

**A LEGALWISE SEMINAR
UNSW CBD CAMPUS 26 NOVEMBER 2015**

ESTATE DISPUTES : PRACTICAL TACTICS AND RECENT EVENTS

A COMMENT

By Justice Geoff Lindsay

- 1 In the course of this seminar (on “Estate Disputes: Practical Tactics and Recent Events”) participants will hear presentations from several barristers experienced in the conduct of estate litigation in the Supreme Court of NSW.
- 2 Their particular presentations canvass the conduct of family provision proceedings, at first instance and on appeal, as well as “rights and remedies” associated with passing over or removing an executor of a deceased estate.
- 3 In this introductory paper my aim is to provide a general commentary on the nature of problem solving in disputes that arise in the administration of estates.
- 4 In doing so, I invite a critical appraisal of the seminar topic. It is necessary to question the question so that there can be an informed search for answers.
- 5 Invocation of the concept of “practical tactics” in estate “disputes” might be thought, implicitly, to invite everybody to embrace a purely adversarial approach to the resolution of disputes.
- 6 At a superficial level that is entirely understandable, and not wholly inappropriate. Private lawyers, representing private interests, naturally tend to embrace the aspirations and perspective of their private clients. They look

towards their clients in taking instructions, defining problems and searching for solutions.

- 7 However, there is a public interest element in the administration of deceased estates that displaces comfortable assumptions about the unqualified adoption of an adversarial model of dispute resolution procedures relating to estates. The public has an interest in the due administration of a deceased estate which extends to ensuring that, in conformity with prevailing law, a deceased person's testamentary wishes are carried into effect, and that those amongst the living who have a claim to his or her bounty have a reasonable opportunity, but no more than a reasonable opportunity, to advance their claims.
- 8 In other papers published on the website of the Supreme Court of NSW, I have drawn attention to a need:
 - (a) to transcend historical demarcations between the protective, probate and family provision jurisdictions of the Supreme Court;
 - (b) to view each branch of those jurisdictions, conceptually, as centring upon the ideal of an autonomous individual, living (and dying) in community, appreciating that at different stages of the life cycle different importance is, or may be, attached to the relative entitlements of "the individual" and "the community";
 - (c) to appreciate the purposive character of each branch of the Court's jurisdiction; and
 - (d) to consider that, from a legal perspective, "death" has become a process rather than merely an event: a process that may begin as early as when, in anticipation of death or incapacity, a person executes an enduring power of attorney, with or without appointment of an enduring guardian, and end only when the possibility of family provision litigation comes to an end.

- 9 A study of the history of the “equity” jurisdiction (including that branch of the modern equity jurisdiction we describe as the “probate jurisdiction”, which earlier generations, more familiar with English legal history practice and procedure, once described as the “ecclesiastical jurisdiction”) demonstrates that there is: in equity practitioners a constant tendency to limit the jurisdiction by elevating rules of practice into jurisdictional limitations; *and* a constant countervailing tendency in equity jurisprudence (prompted, or aided, from time to time by Parliament) to break free of such limitations in the interests of facilitating the due administration of justice, adapting to the felt necessities of the time.
- 10 In a recent paper presented to a College of Law seminar (on 16 September 2015) I recorded my view that importance attaches to identification of the purpose(s) served by the law in estate administration because:
- (a) the purpose served by law guides sound decision-making, supplying answers to questions about whether, why, what and how something can, and should, be done; and
 - (b) attention to the purpose served by law enables principled, productive decisions to be made without the process of decision-making becoming bogged down in misdirected, conflicting, rule-based claims of entitlement (to which litigants, with little or no encouragement, routinely resort).
- 11 In the same paper, supplemented here with additional case references, I described the purposive character of the protective, probate and family provision jurisdictions in the following terms:
- (a) The **protective** jurisdiction of the Supreme Court focuses on the welfare and interests of a person incapable of self-management, testing everything against whether what is done or left undone 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, subordinating all other interests to his or hers: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259; *Countess of Bective v Federal Commissioner of Taxation* (1932) 641 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-433; *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 237F-243F; *CJ v AKJ* [2015] NSWSC 498 at [27]-[30]; *Guardianship Act* 1987 NSW, section 4; *NSW Trustee and Guardian Act* 2009 NSW, section 39.

- (b) The **probate** jurisdiction 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 testator's testamentary intentions, and to see that beneficiaries get what is due to them: *In the goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakis* [2014] NSWSC 786 at [211]. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229.
- (c) The **family provision** jurisdiction also looks to the due and proper administration of a particular 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. The normative judgement required of the Court, implicit in the word "ought", or a grant of a general discretionary power, was once unequivocally judged against the standard of a "just and wise testator" (an expression associated with *In re Allen*

[1922] NZLR 218 at 220-221, *Bosch v Perpetual Trustee Co.* [1938] AC 463 at 479 and *The Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20); but, more recently, it has been located in shifting sands by reference to “community values” about what is right and appropriate.

