was written; and some of the law which they have made still influences the law administered by the courts which have succeeded to them. ...*

In the Middle Ages England recognized the supremacy of the Pope, and the binding force of the canon law. It is, therefore, not surprising to find that there are no great English writers upon the ecclesiastical law. The larger litigation went to Rome, and foreign canonists were usually employed. If Englishmen were employed, they were obliged to spend a large part of their time at Rome; and foreign books were the best authorities upon a foreign system of law.

...

In the sixteenth century no great books were written on ecclesiastical law. Political events are a sufficient explanation of this fact. The study of the canon law was in every way discouraged. *The project of making a codification of English ecclesiastical law had failed. The law which the ecclesiastical courts were expected to administer was so much of the medieval canon law as was applicable to the new situation; and, in their efforts to administer it, they were hampered at almost every turn by the writs of prohibition issued by the common law courts.*

...

But it is not till the latter half of the seventeenth century that the first really able books began to appear. At that period the controversies as to jurisdiction between the common law courts and the ecclesiastical courts were settled; and the works of men like Selden had made it more possible to form reasonably correct opinions on many topics of ecclesiastical law. Besides books on the practice of the courts, written by Clarke (1684), H. Conset (1685), and Oughton (1738), there was a demand for books on the substantive law. Lyndwood's Provinciale was reprinted in 1679; and Godolphin's Repertorium Ganonicum

summarizes, in a manner which anticipates the eighteenth-century treatises of Gibson and Burn, the principles of the ecclesiastical law. Burn's Treatise was edited by Sir Robert Phillimore in 1842, who in 1873 published what is now the standard work on this subject.

These are the principal books upon ecclesiastical law as a whole. *A very separate branch of that law, which produced a separate literature, was the testamentary jurisdiction of these courts. In the sixteenth century the best book on this subject was the book on Testaments, written by Henry Swinburn the judge of the consistory court of York, which was first published in 1590. It is a very useful summary of the law as to wills and executors as administered in the ecclesiastical courts. In the latter half of the seventeenth century Godolphin wrote his 'Orphan's Legacy' or a 'Testamentary Abridgement'. It deals in three parts with the law of (1) Wills, (2) Executors and Administrators, and (3) Legacies and Devises, from the point of view, not only of the ecclesiastical law, but also of the common law, and of the rising jurisdiction of the Chancellor. To this topic on the border line between the ecclesiastical and the common law - the common lawyers also contributed something. Either Dodderidge or Thomas Wentworth wrote a treatise on wills and executors for students, almost entirely from the point of view of the common law, which was several times reprinted and brought up to date. But, though some part of the jurisdiction over executors and administrators had always been shared with the common law courts, the greater part of it had, by the end of the seventeenth century, been captured by the Court of Chancery. Hence, except for the law of Probate and grants of Administration, the later literature of this subject is to be found in the literature of equity.*

It is in these three great fields of jurisdiction that the civilians made their chief contribution to the sources and literature of English law."

- 135 I had occasion to refer to Swinburn, Godolphin and Burn in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 (on solemn form grants of probate and revocation of grants) and to Godolphin and Burn in *Re Estate Capelin* (2022) 107 NSWLR 461 (on probate caveats).
- 136 It is a notable fact that even modern English probate texts often reflect texts of earlier generations. This I take to be evidence of the timeless character of essential probate practice, if not probate law. Continuity accompanies change.
- 137 An explicit illustration of the continuing influence of the old ecclesiastical jurisdiction in modern Australian probate law is found in *Osborne v Smith* (1960) 105 CLR 153 at 158-159.
- 138 The headnote to *Osborne v Smith* summarises the law and demonstrates how it came to the Supreme Court of New South Wales:

“It is a well-established principle of probate practice, which grew up in the ecclesiastical courts, that a person having an interest in the subject-matter of a suit may by intervening have himself made a party. If, knowing what is passing, he does not seek to intervene, he is bound by the result and is not to be allowed to re-open the matter. This principle applies in the Supreme Court of New South Wales in its probate jurisdiction, because by virtue of clause XIV of the *Charter of Justice* and section 33 of the *Wills, Probate and Administration Act*, 1898 (NSW) that Court has ecclesiastical jurisdiction, and with it the rule as to intervention.”

139 Pivotal changes in English probate law were effected by statute, particularly the *Statute of Wills* 1540, the *Statute of Frauds* 1677 and the *Wills Act* 1837, the latter of which is presently under review by law reformers in England.

