THE EASTERN SUBURBS LAW SOCIETY

THE ESLS LAWYERS LEARNING FOR CHARITY CONFERENCE

31 August 2019

THE CONCEPT OF "SPECIAL"ADMINISTRATION OF A DECEASED ESTATE

by

Justice Geoff Lindsay

Probate and Protective List Judge
Equity Division, Supreme Court of NSW

INTRODUCTION

1 Probate law and practice are idiosyncratic, replete with "rules" (many of which are rules of practice rather than rules of law) governed by the purpose for which the probate jurisdiction exists.

2 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 deceased person'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.

3 Many probate proceedings are non-contentious, essentially administrative in character. In that guise, the focus of decision making is most clearly on "estate administration", with an emphasis on the management of property.

4 The focus on "estate administration", and the associated emphasis on property management, are not absent from contentious probate proceedings.

5 Contentious proceedings may, for a time, appear to be subordinated to the competing claims of right asserted by litigants with an interest in the outcome of disputed questions about estate administration. However, the due administration of a deceased estate involves a public interest element (because the Court aims to give effect to the testamentary intention of a person who, by reason of death, is absent and because civil society requires that there be a reliable regime for succession to property), accompanied by procedures, essentially "inquisitorial" in character, which (on a proper exercise of probate jurisdiction) moderate adversarial litigation.

6 A study of the concept of "special" administration of a deceased estate provides an opportunity to view probate litigation in a broader perspective.

THE COURSE OF PROBATE PROCEEDINGS

7 The course of probate proceedings follows the pattern of other proceedings in the Supreme Court, with idiosyncratic features: *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [60]-[62]; *Mekhail v Hana* [2019] NSWCA 197 at [164]-[173].

8 In formal terms, proceedings generally commence with the filing of originating process (in the form of a summons or a statement of claim) and conclude with a grant of probate of a will or a grant of letters of administration of an estate. In common understanding, they may be thought to have broader endpoints. In that understanding, probate proceedings begin with the publication of a notice of intention to apply for a grant or the filing of a caveat (a warning to the Court not to make a grant without notice to the caveator), and they end with the filing of accounts – if accounts be required – when the administration of an estate is finalised.

9 The distinction between "final" and "interlocutory" orders of the Court, as understood in ordinary civil proceedings (particularly in the context of provisions, such as this section 101(2)(e) of the *Supreme Court Act* 1970 NSW, which govern rights of appeal) is not wholly absent from probate proceedings. However, much of the work done by that distinction in the

context of ordinary civil proceedings is done, in probate proceedings, by the concept of a "special grant of administration". This reflects the focus of probate proceedings on "estate administration" and their emphasis on the management of property.

THE NATURE OF A GRANT

10 A grant of probate or administration, in whichever form it takes, is a judicial act in the character of an order of the Court, as well as an instrument of title: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 785 at [228] -[233].

THE PROBATE DECISION-MAKING PARADIGM

11 The concepts which govern the decision-making paradigm of probate proceedings can conveniently be identified by reference to a classic probate text still consulted by specialist practitioners: the first (1911) edition of *Mortimer on Probate.*

12 In the First Part of that text (entitled "The Law") Chapter VIII deals with grants of probate, and chapters IX and X deal with grants of administration.

Grants of Probate

13 The treatment of grants of probate (in chapter VIII) focuses upon the distinction between a grant of probate "in common form" and a grant of probate "in solemn form".

14 **A grant of probate in common form** is sometimes described as "inherently interlocutory" because it can, with comparative ease, be revoked: eg, *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [8]. It is the form of grant routinely made administratively in non-contentious proceedings.

15 **A grant of probate in solemn form** is generally made only after the Court has received evidence satisfying it that a form of administration "binding the whole world" should be made because, *inter alia*, all persons who may have an interest in the estate the subject of a grant have been given notice of the

proceedings and a reasonable opportunity to intervene - so that (in accordance with a long established principle identified in *Osborne v Smith* (1960) 105 CLR 153 at 158-159) they are bound by the outcome of the proceedings.

16 As explained in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249], a grant of probate expressly issued "in solemn form" is a judicial statement that, on the Court's then assessment:

(a) all persons interested in the making of a grant (and, particularly, those with an interest adverse to the making of a grant) have been allowed a fair opportunity to be heard, with a consequence that principles about the desirability of finality in the conduct of litigation should weigh heavily on any application for revocation of the grant;

(b) on evidence then formally noticed, the Court is satisfied that the particular grant represents, consistently with the law's requirement that testamentary intentions be expressed formally, an expression of the deceased's last testamentary intentions, if any; and

(c) an order for a grant in solemn form appropriately serves the due administration of justice.

