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**OPERATION OF THE PROBATE AND PROTECTIVE LISTS**

By

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**THE EQUITY DIVISION, PROBATE AND PROTECTIVE LISTS**

- 1 In the modern mindset, the jurisdiction of the Supreme Court of NSW exercised in probate and protective cases is, in each branch of the Court's business, clearly located in the Court's equity jurisdiction.
- 2 This may be both a cause, and effect, of *administration* of the business of the Court through a "*Probate List*" and a "*Protective List*" in the *Equity Division* of the Court. Over time, administrative practices can come to be thought of as jurisdictional imperatives. That tendency of mind needs to be recognised, if not resisted. As confirmed by section 23 of the *Supreme Court Act 1970* NSW, the Court has "all jurisdiction which may be necessary for the administration of justice in New South Wales."

- 3 Section 23 was intended by the NSW Parliament to be a plenary grant of jurisdiction incorporating, and rising above, the grants of authority conferred on the Court (by reference to English law and institutions) by the *New South Wales Act 1823 (Imp)*, the *Third Charter of Justice*, the *Australian Courts Act 1828 (Imp)* and ancillary legislation. The Court's jurisdiction is informed, but not constrained, by arrangements for the separate administration of probate, protective, equity and other heads of jurisdiction in nineteenth century England. Jurisdictional constraints embedded in England's fractured, pre-*Judicature Act* system of court administration have never really constrained the administration of justice in NSW except by local choice. Section 23 of the *Supreme Court Act* confirms that to be so.
- 4 All judges of the Court, in common with each other judge of the Court, can exercise the whole of the Court's jurisdiction. That judges tend to specialise in one or another type of case – be it in the Common Law Division or the Equity Division – is a fact reflective of administrative convenience. Nothing more; unless, perhaps, a reminder of the cultural traditions, and functional imperatives, that adhere to particular types of cases.
- 5 Within the Equity Division, all judges routinely decide Probate List cases and, less frequently, Protective List cases. The Probate and Protective List Judge has no monopoly on cases of this character.
- 6 The field of operation of the Probate List is well understood as centred upon succession to property upon death, by a will or upon intestacy. In the practice of the Court claims for family provision relief under Chapter 3 of the *Succession Act 2006 NSW*, although closely related to probate cases, are generally case managed by the Family List Judge (Hallen J). All judges of the Equity Division are available to assist the Family Provision List Judge from time to time.
- 7 The field of operation of the Protective List focuses squarely upon persons who are unable, by reason of incapacity, to manage their own affairs (their property or person). Although the Court's protective jurisdiction (sometimes

labelled *parens patriae* jurisdiction) includes jurisdiction over minors (*Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259, citing *Re Eve* [1986] 2 SCR 388 at 407-417; 31 DLR (4<sup>th</sup>) 1 at 14-21), cases relating to minors are not routinely dealt with in the Protective List. They are shared between all judges of the Equity Division or, according to the nature of the case, assigned to the Adoptions List (administered by Brereton and Kunc JJ).

## THE LIST JUDGE AND LIST DAYS

- 8 The List Judge periodically entertains probate and protective cases on a "List Day", currently every second Monday, in the course of which a variety of applications (including applications for a grant of probate in solemn form passing over a later will, interlocutory disputes and applications for the revocation of protected estate management orders) are routinely entertained.
- 9 The *Protective* List Judge also deals with routine protective business that requires a judge and can be dealt with in the absence of the parties, "in chambers". That work generally involves applications for protected estate management orders (under sections 40-41 of the *NSW Trustee and Guardian Act 2009 NSW*) accompanied by an application for an order (under the *Civil Procedure Act 2005 NSW*, section 77) for the payment out of court of compensation moneys paid into court pursuant to a judgment in personal injury litigation conducted, upon an exercise of common law jurisdiction, in the Common Law Division of the Supreme Court or in the District Court of NSW.
- 10 The need for an order that funds in court be paid out (or, on an application for appointment of a private protected estate manager for reward, not being a licensed trustee company, a need for an order authorising an allowance of remuneration out of the estate of a protected person) drives much of the Court's protective work. That work, otherwise, goes to the Guardianship Division of NCAT, governed by the *Guardianship Act 1987 NSW* and the *Civil and Administrative Tribunal Act 2013 NSW*.