140 The importance of the English Wills Act of 1837 (which NSW adopted in 1840 and for which chapter 2 of the Succession Act 2006 NSW now provides) to the emergence of the modern concept of a “formal will” is underscored by Plucknett (*A Concise History of the Common Law*, 1956, page 740) in the following terms, with footnotes omitted:

“The Statute of Wills, 1540, merely required that a will of land should be ‘in writing’; the Statute of Frauds, 1677, required as an essential form that a devise of lands be in writing, signed, and witnessed ‘by three or four credible witnesses’; but the requirement of signing and witnessing of wills generally dates from 1837 [upon enactment of the Wills Act of that year]. The word ‘credible’ caused much trouble. By taking as a model the common law rules about witnesses, it was at once apparent that a person interested in the subject-matter could not be a witness; from this it followed that if a witness to a will devising land was a beneficiary under it, then he was not a ‘credible’ witness, since he could not give his evidence in court, with the result that (unless there was a sufficient number of other witnesses who were qualified) the will was void under the Statute of Frauds. This disastrous conclusion was remedied in 1752 when it was enacted that a legatee could be a witness, but the legacy to him should be void”.

141 The law relating to a beneficiary-witness has since been liberalised in NSW. Section 10(3) of the Succession Act 2006 NSW provides, inter alia, that a beneficial disposition to an attesting witness is not void if the court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

142 A feature of the *Wills Act* 1837 (Eng) which has since been thoroughly assimilated in modern thought is the stipulation (reproduced in section 30 of the

Succession Act 2006 NSW) that a will takes effect, with respect to all property disposed of by the will, as if executed immediately before the death of the testator. The object of the *Wills Act 1837*, section 24, in adopting this rule was to abolish old law that a testator could only devise land which he or she owned at the date of making the will, and to equate realty with personality, which was capable of being disposed of by will even if acquired by the testator after execution of the will: *McBride v Hudson* (1962) 107 CLR 604 at 614-615. An inconvenience of the old rule was that, if a will was to express the true intentions of the testator, it would have to be updated each time the testator acquired an interest in real property.

- 143 Historically, legislation lies at the heart of the law governing administration of intestate estates, no less than the law of wills. The statutory rules governing distribution of an intestate estate in New South Wales (embodied in Chapter 4 of the *Succession Act 2006 NSW*) go back to the *Statute of Distribution(s)* 1670.
- 144 Sir John Baker's explanation for enactment of the Statute of Distribution(s) 1670, 22 & 23 Charles II chapter 10, is as follows, extracted (with footnotes omitted, but editorial adaptation) from *An Introduction To English Legal History* (Butterworths LexisNexis, London, 4th ed, 2002) at pages 386-387 (with emphasis added):

"SUCCESSION ON DEATH

*Before the Norman conquest, English customs of succession seem to have been designed to provide for the whole family of the deceased by dividing his estate into aliquot parts or shares, usually halves or thirds. Under the influence of Christianity, the deceased was also given a 'part' to dispose of by testament (or through his representatives) for the good of his soul; the other two parts went to the widow and children. This system survived Norman feudalism in the case of moveable property, and survives in Scotland to the present day. Under the early common law there was a writ, similar to debt, called *de rationabili parte honorum*, whereby the widow and children could claim their reasonable parts. In the thirteenth century, however, the spiritual jurisdiction won control of testate and intestate succession to moveable estates. Thereafter questions about testaments and parts fell to the Church courts.*

The Church encouraged people to make wills, even to the extent of disposing of all their movables, no doubt because testators were likely to be more impartial than administrators. As a result of this policy, the fixed parts of the widow and children could be claimed only if the deceased died wholly or partly

intestate, or if a local custom preserved the older principle restricting testation to the deceased's part. *Before 1600, the province of Canterbury (excepting Wales and London) came to permit complete freedom of testation, whereas the province of York adhered to the old system of parts until 1692. Freedom of testation was not universal in England until 1724, when it was extended to the city of London. Probate of wills, and litigation related thereto, belonged to the Church courts until 1857.*

The administration of intestates' estates also belonged to the ecclesiastical authorities and in 1357 it was enacted that bishops were to commit their responsibilities in this connection to administrators, who were made capable of suing and being sued in the same way as executors. In the course of time, partly through inefficiency and partly through interference from the lay courts, the Church courts lost effective control over administrators, who usually divided the property among themselves once they had paid off any debts. After a particularly scandalous case of 1666 [Hughes v Hughes (1666) Carter's Rep 125; 124 ER 867] brought the matter to the king's personal notice, a statute was passed in 1670 to end this anarchic situation by laying down a definite scheme of distribution which administrators were obliged to observe. The thirds rule was incorporated into this scheme, but the dead man's part was abolished. The rules for distribution have since been adjusted many times by statute [currently, in NSW, Chapter 4 of the Succession Act 2006 NSW], though the rules are of necessity arbitrary... The extension of free testation had led to the harsh result that widows and children could be completely cut off by their husband or father making a will in favour of someone else. It was over two centuries before the remedy was found [in 20th century family provision legislation]".