17 Although commonly expressed as "a *grant* (of probate of a will) *in solemn form*", the solemnity of the grant is a function of the nature and degree of proof attaching to *a will*, with consequences as to the amenability of the grant to an order for revocation. Strictly, one should speak of a grant of probate consequent upon proof of a will in solemn (or common) form, as *Mortimer on Probate* (1st ed, 1911) does at pages 276-277.

18 Because the concept of a grant "in solemn form" is a function of proof of a will, a will may (and logically should) be admitted to probate in solemn form as a

step towards a grant of probate, or a grant of letters of administration with the will annexed, to a named grantee. In practice, more often than not, a judge's orders for admission of a will to probate, and for a grant of probate or administration in respect of that will, run these two separate concepts together with an order to the effect that "a grant of probate of the will of the deceased be made to X in solemn form" or an order to the effect "that a grant of letters of administration of the estate of the deceased, with the will of the deceased annexed, be made to X in solemn form".

19 When a grant of administration is made without reference to a will, the language of "common form" and "solemn form" fades from view. The Court does not, on an intestacy, make a grant of letters of administration "in solemn form" even if the grant is made consequentially upon a determination (after a fully contested hearing) that a will was invalid. In such a case, the Court may make a declaration that a particular will was invalid as a step towards a grant of letters of administration, but the order authorising a grant of administration does not incorporate any form of reference to the invalid will.

20 Ordinary principles about "finality" in court proceedings are necessarily qualified, in probate proceedings, by the nature of probate jurisdiction. The circumstances in which a grant of probate may be revoked depend, in part, on the form of grant made and the purpose of a revocation order: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [284]-[317]. Any form of grant may be revoked if a valid will of the deceased entitled to admission to probate is discovered, or if the purpose of a revocation order is not to displace a will, but to replace the grantee with an administrator better able to administer the estate.

21 Probate proceedings have an administrative character which manifests itself, even in contested proceedings for a grant of probate of a will or contested proceedings which culminate in a grant of letters of administration. That is evident when, at the end of a contested hearing, in making orders which determine the parties' competing claims (and are, accordingly, "final" rather than "interlocutory" for the purpose of section 101 of the *Supreme Court Act*

1970), the Court: (a) orders that there be a grant; and (b) orders that the proceedings be referred to the Probate Registrar for "completion of the grant", subject to the Probate Rules, with or without dispensation from particular requirements of the Rules (eg, in relation to the provision of an administration bond).

22 The judicial phase of proceedings having concluded, there is an administrative phase that must be dealt with before a grant (signed and sealed by a Registrar) is issued. This is commonly not understood by many lawyers. An order that a grant be made does not, of itself, clothe an executor or administrator with the authority to administer an estate. That authority comes with the issue by the Registry of an instrument of grant.

23 Once a grant of probate is made ("issued"), an executor's title is derived from the will thus "proved" to be the last will of the deceased. By contrast, the title of an administrator is said to be derived from the Court's grant of administration: *Gertsh v Roberts*; *The Estate of Gertsh* (1993) 35 NSWLR 631 at 635B.

Grants of Administration

24 Chapter IX of *Mortimer on Probate* (at pages 307-308) provides a convenient summary of the various kinds of grants of administration traditionally available upon an exercise of probate jurisdiction (with emphasis added):

> "Grants of administration are either general or special.
>
> 1. **General grants of administration** are made when a man dies intestate, and in certain other cases subsequently to be enumerated.
>
> 2. **Special grants of administration** are classified according as they are special (a) by reason of the nature of the estate which is to be administered, and (b) by reason of the limited nature of the grant.
>
> (a) Grants which are special by reason of the nature of the estate which is to be administered.
>
> The following grants fall under this heading:

(i) Administration *cum testament annexo*, which is granted when the deceased has made a will but has appointed no executor who is able or willing to act.

(ii) Administration *de bonis non administrates*, which is granted when the sole or sole surviving executor has died intestate after a grant of probate has been made to him, or where the administrator has died after obtaining a grant; in either case without having completely administered to the estate.

(b) **Grants which are special by reason of the limited nature of the grant** may be classified according as they are limited (1) in respect of the time for which they endure, or (2) in respect of the property to which they extend, or (3) in respect of the purpose for which they are granted.

(1) Grants limited in respect of the time for which they endure. Of this kind the following are the most important:

(i) Administration to an attorney for the use and benefit of the person entitled, when the latter is abroad.

(ii) Administration *durante minore aetate*, which is granted when the executor or the person entitled to a grant of administration is a minor.

(iii) Administration for the use and benefit of a lunatic, which is granted when the executor or person entitled to a grant of administration is a lunatic, or becomes a lunatic after grant obtained.