- 11 The *Probate* List Judge infrequently deals with applications for urgent relief (principally applications for an interim grant of administration of a deceased estate) that cannot be dealt with by “the Probate Registrar” (Senior Deputy Registrar Brown) or the Equity Duty judge. If a practitioner is in doubt about how best to proceed, consultation with the Probate Registrar is often a sound option.
- 12 At the registrar level, the Probate Registrar periodically conducts her own “List Day” – currently every Monday – during the course of which she case manages probate cases (commencing at 9.00am) and protective cases (commencing at 11.00am), dealing with what a registrar can deal with; referring to the List Judge short matters that require the attention of a judge; and making arrangements for the listing of cases ready for a final hearing.

#### **APPELLATE/REVIEW BUSINESS**

- 13 Not infrequently, but not commonly, the List Judge is called upon to case manage, or hear, an appeal from the Guardianship Division of NCAT (generally in relation to the appointment of a financial manager or a guardian) or an application for review of a decision of a Registrar (generally in relation to a dispute about subpoenas and discovery, or a challenge to the Registrar’s determination of executor’s commission).
- 14 An appeal from NCAT is governed by clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act* 2013. That clause provides great flexibility for the Court in the moulding, and regulating, an appeal (*P v NSW Trustee and Guardian* [2015] NSWSC 579); but the basic rule remains that, generally, there is no “right” of appeal otherwise than on a question of law in relation to a “final” decision of the Tribunal. Any other appeal requires a grant of the Court’s leave. Litigants in person generally, and practitioners sometimes, tend to overlook that fact, or they seek to invoke the Court’s inherent jurisdiction (not displaced by the NCAT legislation) as a means of circumventing the statutory appellate procedure without establishing “exceptional” circumstances that justify such a course.

- 15 Because an appeal to the Court operates as a stay of an NCAT decision under appeal, subject to any interlocutory order made by the Court (clause 14(5)), importance may attach to ensuring that an appellant's summons is promptly brought before a judge for early consideration of whether or not the statutory stay should be varied.
- 16 The practice of NCAT in listing cases for regular, routine reviews of both financial management orders and guardianship orders operates, in practice, to limit the utility of an appeal to the Court, where procedures are generally more formal than those that operate in the Tribunal and parties are routinely exposed to costs orders.
- 17 An application for review of a decision of a Registrar is governed by a rules 49.19 and 49.20 of the *Uniform Civil Procedure Rules 2005* NSW. Such a review does not depend upon proof of error on the part of the Registrar in order to justify intervention; but a judge may, upon an independent exercise of discretion, decline to intervene if no error can be identified in the Registrar's making of a discretionary determination: *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32,763 at [98]-[110].

## **COMMON FEATUES OF PROBATE AND PROTECTIVE CASES**

- 18 The Probate and Protective jurisdictions share common characteristics that require their exercise to be accompanied by administrative assistance. They both involve, largely but not exclusively, arrangements for the management of property.
- 19 Both require that the perspective of at least one "absent person" be centre stage: in the probate arena, such an absence is caused by the death of the deceased person whose estate requires administration; in the protective arena, it is caused by the spectre, or reality, of the incapacity of a person in need of protection.