- 145 Well into the 20th century reference was commonly made to "the Statutes of Distributions" in discourse about intestate estates in NSW. That is the title to a treatment of intestate estates found in the popular text of HV Edwards, *The New South Wales Lawyer: A Handbook of the every-day laws of this State* (William Brooks & Co, Sydney, 2nd ed, 1904) at pages 167-168. The standard probate text of Hastings and Weir, *Probate Law and Practice* (Law Book Co, 2nd ed, 1948) – published before the intestacy rules operating in NSW were restated in the *Administration of Estates Act 1954 NSW*, Division 2A of Part 2 of the *Wills, Probate and Administration Act 1898* (enacted in 1977), and chapter 4 of the *Succession Act 2006 NSW* (enacted in 2008)– reproduced as material to everyday practice in NSW the Statute of Distribution(s) 1670: p 345 *et seq* and p740 *et seq*. An historical treatment of that Act can be found in *Hastings and Weir*, and in IJ Hardingham, *The Law of Intestate Succession in Australia and New Zealand* (Law Book Co, Sydney, 1978), chapter 2.

CONCERNING LEGAL METHOD

The Influence, and Legacy, of Sir Owen Dixon

- 146 There was a time when law students and practising lawyers, young and old, were referred to a paper of Sir Owen Dixon entitled “Concerning Judicial Method” (delivered at Yale in September 1955), published as a chapter in *Jesting Pilate* (Lawbook Co, Australia, 1965) and as a journal article in the *Australian Law Journal*: (1956) 29 ALJ 468.
- 147 I suspect that it may have fallen out of favour, at least to some extent, as new generations of lawyers have emerged and offered fresh insights of Australian law and society.
- 148 Dixon’s paper is noted here for four reasons. First, it provides an orthodox statement of what is required of a judge for the orderly development of law. Secondly, it provides an insight into the development of principles of estoppel which continue to be of significance in the administration of a deceased estate. Thirdly, it implicitly recognises a fundamental difference between the inductive reasoning processes traditionally associated with a Common Law system of law (of which the equity jurisdiction of Australian Supreme Courts is an exemplar) and the deductive reasoning favoured by those who stand in the tradition of Jeremy Bentham and a civil law system of law. Fourthly, it illustrates a strong appreciation of a need for an external standard as a foundation for both philosophy and law.

An Orthodox View: Judicial Restraint v Judicial Activism: (A False Dichotomy)?

- 149 Still the gold standard of what is required of a judge is the following statement by Dixon in his paper “Concerning Judicial Method” (in *Jesting Pilate* at page 154 and (1956) 29 ALJ 468 at 472):

“It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with the result held to

flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change. ... The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong. Indeed, there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decisions as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at naught every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday."

150 These observations were made by Dixon in support of a judicial method that privileges gradual and evolutionary change in judge-made law, albeit adapting to "teachings concerning the social ends to which legal development is or ought to be directed" without "deliberate innovation bent on express changes of acknowledged doctrine".

151 At the conclusion of "Concerning Judicial Method" (*Jesting Pilate*, page 165; 29 ALJ 476), after an "extended and technical discussion" of how principles of estoppel might operate to modify the operation of contract law Dixon wrote the following:

"The purpose of this extended and technical discussion is to show by example that it is an error, if it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire".

- 152 Although not apparent on the face of “Concerning Judicial Method” Dixon perceived himself to be writing against the “judicial activism” then associated with Lord Denning. Dixon’s biographer, Philip Ayres (*Owen Dixon*, Miegunyah Press, Melbourne University Publishing, 2003, page 253) records the following:

“[Dixon replied to a letter from Felix Frankfurter, a prominent US judge], ‘To a certain extent ... I was aiming at Denning LJ. However, rather, to my consternation, I received a letter from him saying he completely agreed with everything I wrote in it’. Denning was the judicial innovator *par excellence*. In Lord Simonds’ view ‘He is personally attractive and has great learning, but I do regard him as a judicial menace.’ That was Dixon’s view: ‘he baffles me. He seems always to be setting principle at defiance. I do not think wild horses would get a majority of the High Court to follow some of his decisions’.”