(iv) Administration for the use and benefit of a convict.

(v) Administration *pendent lite*, granted during the pendency of a lawsuit in the Probate Division.

When these temporary administrations cease by the death of the administrator during the currency of his office, a second or *cessate* grant of administration is made.

(2) Grants limited in respect of the property to which they extend are of various kinds.

(3) Grants limited in respect of the purposes for which they are granted are chiefly administrations *ad litem*, limited to proceedings in Chancery; administrations *ad colligenda bona*, limited to collecting and preserving the property of the deceased until a general grant can be made; and administations *durante absentia*, limited for certain specified purposes, or to certain property, when the executor or administrator is abroad.

> When administration limited to a particular part of the deceased's estate is granted, or administration limited for a particular purpose has issued, the persons entitled to the general grant are given administration *caeterorum.*
>
> Under certain circumstances a grant of administration "save and except" certain property of the deceased is made".

25 Some forms of grant of administration are analogous to a grant of probate insofar as they extend to the whole of a deceased estate and endure until the death of the grantee. The most conspicuous illustration of this is a grant of letters of administration, with the will annexed, to a person not named in the will as an executor.

26 However (as explained in chapter X, on page 363, of *Mortimer on Probate*), "[there] are … other forms of administration which are limited either in respect of the time for which they endure, or of the property to which they extend, or of the purposes for which they may be exercised".

27 In practice, when an application is made for a "special grant of administration" what is generally sought is a limited, interim grant (made to protect an estate in some way prior to a full grant) in the character of:

(a) a grant *pendente lite* (ordinarily pursuant to section 73 of the *Probate and Administration Act* 1898 NSW), limited to protection of an estate during contested probate proceedings which go to the validity of a will or a grant of probate.

(b) a grant *ad litem* (commonly pursuant to section 74 of the *Probate and Administration Act* 1898), limited to the commencement and conduct of proceedings, other than probate proceedings and ancillary business.

(c) a grant *ad colligenda* (commonly pursuant to section 74 of the *Probate and Administration Act*) limited to the collection and preservation of estate assets (including the conduct of a business) pending anticipated delays in obtaining a full grant.

28 Use of a Latin tag in the description of these forms of "special grant" may be a convenient way of describing the circumstances in which a special grant is required; but, as a downside, it tends to obscure the nature and limits of such a grant.

29 These "special grants" are analogous to an order for the appointment of a receiver and manager of property upon an exercise of general equity jurisdiction or under legislation such as section 67 of the *Supreme Court Act* 1970. The powers of a "special administrator" must be specifically defined by an order of the Court.

30 Whatever the form of a grant of special administration, the powers of a special administrator are ordinarily set out *in the order* by which the administrator is appointed, *or in a supplementary* order.

31 The nature and extent of powers conferred on a special administrator will depend upon the circumstances of the particular case.

32 If there is a limit to what powers might be conferred on a special administrator, it is likely to be found in a need to preserve an estate pending its due administration pursuant to a full grant. Although the Court might authorise an administrator to make an interim distribution of estate assets, a grant of such authority cannot lightly be made in case persons who may be found to have an entitlement against, or in respect of, an estate in the course of its due administration might be prejudiced. An order for special administration is unlikely, therefore, to extend to authorisation of any form of "final" distribution.

33 Procedurally, a distinction between a grant of probate or letters of administration (on the one hand) and (on the other hand) a special grant of administration is that, whereas a judge who authorises the former does so by the orders which provide for a reference to the Probate Registrar "to complete the grant", a judge who appoints a special administrator simply makes the order effecting the grant of special administration without referring the proceedings to the Probate Registrar.

CONCLUSION

34 An appreciation of the purposive character of the Supreme Court's probate jurisdiction, the nature of estate administration, and the paradigm of decision-making upon an exercise of probate jurisdiction (whether directed towards a grant of probate or a grant of administration) is required in order to understand the nature and purpose of a "special" grant, and probate practice referable to the appointment of a "special" administrator.

35 An illustration of the inter-connectedness of these elements of probate decision-making is the possibility that, in an appropriate case, a grant of probate in common form (with an acknowledgement of all interested parties that it is revokable if the will the subject of the grant is contested, and undertakings as to preservation of estate assets pending the determination of competing claims) may serve the due administration of an estate better than any form of special grant.

36 Moving beyond the traditional paradigm of probate decision-making, a better understanding of "special" grants of administration designed to protect an estate in some way prior to a full grant may be had by recognising a special grant, conceptually, as akin to an order for the appointment of a receiver and manager with specified powers.

GCL

Revised 3 September 2019