- 20 Both types of jurisdiction require an appreciation of the possibility that “interests” other than those of the deceased or the person in need of protection may need to be consulted or protected.
- 21 A common perspective of the concept of “parties” to proceedings – broader than that encountered in common law proceedings influenced by the historical imperatives of trial by jury - carries as a consequence a need, greater than that encountered in ordinary adversarial litigation, to recognise a public interest element in the Court’s decision-making and, no less so, in the decision-making of all who invoke the Court’s jurisdiction.
- 22 That public interest element impacts on the Court’s approach to costs orders (departures from the ordinary rule that “costs follow the event” are not uncommon) and may impact on decisions about the availability of discovery, legal professional privilege and the admissibility of evidence.
- 23 The practice of the Court in dealing with costs questions is reasonably settled. In both Probate and Protective cases the Court is concerned to ensure that costs orders are appropriate to the particular circumstances of the case. In the Probate Jurisdiction the measure of what is “appropriate” is often tested against whether the testator has, or those interested in the residue of an estate have, been the cause of litigation or whether there have been reasonable grounds for an investigation culminating in litigation: *Re Hodges* (1988) 14 NSWLR 698 at 709E-710D; *Williamson v Spelleken* [1977] Qd R 152. In Protective cases, where a broader range of issues generally need to be consulted, the question is often stated as “what, in all the circumstances, seems the proper order for costs?”: *CCR v PS (No. 2)* (1986) 6 NSWLR 622 at 640; *CAC v Secretary, Department of Family and Community Services (No. 2)* [2015] NSWSC 344.
- 24 Nobody can safely engage in probate or protective litigation without addressing each party’s exposure to the risk of an adverse costs order. This is reasonably well understood in probate litigation, and often misunderstood in protective litigation. Parties to protective litigation often radically reassess

their involvement in proceedings when confronted with the possibility that they may have to bear a liability for costs (or that management of a protected estate might go to the NSW Trustee rather than one or another of warring family members expecting to conduct litigation at the cost of a protected estate).

- 25 In dealing with questions about discovery, privilege and the admissibility of evidence the general law is generally a sound guide to the Court's practice, if only in terms of procedural fairness. However, there are special features of the probate and protective jurisdictions that need to be borne in mind. In the probate realm, regard has to be had to the *Rule in Re Fuld* [1965] P 405 at 409F-411B, according to which evidence bearing upon whether a will was or was not duly executed may not be privileged from production to the Court: *Re Estate Pierobon, deceased* [2014] NSWSC 387; *Boyce v Bunce* [2015] NSWSC 1924. In protective proceedings, to the extent necessary to protect a person in need of protection, strict rules of evidence do not apply.
- 26 Upon an exercise of probate or protective jurisdiction there is a sense in which the Court, because of the nature of decisions to be made, has to be more conscious of "outcomes" than it need be in litigation between competent parties engaged in ordinary civil litigation that culminates, once and for all, in a final judgment *inter partes*. The Court plays, or at least may play, an ongoing role in the administration of an estate beyond the point of immediate decision, for example, in identifying an "administrator" of an estate (whether that "administrator" be characterised as an executor, administrator or trustee of a deceased estate or as the protected estate manager or financial manager of a protected estate).
- 27 Until a deceased estate is fully administered, a probate file of the Court is never irretrievably "closed"; it can be "re-opened" if need be to deal with newly arising questions relating to the administration of the estate, if not beneficial entitlements to the estate.

- 28 Even more so, a protective file is never really “closed” until, on or after the death of the person under protection, so much of his or her protected estate as remains is conveyed to his or her legal personal representative to be dealt with in the probate jurisdiction; old files are routinely consulted, for example, when there is a change of manager or an application for revocation of protected estate management orders.
- 29 Because importance may attach to the antecedents of protective proceedings, and because the NSW Trustee needs to know information about the course of proceedings in order to supervise management of protected estates, orders made in protective proceedings are generally accompanied by formal notations of court process and supporting evidence, and by an order that a copy of the orders be served on the NSW Trustee.
- 30 An effective exercise of the Court’s probate or protective jurisdictions accordingly requires administrative assistance of the type that is routinely provided:
- (a) in the probate jurisdiction, by the Court’s Probate Registry and, within the limits of its governing legislation, the NSW Trustee; and
  - (b) in the protective jurisdiction, by the NSW Trustee and the Public Guardian within their respective legislative frameworks.
- 31 Recognition of this is important, not only for the purpose of appreciating the nature and effect of an exercise of the Court’s jurisdiction, but also for location of repositories of practical advice for practitioners, and members of the public, working out how to tackle particular problems. Both the Probate Registry and the NSW Trustee are accessible to the public. Their accumulated practical wisdom is a resource not to be ignored.