- 153 Dixon did not live to see judgments of the High Court of Australia under the leadership of Chief Justice Sir Anthony Mason or Michael Kirby’s approach to development of the law in times of change.

- 154 In his book of published papers, *Through the World’s Eye* (Federation Press, Sydney, 2000), in Chapter 9 (entitled “Judicial Activism”) Kirby offered his own view of judicial method (at pages 96-97, omitting footnotes):

“The judiciary is the last empire of governmental individualism. Every judge is aware of the importance of certainty and predictability in the law, at least in those areas where the people’s liberty or their major investments of capital and wealth are involved. Judges vary in their inclination to develop or change the law. Some are by nature conservative; some activist; and some selectively evidence both tendencies at different times. There are judges who have a large confidence in their own abilities to foresee the direction in which the ‘river’ of the law is flowing. If such confidence is combined with assurance that they can perceive the ‘permanent values of [their] community’ and if they have great technical skills, much valuable reformist work may be done which is presented as a justifiable adaptation of underlying legal principles.

Every judge, especially in the higher courts, nudges the law forward a little. Even judges whose inclinations are generally rule-based and whose personal predilections are conservative will occasionally strike a topic upon which the sense of justice in the particular facts moves them to do what judges of our tradition have been doing for 800 years. Nor is it appropriate to limit judicial creativity to the highest court. Necessarily, that court can accept only a small proportion of the important issues of legal principle and policy that confront the nation at any time. In Australia, the High Court has emphasised the need for the intermediate appellate courts to play their role in the development of legal doctrine. Inevitably, this extends the opportunities for judicial creativity. Even dissenting judgments can play an

important part in fostering new ideas and promoting the eventual emergence of new principles.

Methodology

In terms of day-to-day judging, the methodology of the common law judge also tends to impose a measure of restraint. The adversary trial limits most proceedings to a contest between particular parties who rarely, if ever, have an esoteric interest in legal developments. They just want to win the case. The stimulus to new legal authority must often come from the judge's own reading and perceptions stimulated by a sense of grave injustice. The adversary trial tends to limit the material available to the judge, particularly on the social and economic consequences of alternative solutions to the problem in hand. In an often unformulated way, the judge will be conscious of the need to avoid large changes which would have wide economic and social ramifications. This is simply because these may not be wholly predictable. Appeals to judicial commonsense are increasingly seen today to be suspect, given the comparatively narrow band of persons from whom the judiciary is typically drawn.

No established protocol exists for the introduction of important new legal principles by judges. Because appellate courts are ordinarily limited to the evidence adduced at a trial, some of them resist the admission of economic and social data that would help them to make correct policy choices, if that is their wish in a particular case. Reading law books on the resolution of past cases will but rarely be a suitable preparation for a large leap of judicial creativity. If the role of judges in developing legal principle is to be recognised overtly and not secretly in whispers, it behoves courts to adopt a new protocol or methodology for the judicial function. This would identify the leeways for choice, invite the provision of appropriate information and materials on the social and economic consequences of the competing choices, and expand the opportunities for selected interest groups to be heard to assist the court to come to the preferable conclusion.

Yet all of this must be achieved within the framework of judge-like activity in a court disposing of real cases for real parties in a true dispute. Otherwise, courts will run the risk of expanding their procedures to take on the appearance of a legislative committee and enlarging their function beyond the disposal of the case before them by reference to legal norms. True, the norms may need to be expanded and adapted. But the judge is not a completely free agent. A measure of creativity is allowed. But it is a limited one. Its parameters are ultimately fixed by the very nature of the judicial function."

- 155 Temperament may play a part in different formulations of the optimal approach to "judicial method", particularly if one bears in mind that Dixon himself regretted that his statement that "[there] is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism" (*Jesting Pilate*, page 249) was taken out of context.

- 156 A close reading of “Concerning Judicial Method”, and Dixon’s other work, reveals a mind more engaged with the development of law in social context than the expression “strict legalism” suggests.
- 157 Of course, Dixon spoke 30 years before the passing of the *Australia Acts* of 1986 (Cth and Imp) which required the High Court of Australia, once confirmed as the nation’s ultimate court of appeal, to re-orient Australian law to Australian conditions without the constraints of appeals to the Privy Council.

