Equity Trustees Ltd - Sir Ninian Stephen Lecture – 1 June 2016

"Has death, in law, become a process and not merely an event?"

It is a great honour to be speaking at this Sir Ninian Stephen Equity Trustees Lecture. Thank you for inviting me to do so. I have no doubt you'll be sorry you did.

Sir Ninian's legacy is remarkable through his outstanding contributions not only to Australia, but also internationally through many public offices has held.

One example of Sir Ninian's 'mastery of the situation' was in 1976, as I remember, when he attended a Dinner at which Sir John Kerr was billed as the guest speaker. The anti-Kerr rage was then very prevalent and those entering the venue had to run a gauntlet of abuse, smoke bombs and eggs, if not worse, hurled by demonstrators. As Sir Ninian was about to enter the building a demonstrator yelled in his face: 'Haven't you read the Constitution?', to which Sir Ninian calmly replied: 'You are obviously a student of my judgments.'

Fortunately I have not had the same experience tonight, so far, but I shall be leaving through the back door.

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When thinking about what the meaning of this topic "*Has death, in law, become a process and not merely an event"* is, … knowing the composition of my audience tonight, I was well aware that I could not possibly try to be humorous:
(a) the solicitors would be embarrassed if they had to ask a barrister to explain, and
(b) the barristers would be castigated for attempting to do so.

But, as the acidic, and recently departed American comedian Joan Rivers once said: "*Life is uncertain: eat desert first*."

….very good advice, given life is replete with unpredictable events. One event, that isn't totally unpredictable ….is death. What is not quite so precise however, is where, when and how that event will occur.

While we can't usually control or affect the 'where' and the 'when' of our celestial transfer, we can have some say over what happens afterwards, in respect of how we control what happens to our estate …….if there is one.

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

Recently, when searching an online index of probate records for information on one of my ancestors - I wasn't absolutely sure of his first name, I only had an initial - I decided to see if I could match the data that I had by date. I knew my ancestor had died in 1900, so I entered that date and the surname. I got over 100 returns on the information that I had entered, but fortunately many of the deaths were for 1898 and 1899, so I could discount them immediately.

As I was browsing the list, I noticed an entry for an
…….Oscar Fingal O'flahertie Wills Wilde.

As I didn't know Oscar Wilde's full name, I did a quick search, and sure enough, it was a match, even though I realized I was being distracted from my initial objective. It was a subscription site so, rather than pay immediately for access, I signed up for their free trial offer. It's a good way to access records…….. as long as you remember to cancel the subscription by the specified date.

I discovered that Mr. Wilde had left a mere two hundred pounds upon his death in a Paris hotel in 1900. As I was already a bit off track, I decided to look for a few other historical figures.
I found that records Charles Darwin, father of the theory of evolution, left what would amount to $20 million today!

Karl Marx, the father of communism, true to his communist roots, left a paltry $400.

The largest estate recorded in the records is one that would be worth over thirty billion dollars today….But, of course, Ms Brewer, yours is yet to be recorded.

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

The legal process of passing property from one generation (or, more broadly, from one person) to the next may commence during a period of incapacity before the

arrival of actual death. That is something specifically contemplated by the concept of a "statutory will", and, within the limits of the protective jurisdiction, the interests of an incapable person's family might be taken into account in the deployment of an enduring power of attorney or during the course of protected estate management.

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

The most common form of Probate litigation arises from disputes over the validity of a will because it is alleged at the time of making that will the testator lacked the requisite testamentary capacity.

We've all heard the saying "where there's a will there' a lawsuit".

That's simply not true, *but* in the individual cases that it is true, a challenge to the validity of a will is most commonly brought on the ground that the testator lacked testamentary capacity and did not know and approve of its contents.

There has always been - a general tendency in the common law - towards freedom of testamentary disposition. The history of testamentary freedom, recounted by Palmer J in *Re Fenwick*[1] is reflected in the difficulty that one faces when attempting to show, *ex post facto,* that a testator lacked testamentary capacity. It's one of the greatest challenges in probate law.

Most, if not all of us here know that the elements of the test are that a testator:

(i) understands the nature of the act of making a will and its effect;
(ii) knows the extent of the property of which he/she is disposing;
(iii) is aware of the claims to which he/she ought to give effect;

and that

no disorder of the mind must poison his/her affections, pervert his/her sense of right, or prevent the exercise of his/her natural faculties

and also that

[1] [2009] NSWSC 530 at [12]-[18].

no insane delusion must influence his/her will in disposing of his/her property and bring about a disposal of it which, if the mind has been sound, would not have been made.