## THE OBJECTIVE PARAMETERS OF A PROPERTY CASE : WHAT TO LOOK FOR

32 In probate and protective proceedings an initial, key step in any decision - making, problem-solving process involving property is generally to identify:

- (a) the central personality (the deceased or a person at risk because of incapacity for self-management) through whose lens the world must be viewed.
- (b) the nature and value of the “estate” (property) to which that key personality is, or may be, entitled.
- (c) the existence or otherwise of any and all legal instruments that may govern, or affect, the disposition or management of such property: eg, a Will, the “intestacy provisions” of the *Succession Act* 2006 NSW, an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.
- (d) the full range of persons whose “interests” may be affected by any decisions to be made:
  - (i) probate litigation is “interest litigation” in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *The Public Trustee v Mullane* (Powell J, unreported, 12 June 1992) BC 9201821 at 4-5; *Bull v Fulton* (1942) 66 CLR 295 at 337, citing *Bascombe v Harrison* (1849) 2 Rob Ecc 118 at 121-122; 163 ER 1262 at 1263-1264; *Estate Kouvakas* [2014] NSWSC 786 at [212].

(ii) protective litigation requires identification of “family” and “carers” who, *in the interests of the person in need of protection, need to be consulted*: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C, 242B-C and 242E-243E; *NSW Trustee and Guardian Act* 2009, sections 39, 61, 65, 71-73 and 76.

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration.

(f) whether any (and, if so, what) steps need to be taken to ensure that all “interested persons” are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

33 It is possible, almost, to approach these types of question in a routine, mechanical way. That is a measure of their central importance in most cases. However, to approach them as if a mechanical exercise is an invitation to error. The problems that can, and routinely do, emerge in the probate and protective jurisdictions occupy a broad range of life’s experiences. Questions relating to the management of an “estate” (property), and of “the person” of a person incapable of self-management, are inherently prone to complexity.

34 A sound working rule of practice generally is that, in management of a probate or protective case bearing upon property, prudence dictates that, as soon as may be practicable, all property, and all potential claimants on property, at issue should be given notice of the proceedings and an opportunity to intervene.

35 This is a function of the nature of property and the desirability of the title to property being settled in an orderly way without unnecessary exposure to successive claims. The Court does, and the parties should, generally endeavour to “build an estoppel” against those who might contest the Court’s orders: *Estate Kouvakis* [2014] NSWSC 786 at [276]-[283].

## PRUDENT CASE PREPARATION

- 36 On a List Day, when time is at a premium, advocates will best advance their cause, assist the Court and save costs if they anticipate the Court's needs by producing a short written outline that carefully addresses: (a) the precise terms of the orders sought (draft short minutes of orders); (b) the operative pleadings; (c) the evidentiary material supportive of orders sought (affidavits listed and, if practicable, collated for easy reference); and (d) in summary terms, the objective parameters of the decision(s) required of the Court, bearing in mind that the nature of the Court's jurisdiction is such that decisions generally cannot be made simply "by consent".
- 37 Within the constraints of a busy List Day, there may be no time available for more than a short oral explanation of the nature of the case, coupled with a formal order that the proceedings be referred to chambers for consideration. If a party's paperwork is not up to standard, further delays, costs and a potential for refusal of relief are on the cards.
- 38 In preparation for a final hearing, parties should anticipate what might be required for the Court to make a definitive determination of questions required to be determined. Thus, on an application for a grant of probate, the presiding judge should generally be placed in a position to order that a grant be made in solemn form: *Estate Sue* [2016] NSWSC 721 at [114] – [116].
- 39 A common deficiency in both probate and protective cases is a failure to ensure that "interested" persons are given timely notice of proceedings or that a case for dispensing with service of such notice on particular persons is openly articulated. A failure to ensure that questions about "notice" are properly addressed tends to undermine the Court's confidence in any case presented to it, and may be productive of unnecessary delays and increased costs.