Principles of Estoppel

- 158 The “extended and technical discussion” as Dixon described his discussion of the interplay between contract law and principles of estoppel included this gem (based on *Grundt v Great Boulder Pty Goldmines Ltd* (1937) 59 CLR 641 at 675-677 and *Newbon v City Mutual Life Association* (1935) 52 CLR 723), which remains insightful in the current era when the metes and bounds of estoppel remain fluid:

“It is by no means fanciful to regard the fundamental principle of an estoppel which comes from dealings between the parties to be simply that one of them is disentitled to depart from an assumption in the assertion of rights against the other when it would be unjust and inadmissible for him to do so. It is a necessary condition that the second should have acted, or abstained from acting, upon the footing of the state of affairs assumed, in such a way that he would suffer a detriment if the first party were afterwards allowed to set up rights against him inconsistent with the assumption. It is further necessary that it should be unjust and inadmissible for the first party to depart from the assumption for the purpose of asserting rights. The grounds upon which it would be considered unjust and inadmissible are well recognised, but they form more than one category. It may be because the first party made representations upon which the second founded the assumption; it may be because, where care was required of him, the imprudence of the first party formed a proximate cause of the second party’s adopting and acting upon the faith of the assumption ; or because, knowing of some mistake under which the second laboured, he refrained from correcting him when it was his duty to do so ; it may be because the first exercised against the second party rights which would exist only if the assumption was correct; it may be because the assumption formed the conventional basis upon which the parties conducted contractual or other mutual relations”.

Contra Bentham

- 159 Dixon's antipathy to Jeremy Bentham's jurisprudence appears in the following passage (*Jesting Pilate* at pages 1547-158; 29 ALJ 471):

"The rise in the early nineteenth century of Benthamite principles spread the opinion that the function of evolving the law ought not to be conceded to the judiciary. If the judiciary, whether consciously or unconsciously, developed legal principles or even if the judges extended the application of law inductively without taking the next step of producing new principles deductively from the extensions, this was judicial usurpation. It was for the legislature alone to bring about any legal change. The inherited system must be given a rigidity and statute must become the only source of law. The natural reaction from such false doctrine has perhaps carried the attack upon orthodox conceptions of judicial method so far in the contrary direction that it has overshot the truth. In reality Benthamite views did not retard the development of the law under judicial hands. It is enough to look at the English law reports from the end of the Napoleonic Wars until the later years of the nineteenth century. The future will probably regard that as the classical period of English law. It was a period of legal rationalisation. The search for principle was a marked characteristic of many judges. Principles were not only used, they were developed. There was a steady, if intuitive, attempt to develop the law as a science. But this was done not by an abandonment of the high technique and strict logic of the common law. It was done by an apt and felicitous use of that very technique and, under the name of reasoning, of that strict logic which it seems fashionable now to expel from the system. The courts did not arrogate to themselves a freedom of choice. It is no doubt unsafe to generalise about judicial process. For after all it is a generalisation about the work of individual men. In no field of special knowledge does one man pursue its technique or exercise its art precisely in the same way as another. Certainly the differences are marked between judicial minds at work. There is no place where the inequalities and variations of men can be seen more clearly than when the men are upon a bench. Not only is the working of the judicial mind more exposed to view, it is more exposed also to expert analysis and criticism. But it is a safe generalisation that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly no doubt, but still as having acquired."

- 160 Dixon's description of 19th century English jurisprudence ties in with an insightful essay by the renowned legal historian AWB Simpson entitled "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 *University of Chicago Law Review* 632-679, reproduced as Chapter 12 in Simpson's *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, London, 1987).

- 161 The “scientific age” of law and law reform in 19th century England went hand-in-hand with a change in the nature of legal literature, from digests of cases to specialist texts. That can be seen, in the context of the law of succession, in Edward Vaughan Williams’ *A Treatise on the Law of Executors and Administrators* (US editions 1832 and 1841) and subsequent texts.
- 162 When I first became a probate judge, the then Senior Deputy Registrar in Probate (Paul Studdert) advised me that the seminal practice book on probate was H Clifford Mortimer, *The Law And Practice of the Probate Division of the High Court of Justice* (Sweet and Maxwell, London, 1911). I have taken Paul’s advice to the extent of keeping a copy of the book close at hand.
- 163 In his Preface, Mortimer wrote the following:

“My aim has been, within the limits of its subject, to make each section of this book complete in itself and as exhaustive as possible. With that end in view, whenever I have been in doubt under which of two or more headings to deal with an important point of law or practice, I have dealt with it under both or all.