In essence, it is simply a case of applying the following principles:

(a) the onus of proving the will being propounded is the last will of a free and capable testator is on the plaintiff executor;

(b) the onus is prima facie discharged by establishing a prima facie case;

(c) each case depends on its own facts but it is significant to examine the exclusion or non-exclusion of beneficiaries, the age, sickness and circumstances of the testator; and

(d) where instructions are given on one day and the will is executed on another it is the former day that must be considered the crucial day.[2]

As to the last point, although the rule is that the *crucial* day is the day when the testator gave instructions, one must think about what this really means.

From *Theobald on Wills*, 15th ed., at page 33, we are told that two rebuttable presumptions may be applicable -

> Firstly, if a duly executed will is rational on the face of it a presumption arises that the testator had testamentary capacity and the person challenging the will may rebut this presumption by evidence to the contrary.
>
> Secondly, if a testator has suffered from serious mental illness during a period prior to the execution of the will, a presumption arises that it continued and the testator lacked testamentary capacity. But *this presumption* may be rebutted by establishing that the testator made the will during a lucid interval or after recovery from the illness. If there is reason to anticipate there may be a challenge on the ground of testamentary incapacity precautions ought to be taken before the execution of a will.

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2 *Bailey v. Bailey* (1924) 34 CLR 558 at 570-572, per Isaacs J;see also, *Perera v. Perera* [1901] AC

The legal, or persuasive, burden of proof always lies on the person propounding the will; however, the evidential burden of proof may shift from one party to another in the course of a case.

As a process, with different dimensions for "person" and "property", death requires different but interrelated approaches to management before and after its actual event.

The legal process of passing property from one generation (or, more broadly, from one person to the next) may, of course, commence during a period of incapacity before the arrival of physical death. That is something specifically contemplated by the concept of a "statutory will" and, within the limits of the protective jurisdiction, the interests of an incapable person's family might be taken into account in the deployment of an enduring power of attorney or during the course of protected estate management.

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

The character of "probate litigation" has changed fundamentally. I have always wondered about the emphasis that is often placed on the value of a mini-mental status examination or MMSE.

I find little reference to this in the case law, in the sense of any critical analysis. However, there is great assistance to be found in Collier, Coyne & Sullivan's *Mental Capacity* [3].

The authors point out that the MMSE was not developed "to assess capacity". They say that it has "often been used to document 'general cognitive' abilities as part of capacity assessment in clinical and research context."

The attraction in the test lies perhaps in two aspects:

(a) it is a well-known screening test; and

(b) there have been some attempts to devise cut-off scores to indicate incompetence.[4]

[3] Federal Press, Sydney, 2005) at pp.116-119
[4] Refer pp.116 and 117.

However, there appears to have been substantial debate in the medical and psychological literature about its use as a capacity assessment:[5]

The arguments for the use of the MMSE in capacity determinations rest largely on the cost effectiveness of this measure (it is in the public domain, is quick to administer and score, and can be given by any health professional), its substantial literature base, as well as demonstrations that scores from this test correlate with other measures of capacity (although the strength of this association is a matter of some debate …).

Although those are rational arguments in favour, Collier *et al*. then outline arguments against use of the MMSE to determine capacity:[6]

The arguments against use of the MMSE to determine capacity rest largely on the finding that scores on this test are poorly correlated with other measures of capacity, such as understanding of published guidelines in relation to the appointment of a health care proxy. … this has led to the view that the MMSE is "insufficient in and of [itself] to measure whether a patient has the ability to make specific health-care decisions", and it does not adequately assess abilities relevant to capacity determinations, such as the foresight, planning and task execution skills necessary to care for oneself and one's property, or to manage funds.

From what I see there, I imagine that the MMSE is a useful screening test, but is not the end of the road for a proper workup. I also have doubts

But tonight is not a night for separating red from blue in the law of Probate.

As one of NSW's Probate list judges[7] said, when delivering a speech to the College of Law a couple of years ago, "whether or not there was an Orwellian significance in the year '1984', it was in that calendar year that Justice Frank Hutley wrote the following in a foreword to the third edition of Hutley, Woodman & Wood's *Cases and Materials on Succession*:

> "… since the first [1967] edition, the law of succession on death has been simplified by the abolition of death, estate and succession duties by the Commonwealth, and the States of Queensland, New South Wales and

[5] p.117.