- 12 For some years the seminal authority illustrating family provision tensions between individualistic and community perspectives has been *Andrew v Andrew* (2012) 81 NSWLR 656. Whether the recent decision of *Burke v Burke* [2015] NSWCA 195 calls for a reappraisal of the law, or practice, in exercise of the Court’s normative judgement is a topic that occupies the attention of one of the papers to be presented today. The two concepts of a “just and wise testator” and “community values” are generally able to be reconciled so as to operate *in tandem*; but (at least in theory) they start at different ends of a spectrum connecting “the individual” and “the community”.
- 13 Although it is convenient, in the context of disputes about deceased estates, to focus attention on the protective, probate and family provision jurisdictions of the Court, one should never overlook that, in the context of the work undertaken by the Court, they are now regarded as subsets of a broader, **equitable** jurisdiction.
- 14 An illustration of this, at the intersection between the three particularised heads of jurisdiction and the general jurisdiction of equity, can be found in relation to:
 - (a) a contract to make a will: *Horton v Jones* (1935) 53 CLR 475.
 - (b) mutual wills: *Birmingham v Renfrew* (1937) 57 CLR 666; *Barnes v Barnes* (2003) 214 CLR 169.
 - (c) general principles relating to estoppel: *Giumelli v Giumelli* (1999) 196 CLR 101; *DeLaforce v Simpson-Cook* (2010) 78 NSWLR 483.

- 15 All law tends to adapt, over time and space, to meet the needs of its community as they change from time to time. Historically, that has been especially true of the equity jurisdiction, infused with a tradition of supplementing rules of law and moulding discretionary relief in the solution of particular problems.
- 16 Equity jurisprudence has generally exhibited a concern for *problem solving* involving the *management* of property, persons and relationships. Historically, it has stood in contrast to the adversarial tendency of common law jurisprudence, with its focus on vindication, and adjudication, of competing *claims of right*.
- 17 In recent decades the Australian court system has tended, *not* to “fuse” common law “rules” and equitable “principles”, *but* to insist that their administration be informed by a principles of “case management” (currently epitomised by sections 56-60 of the *Civil Procedure Act 2005 NSW*) in which primacy is given, in the conduct of civil proceedings, to an “overriding purpose” of facilitating “the just, quick and cheap resolution of real issues”.
- 18 We have all become so familiar with the concept of this “overriding purpose” that it is easy to overlook the profound demands it makes upon all participants in the civil justice system. Those demands are made not least because parties and their lawyers are under statutory duties to assist the Court in giving effect to the overriding purpose.
- 19 Case management principles, with their emphasis on “purpose” and identification of “real issues”, direct attention, in estate litigation, back to the purposive character of whatever jurisdiction the Court is called upon to exercise.
- 20 This is no small thing for an advocate to remember, especially in these days when (under the influence of case management philosophy and in the wake of a practical abolition of jury trials) the very concept of “a trial” has given way to

judge-managed outcomes, not limited to a bare, one off adversarial contest on an appointed day.

- 21 The successful advocate, in this environment, is one who is able to work with the Court, not against it, in a fair identification of problems to be solved, and alternative solutions to those problems fairly available, in the application of principles serving the jurisdiction that governs the Court's decision making.
- 22 This involves no unthinking surrender of a client's "rights", and no sacrifice of a client's interests, but a need for subtlety and insight in recognising rights and advancing interests.
- 23 It is not enough to look *to a client* for instructions. An advocate needs to look, and work, *towards the Court* in the conduct of proceedings. An effective advocate is no mere mouthpiece of his or her client.
- 24 The skill of an effective advocate is grounded in mastery of law and facts, judgement in the identification of problems to be solved and available solutions, formulation of a "case theory" supportive of a desired outcome and a capacity to persuade the Court towards that outcome. Only in comparatively rare cases can an advocate "compel" a judge to submit to a particular outcome (eg., in a factual setting in which a binding authority cannot be distinguished); more often than not, a successful advocate gently leads a court to an outcome by assisting a judge to accept it by a free, informed exercise of judicial choice.
- 25 An advocate who imagines that cases can be won by "tactics" may occasionally be vindicated but is likely, on the whole, to be disappointed. A judge who, rightly or wrongly, comes to view an advocate through the prism of adversarial "tactics" is likely, in the nature of things, to be resistant, preferring what he or she perceives to be substance over form, and dwelling upon potential counter-arguments rather than absorbing the full force of a clever argument. This is a natural tendency of mind in most senior lawyers who

have spent a lifetime engaged in adversarial contests. It is a force that needs to be reckoned with by an advocate hoping to “manage” a judge.

- 26 The most successful advocate is generally the one who, with sound judgement about the law and facts, can anticipate the most likely, realistic outcome of proceedings and, with a minimum of fuss and costs, assist his or her client to reach that point, undistracted by collateral issues.
- 27 This presents a large challenge to the legal profession in all branches of the law, but particularly in estate litigation: where a tendency to allow clients to incur costs disproportionate to the amount in issue, and unrelated to an objective assessment of likely outcomes, may, unless restrained, kill the golden goose.

GCL

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