In every case, I have consulted the original authorities, in the form both of decided cases and of the old text books on Ecclesiastical Law, and have stated the propositions of law as far as possible in the words of the judges. All modern works on the subject have also been consulted, and I wish especially to acknowledge my indebtedness to Sir Edward Vaughan Williams’ work on Executors, and to Tristram, and Coote’s Probate Practice.”

Need for an External Standard in both Philosophy and Law

- 164 For those who take an interest in current debates about “overreach” on the part of those who call themselves “progressives” and those who call themselves “conservatives”, Dixon’s philosophical observations in “Concerning Judicial Method” (in 1955) resonate with current debates (*Jesting Pilate* pages 153-154; 29 ALJ 469-470):

“During the forty-five years of my working life in the law I have been conscious of a revolution in the conception of law that is taught. In Maitland’s introduction to the first volume of the Selden Society’s Year Book Series there is a passage in which he finds in certain qualities of the common law its capacity to resist in the sixteenth century a. Reception of the civil law in England. It was, he says, “not vulgar common sense and the

reflection of the laymen's unanalysed instincts: rather ... strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books rooted in the centuries."

The historical accuracy of Maitland's thesis can hardly be doubted. Not only can the effect of its technique be seen in the survival of the common law where elsewhere in Europe the civilians were victorious. In the ensuing centuries men trained in the common law and dominated by its conceptions carried its influence into the special jurisdictions including those of the Council, when they were at their strongest; into Chancery itself, and indeed into widely different systems prevailing in other countries. Witness the jurisprudence of India and that of Pakistan today. But now the signs are many that the strict logic and the high technique of the common law have fallen into disfavour. Perhaps too much of the technique has been swept away by the reforms in procedure. Perhaps the minds it held in thrall were forensic and professional and since the teaching of law passed to the universities it has lacked votaries who would bring acolytes to the altar. But more probably the causes are deeper. It is not an age in which men would respond to a system of fixed concepts logical categories and prescribed principles of reasoning. In the exact sciences the faith is gone which the nineteenth century is reputed to have held in the immutability of ascertained and accepted truths. The conclusions of physical science are now held as provisional but workable hypotheses. Even more tentative are the fundamental explanations of bacteriology and virology. Philosophy appears to have foregone the search for reality and seldom speaks of the absolute. History concedes the validity of a diversity of subjective interpretations. The visual arts tend to discard form as an expression of aesthetic truth. Clearly the intellectual climate is unfavourable to the high technique of the common law, to say nothing of strict logic. It is certainly not a time when many minds can be found to respond with lively animation to an encounter with a tolled entry upon a descent cast, or with a demurrer to a plea giving express colour on the ground that, lacking a protestando, the plea confesses but does not avoid, a count in trespass; nor even with the acceleration of a legal contingent remainder by the destruction of a prior contingent interest. We have turned in other directions. We think about the law in a way which may have an analogy in the attitude ascribed to those who pursue the exact sciences towards the more basal concepts of the knowledge their predecessors won and organized. The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal. They are accommodated with a place, it is true, but only as illusory guides formerly treated with undue respect. The technique of the law cannot or should not now, so it is thought, exercise any imperative control over the minds of those whose lot it is to engage day by day in the judicial process."

- 165 The more some things change the more they stay the same. Debate between those who aspire to "absolute truth" and those who believe all truth is "relative" continues unabated.

166 For the purposes of this paper, the salient point is that if “change” in the law of succession is to be both recognised and managed there is need for an external standard against which change and any perceived need for change can be managed.

167 In my opinion, that external standard involves an appreciation that “Succession Law is a manifestation of the “welfare jurisdiction(s)” of the Supreme Court, and that those jurisdictions are governed by the purpose for which they exist.

“SUCCESSION LAW”, CONSTANCY AND CHANGE

168 The decades before and after 1986 experienced radical changes in Australian law and society from which “Succession Law” was not immune.

169 Witness, during that period, legislative changes that included provision for informal wills, statutory wills, enduring powers of attorney, enduring guardianship appointments, rectification of wills, and extended family provision jurisdiction and the establishment of the Guardianship Tribunal (subsequently merged with other jurisdictions in the NSW Civil and Administrative Tribunal).

170 During the same period Australia was developing its own legal literature, no longer relying principally on Australian supplements to English texts.