## TRACES OF LEGAL HISTORY IN MODERN PRACTICE

- 40 The richness of each branch of the Court's probate and protective jurisdiction can be brought to mind, both in the abstract and in particular cases, by recognition that, although closely aligned to be Court's "equitable jurisdiction", neither branch was, historically, part of the equitable jurisdiction of the English Lord Chancellor.
- 41 Traces of the origins of the Court's probate jurisdiction in the practices of the English ecclesiastical courts can be seen in the seminal judgment of the High Court of Australia in *Osborne v Smith* (1960)105 CLR 153 at 158-159:
- "It was both proper and necessary in the second suit to treat as binding upon the appellant the findings as to knowledge and approval which had been made in the first suit. She, it is true, was not a party to the first suit; but there is a well-established principle of probate practice, which grew up in the ecclesiastical courts, that any person having an interest may have himself made a party by intervening, and that if he, knowing what was passing, does not intervene, but is 'content to stand by and let his battle be fought by somebody else in the same interest', he is bound by the result, and is not to be allowed to re-open the case: *Wytcherley v Andrews* [1871] LR 2 P&D 327; *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95. The 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: *Hamilton v Hamilton* (1913) 30 WN (NSW) 46. Accordingly the appellant might have intervened in Blanch's suit for probate. She preferred, however, to let Blanch fight her battle for her. She knew he was doing so, for she was called on his behalf as a witness and gave evidence in the suit. Having thus acted, she must be held bound by the decision that was given, namely, that the document propounded was not, as a whole, the deceased's will".
- 42 The "probate practice" explained by *Osborne v Smith* is critical to the Court's certification of a grant of probate as a "solemn form" grant, and to the question whether a grant (however characterized) can be revoked. See, generally, *Estate Kouvakis* [2014] NSWSC 786 at [236] *et seq.*
- 43 Traces of the origins of the Court's protective jurisdiction in the lunacy jurisdiction exercised by the English Lord Chancellor can be seen in the judgment of the Court of Appeal in *Protective Commissioner v D* ( 2004) 60 NSWLR 513 at 540 [149] *et seq.*, dealing with gifts and allowances out of the

estate of a protected person. The judgment of Lord Eldon in *Ex parte Whitbread; Re Hinde* (1816) 2 Mer 99 at 103; 35 ER 878 at 879 remains centre stage.

- 44 With emphasis added, the headnote to the report of that judgment reads as follows:

*“Practice of making an allowance to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the Lunatic’s life-time, but upon **the principle that the Court will act with reference to the Lunatic and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind.** The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court.*

- 45 Lord Eldon’s judgment (at 2 Mer 101-103; 35 ER 879) elaborates the specified principle, with a precautionary tale about the intersection between human frailty and what is necessary for the due administration of a protected estate (with emphasis here added):

*“The Lord Chancellor [Eldon]. For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund [102] which, it is probable, may one day devolve upon themselves. Nevertheless, **the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kind.** With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, **looking at what is likely the Lunatic himself would do, if he were in a capacity to act,** will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former, *upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars.* So also, where the father of a family becomes a lunatic, **the Court does not look at the mere***

*legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, - but considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.*

*The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes [103] care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.*

The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children – to brothers and other collateral kindred; and *if we get to the principle, we find that it is not because the parties are next of kin to the Lunatic, or, as such, have any right to an allowance, but because **the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.***

[No Order was made upon the Petition.]”

- 46 Although there is much to be said for the view that historical distinctions between the probate and protective jurisdictions have been blurred, as between themselves and because of an ever present overlay of equitable jurisdiction, a full appreciation of the nature, and solution, of a problem often requires those very same historical distinctions to be called to in mind.

## **FIDUCIARY OBLIGATIONS IN PRACTICAL OPERATION**

- 47 An illustration of this can be found:
- (a) in characterisation of an executor, administrator or trustee of a deceased estate, or the manager of a protected estate, as a “fiduciary”; and
  - (b) in attributing content to their respective obligations as “fiduciaries”, including their obligation to account.