[6] p.118.

[7] Lindsay J

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

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

The prospect of "estate litigation" now requires a litigation lawyer to survey potential claims or defences over several fields such as

- the law of trusts, including principles governing a contract to make a will[8]
- mutual wills[9] and
- general principles relating to estoppel[10].

A search for an expression of testamentary intentions may require an examination of formal wills, informal wills, grounds for rectification of a will and statutory wills (all governed by the *Succession Act)*.

Where a deceased person was incapable of managing his or her estate (and whether or not a financial management order was made for management of that estate or an

[8] *Horton v James* (1935) 53 CLR 475
[9] *Barns v Barns* (2003) 214 CLR 169
[10] *Giumelli v Giumelli* (1999) 196 CLR 101

enduring power of attorney granted or purportedly granted in respect of the particular person) consideration may need to be given to the recovery of property for the benefit of the estate.

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

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

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

However far we may stray from the touchstone of a particular individual's testamentary intentions under the lure of appeals to "community standards" [11] or objective standards as propounded in *Re Fenwick*[12] we must remain connected with the perspective of the autonomous testator.

For that reason, alone, there remains merit in retention of the concept of a "wise and just" testator[13] as an idea capable of informing decisions made in exercise of probate jurisdiction.

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

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[11] *Andrew v Andrew* (2012) 81 NSWLR 656
[12] (2009) 76 NSWLR 22
[13] to adapt *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19-20 and related cases

Of course, it is not merely a dispositive clause that can sometimes attract, not only the wrath of disillusioned would-be-beneficiaries, but the terms in which such dispositions are couched can attract attention.

One Samuel Bratt, who was actually a Britt, used his will simply to get even. His wife had never allowed him to smoke his favorite cigars at home. When he died, in 1960, the embittered Britt Bratt returned the favor. He left her £330,000. To get it, however, she had to smoke five cigars a day.[14]

There are many examples of weirdness. Some relate to conditional gifts while other directions by testators relate to methods of the disposal of their remains and even the interim period.

A funeral home in Puerto Rico used a special embalming treatment to keep the body of 24-year-old, Angel Pantoja Medina, standing upright for a three-day wake in his mother's San Juan home.[15]

Donning a New York Yankees cap and sunglasses, Pantoja was mourned by relatives while propped upright in the living room.
"[Angel] wanted to be happy ending, standing," The owner of the Marin Funeral Home, Damaris Marin, told The Associated Press the mother asked him to fulfill her dead son's last wish. So, Angel was a real stand-up guy, even in death. Well, for 3 days, anyway.

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

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

As Justice Lindsay opined, "In an era in which many practitioners have not studied estate management and the law of succession, one challenge to which all

[14] Strange wills: The good the bad and the ugly. 12.6.2009, walterbristow.com
[15] Published August 19, 2008, FoxNews.com

practitioners in the area may be required to rise is articulation of the law, and principles of practice, in terms capable of speaking to the current generation.

Conclusion:

Since so many of you here know more than anyone else about probate and succession law, I thought I would take the opportunity of seeking some assistance with a problem I currently have.

Recently I was asked to look at giving an opinion on a set of facts provided by a client that faced an estate planning issue although his specific question was something else.

Mr Mohammed Rezonate lived in Lakemba, NSW. His instructions were along these lines:

Many years ago, I married a widow out of love. She had an 18 years old daughter. After my wedding, my father, a widower, came to visit a number of times, and he fell in love with my step-daughter.

My father eventually married her without my authorization

As a result, my step-daughter legally became my step-mother and my father my son-in-law.

My father's wife (also my step-daughter) and my step-mother, gave birth to a son who is my grandchild because I am the husband of my step-daughter's mother.

This boy is also my brother, as the son of my father.

As you can see, my wife became a grandmother because she is the mother of my father's wife. Therefore, it appears that I am also my wife's grandchild.

A short time after these events, my wife gave birth to a son, who became my father's brother-in-law, the step-son of my father's wife, and my uncle.

My son is also my step-mother's brother, and through my step-mother, my wife has become a grandmother and I have become my own grandfather.

In light of the above, I would like to know the following:…and here's where you can be of help…..

Does my son who is also my uncle, my father's son-in-law and my step-mother's brother fulfil the requirements for receiving childcare benefit…..and

Will you help me make a will that will prevent any claim on my estate by anyone but my mistress? Thank you for listening.