171 The first edition of Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Butterworths, Australia) was published in 1975. As revolutionary as that text was, a learned Foreword by Sir Frank Kitto answered “the layman’s question, What is Equity?” by reference to English legal history.

172 In the first edition of Heydon, Gummow and Austin, *Cases and Materials on Equity* (Butterworths, Australia, 1975) the authors’ Preface included the following observations (the underlying message of which I endorse), with emphasis added:

“[This casebook] is presented in *the conviction that equity forms a unity rather than merely a scattered collection of glosses on the common law; that now as much as in its early days it is reducible to certain fundamental principles; that*

the substantive rules of equity are better understood as related in this way than as branches of real and personal property, contract, tort, and so on; and that the best judges exhibit, in their handling of equity more than most legal subjects, a consciousness of this seamless web."

- 173 In Australian law in general, and in Australian "Succession Law" in particular, the maintenance of a strong "equity" tradition of the nature so described remains of fundamental importance. It is one of the few things that, in my opinion, "must remain the same" in Australian "Succession Law".
- 174 "Succession Law" provides an idiosyncratic field of study for an analysis of "change" in "law" for several reasons.
- 175 First, as described by Professor TFT Plucknett in *A Concise History of the Common Law* (5th ed, 1956) at pages 711, 742 and 746, "the law of succession" is generally "an attempt to express the family in terms of property".
- 176 Succession Law, as known to Australian lawyers, is essentially an amalgam of procedural and substantive law for the management of property, either side of death. In every generation it takes colour from the society it serves, and that society's understanding of what constitutes "proper preparation for death", "property" and "family".
- 177 The concept of "family" is often an expression, if not a function, of community. Familial bonds may be co-extensive with communal bonds. They can cross communal boundaries. In any society, "family" and "community" are closely related concepts, never entirely static and inherently liable to change.
- 178 Secondly, intrinsically "Succession Law" (however defined) operates at the intersection of "law" and "society" (however, each concept may be defined), necessarily engaging with fundamental but evolving social relationships: especially "the family" but, more broadly, "the State" in a society in which the affairs of each individual are increasingly managed from birth to death and either side of life.

- 179 Thirdly, the idea that “substantive law” is found in the “interstices” of procedural law (associated with Sir Henry Maine) has scope for application in an analysis of the concept of “Succession Law”, in theory and in practice, in its engagement with changed circumstances. It may, for example, be too early for a contemporary judgement to be made about the effect, if any, on probate law of the abolition of “trial by ambush” in a system of court administration that favours case management directions hearings, “disclosure statements”, “discovery affidavits” and compulsory mediations.
- 180 What we do know, as a lesson from Anglo-Australian legal history, is that procedural changes (instituted by legislation) have profoundly affected estate administration.
- 181 Fourthly, however, the concept of “Succession Law” might, from time to time and from place to place, be defined, it largely involves a managerial mindset on the part of a court entrusted with administration of law, if not all parties who experience it. It stands in contrast to those areas of law involved in a dispute about competing claims of right characteristic of a common law case in which an outcome involves a decision between a binary choice of “guilty” or “not guilty”, “verdict for the plaintiff” or “verdict for the defendant”. Historically, it has lent itself to decision-making by a judge sitting without a jury, whereas, historically, common law proceedings have naturally lent themselves to trial by jury.
- 182 Fifthly, however, “Succession Law” may be defined, it is essentially concerned with management of the affairs (that is, “the estate”, if not also “the person”) of a central personality who, by reason of incapacity or death, is not able to manage his or her own affairs and, therefore, not wholly present in any process of decision-making affecting his or her interests. In each case involving an application of “Succession Law” the “welfare” of the central personality must generally be held in view, if not specifically consulted.
- 183 Sixthly, because the determination of a “Succession Law” case generally involves the interests of a central personality who is not wholly present, a Court

may be required to embrace inquisitorial procedures that differ in kind from those procedures that ordinarily attend an adversarial contest between competent parties about competing claims of right. Whereas, in adversarial proceedings, parties generally select their opponent and the subject matter of their dispute. In a “Succession Law” case, it may be necessary for the Court to go in search of parties, property amenable to a court order and affected interests.