- 48 There is nothing controversial in a *general* observation that the executor, administrator or trustee of a deceased estate is a fiduciary; or that a protected estate manager or guardian is likewise; or, similarly, a person acting as an agent pursuant to a power of attorney.
- 49 Nor is there anything controversial in a *general* observation that a fiduciary is under an obligation not to place himself, herself or itself in a position of conflict, or to obtain a benefit from the fiduciary relationship, without first obtaining the fully informed consent of the “beneficiary” to whom such obligations are owed or without other authority, statutory or judicial.
- 50 Because fiduciary obligations generally attach to the office of a legal personal representative or a guardian (using those expressions generically), any question about whether the holder of such an office ought to be allowed, by the authority of a court order, remuneration (a benefit, by its nature, at the expense of the “beneficiary”) generally has as its starting point the proposition that any such office is *prima facie* a gratuitous one.
- 51 Discussion of that proposition in the context of administration of a deceased estate can be found in *Re Estate Gowing; Application for Executor’s Commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32,763. Discussion of a similar nature, referable to a protected estate manager, can be found in *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245, a companion judgment to which is *Re Managed Estates Remuneration Orders* [2014] NSWSC 383. Remuneration cases generally proceed in an orderly manner, with ground rules well known or ascertainable.
- 52 Difficulty more often attaches to the acutely fact-sensitive character of the law relating to fiduciaries in cases, unregulated by a public authority, within the realm of contested facts.
- 53 The existence, nature and scope of a fiduciary obligation depends on the facts of the particular case, as do available remedies: *Hospital Products Limited v*

*United States Surgical Corporation* (1984) 156 CLR 41 at 102 and *Maguire v Makaronis* (1997) 188 CLR 449 at 463-464.

54 Difficult cases are likely to emerge, increasingly, in an “elder law” context because of:

- (a) an increasing tendency to manage the affairs of incapable people through the private “agency” mechanics of an enduring power of attorney and an enduring guardianship appointment, which lack formal accounting requirements, but are attended by exposure to a temptation to use a power of attorney as a will-substitute in succession law terms; and
- (b) the concern of the law to tailor the obligation of a “guardian” (to use here a generic expression for a financial manager, guardian or carer) to account for moneys entrusted to the guardian in circumstances that: (i) the guardian may be living with the person under protection and, necessarily, enjoying an incidental benefit from property under management; and (ii) some allowance from the property of the incapable person may need to be made for maintenance of the guardian: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2002) 410 at 428-430; *McLaughlin v The City of Sydney* (1912) 14 CLR 684 at 698-699.

55 A resolution of complex cases requires each strand of complexity to be identified, and assessed, by reference to its constituent elements, a process that requires an appreciation of the different (albeit perhaps complementary) imperatives of each type of jurisdiction exercised.

#### **THE PRIMACY OF “PURPOSE” IN ADMINISTRATION OF THE PROBATE AND PROTECTIVE JURISDICTIONS**

56 Although the determination of a probate or protective case may, of necessity, require reference to a myriad of rules of law and principles of equity (as is not



uncommon in litigation about property), the purposive character of the Court's jurisdiction must constantly be borne in mind in each case. It informs any exercise of the jurisdiction.

- 57 The purpose of the probate jurisdiction is generally 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].
- 58 The purpose of the protective jurisdiction is generally to take care of those who, because of an incapacity for self-management, are unable to 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.
- 59 The purposive character of each branch of the Court's jurisdiction manifests itself not only in dealing with "traditional" problems; but, also, in dealing with products of the current era. An example of that, which cuts across jurisdictional divides, is the concept of a "statutory will", for which sections 18-26 of the *Succession Act 2006* provide. See the classic judgment, *Re Fenwick* (2009) 76 NSWLR 22. The law here straddles both the probate and the protective jurisdictions as formerly understood, and the nature of the business to be conducted by the Court necessarily engages the purposive character of those jurisdictions.
- 60 Unless all participants in the court process remain mindful of the purpose of an exercise of the Court's jurisdiction in probate and protective cases, there is a tendency for adversarial mindsets to capture the field, causing all who venture upon it to sink in a litigious bog.
- 61 These days, all lawyers are familiar with the "overriding purpose" for which section 56 (1) of the *Civil Procedure Act NSW* provides: "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real

issues in the proceedings.” That provision is central to the Court’s “case management” philosophy.

62 Grounded in a purposive approach to the law and legal practice, as well as modern management theory, that philosophy complements the purposive approach to the management of estates, and persons, inherently engaged upon an exercise of probate or protective jurisdiction.

Date: 19 September 2016

GCL

Editorial Note: This is a lightly revised version of a paper delivered at the Blue Mountains (Regional) Law Society Succession Conference on 18 September 2016. The only change is that the words “involving property” have been inserted in the introductory words of paragraph 32, and the word “property” in the preceding heading.