- 184 There is, accordingly, a public interest element in a “Succession Law” case not routinely found in an adversarial contest.
- 185 Seventhly, “Succession Law” (however defined), in a day to day setting, largely operates outside the view of the courts (in countless offices of solicitors or others), although subject to intervention of a court if a cause for intervention is identified. “Succession Law” is quintessentially “administrative” (another word for “managerial”) in character, generally administered by practitioners who are (or ought to be) familiar with its purpose, its rules of law and practice, and its cultural context. A vast amount of work in the application of “Succession Law” occurs routinely unnoticed by judicial officers, especially in a court registry.
- 186 Eighthly, in each of its manifestations “Succession Law” (however defined) lends itself to court procedures governed by available remedies. It is, in that sense, “action-based”. Parties generally go to court seeking a standard form of orders based upon a formulaic pattern of facts rather than a prayer for relief moulded, according to established principles, to meet the justice of a particular case.
- 187 Unless one engages an exercise of equity jurisdiction (in which a “narrative” form of pleading facts is commonly necessary), a case involving an application of “Succession Law” gravitates to an old common law style of “issue pleading”. Although the expression “forms of action” is generally encountered only in legal history studies of the old common law courts, it has practical expression in an “action-based” succession case.

- 188 In such a case, a claim for relief (a “remedy” or desired “outcome”) is often sufficient to define a case, subject to the provision of particulars or the service of disciplined affidavits. In this respect, witness a claim for the appointment of a “financial manager” or a “guardian” upon an exercise of the protective jurisdiction of the Supreme Court of NSW; a claim for a grant of probate or administration on an exercise of the Court’s probate jurisdiction; or a claim for a family provision order under Chapter 3 of the *Succession Act* 2006 NSW.
- 189 In each of these cases, an attempt to outline a case by pleading a “narrative statement of facts” is generally unnecessary and sometimes a hindrance to understanding the essential nature of an issue intended for the Court’s determination.
- 190 The special character of an action-based “succession” case is perhaps most apparent, upon an exercise of probate jurisdiction, when the validity of a will is disputed in contested proceedings. The logical framework of a “probate case” generally unfolds better with a form of “issue pleadings” (accompanied by particulars and a well focused affidavit or two) than if pursued by a “narrative pleading” that obscures the issues to be determined. The central issue is whether a “will” is the last will of a free and capable testator. That issue is determined by reference to subsidiary issues, logically, “testamentary capacity”, “knowledge and approval”, “undue influence” and “fraud”. Each of those subsidiary issues has a defined field of operation. The concept of “testamentary capacity”, in particular, has a further set of elements generally defined by reference to *Banks v Goodfellow* (1870) LR 5 QB 549 at 565. Logically, an allegation of “suspicious circumstances” is not a separate ground of challenge to the validity of a will, but is directed towards displacing a presumption that a person who signed and read a will regular in form “knew and approved” the contents of the will.
- 191 The grounds of challenge to the validity of a will are best identified in a form that, at the outset, identifies “the issue” or “issues” to be determined at a final hearing.

- 192 If an allegation is to be made that the execution of a will was procured by an exercise of “equity undue influence” (so as to persuade the Court that the will should not, in whole or part, be admitted to probate or that a constructive trust should attach to any grant of probate or administration made by the Court) that case, which might benefit from a narrative statement of facts, should be separately and distinctly pleaded as an equity case, albeit in a probate suit.
- 193 Ninthly, the managerial character of “Succession Law” generally carries with it a need to view a case (contested or not) through the prism of “problem solving”, not simply “dispute resolution”. That said, one of the problems to be solved might involve identification of competing interests and the potentiality of disputation that may require an adversarial determination (particularly if ownership to property is to be settled).
- 194 Tenthly, the managerial character of “Succession Law” means that the distinction between “law” and “practice” is more flexible than it may be in an adversarial contest between competent parties over competing claims of right the resolution of which might more commonly require reference to known “rules” rather than the “principles” that may inform guidelines for a managerial decision.
- 195 Upon a consideration of “change” in the context of “Succession Law” all these features combine generally to point to:
- (a) A possibility that “change” (in law or practice) might occur unnoticed by anybody.
 - (b) A difficulty in identifying what may constitute “a change” to “existing law” or simply an adaptation of “existing law” to changed circumstances.
 - (c) A difficulty in identifying “agents of change”, in fact, law or practice.

CONCLUSION

196 If called upon to identify the most important thing for an orderly process of “recognising and managing change” in the law of succession, I would say: preservation of the inherent “welfare” jurisdictions of the Supreme Court, and recognition of the purposes for which they exist in the service of each individual living, and dying, in community.

197 A steady focus upon the purposes served by the welfare jurisdiction(s) of the Court provides an “external standard” against which can be measured “what is” and “what ought to be” in the law of succession, in both theory and practice.

GCL

10/9/25