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“Heir Today, Gone Tomorrow: The Whimsical World of Succession Legalities”

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Jennison v Jennison is a decision of the Court of Appeal about probate in New South Wales, delivered on 21 December 2022. It is arguably the most interesting decision of the last year. Like most decisions on probate and succession, it will never be published in the New South Wales Law Reports. But that is for an unusual reason.

The usual reason has two aspects. The first is that the sheer multitude of decisions in this area swamps the very limited capacity of the authorised law reports. By way of sample, from 1 January 2022 until the end of August 2023, some twenty months, the Supreme Court (including the Court of Appeal) delivered 125 decisions (116 from the Supreme Court, 9 from the Court of Appeal). Of course, that is nothing compared to the way in which probate and succession decisions dominate the output of the Supreme Court. By some measures (which are crude but not unattractive to some engaged in analysing courts’ productivity), succession runs rings around the other jurisdictions. The Annual Review shows that some 35,000 civil matters are filed and disposed of each year, but around 26,000 of those are applications for probate, the overwhelming majority of which are uncontroversial and resolved without a hearing and by a deputy registrar.¹ The fact

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¹ See p 32 and pp 48-54 of the 2021 Annual Review (760 civil and criminal appeals, 82 criminal filings plus 2173 applications for bail, some 2980 civil filings in the Common Law Division, some 3740 filings in the Equity Division exclusive of 26,663 applications for grants of probate, letters of administration or

that by one measure almost 80% of the Supreme Court's output is grants of probate says very little about what most judges and most litigants spend most of their time doing. One must always be careful with statistics (a topic to which I shall return).

The second aspect is that the overwhelming majority of decisions in the area of succession is no different from the overwhelming majority of decision in any other area – they are of no interest to anyone aside from the litigants and their advisers. Most decisions of most courts are simply applications of established principle to facts found. When we have created software which can perform the role of an editor of the New South Wales Law Reports, identifying that small minority of judgments which are of genuine interest and value to the profession, then we will have come much closer than we presently have to true artificial intelligence (another topic to which I shall return).

One reason for the foregoing is to explain my methodology. I was invited to give a review of recent decisions, but there is a range of ways in which that can be done. One is to spend 90 seconds talking about each decision, as if each were of equal value. Another is to pick the decisions of interest, and focus on them. There is merit in looking at the body of decisions as a whole, and there is also merit in looking at a selected minority of decisions. This paper does both.

A. The Court of Appeal's decisions on succession over the last three years

You will see from the table annexed to this paper that of the 19 appeals concerning succession which went to hearing in the Court of Appeal in the last 3 years, only 3 were allowed. Although the sample space is quite small, the ratio of 16:3 is strikingly unbalanced in favour of dismissing appeals. Other things being equal, one would expect that around half of the appeals would be allowed. Sophisticated litigants would not bring hopeless appeals, and would compromise indefensible appeals, and it might be expected that the balance would be evenly distributed. That seems not to be the story told by the statistics. Perhaps this is because most succession cases are compromised (as they should be) with the result that of the small minority which go to trial, the preponderance of

resealings). The Review notes at p 31 that "The volume of uncontested probate cases is so large that, if included, it would mask the important trends for all other cases in the Equity Division".

litigation is driven by familial enmity, which will proceed without regard to the prospects of success, and thus this was an area where a larger number of speculative or hopeless appeals were prosecuted.

But 19 appeals is not very many, and so I collected a larger sample. In the decade from September 2013 to August 2023, there were 72 decisions of the Court of Appeal with “Succession” in the catchwords, of which 6 were procedural matters mostly concerning special costs orders, but 66 were principal judgments. Of the 66, 38 were dismissed, and 28 were allowed in whole or in part. That is much closer to the even distribution one might expect.

And, if one splits the decade into an initial period of 7 years, followed by 3 Covid blighted years, one sees that in the 47 principal judgments given by the Court of Appeal in the first seven years, 22 were allowed and 25 dismissed. That is the sort of result one might expect from tossing a coin, and contrasts very starkly with the 3:16 result for the concluding 3 years. (And of the 13 in which I participated, 8 were allowed and 5 dismissed, which seems well within a normal distribution.)

That tends to suggest that rather than there being something unusual about succession appeals, one should consider just how unlikely a success rate of 3 out of 19 over the last three years actually is. If one assumes rather simplistically that the outcome of an appeal is binary, and half are allowed,² that is like asking how likely it is if you toss a coin 19 times, you will get 3 heads. And, because it was dinner time, I asked my 22 year old son. His immediate thought was to ask Chat-GPT, and he did just that.

The software in some ways is very sophisticated. As you will see, it correctly proceeded on the basis that my son’s typographical error, asking it about “flipping a coil [sic] 19 times” was a reference to flipping a *coin*. However, a problematic feature is that the software provides a different answer to the same question. That works well if it is being asked to generate advertising blurb to sell a house, but it is a large problem if what Gageler J

² Of course, many appeals contain multiple issues, and a not uncommon outcome is that an appeal is allowed, but only on one point, which may be the main point, or an insignificant point.

termed (in a completely different context) the correctness standard applies.³ One thing Chat-GPT does not guarantee is accuracy. The results are attached, and as you can see the answers are not all the same. Even those of you who are bemused by probability will probably agree that there can only be one correct answer to the question.

In fact the answer is around 0.185% (${}^{19}C_3 / 2^{19}$), and it is not difficult to explain why,⁴ and it is interesting to see how the verbose and superficially plausible explanations created by the generative AI demonstrate a lack of understanding. Chat-GPT 3.5 is a computer program which puts words together in ways which often seem intelligent. It may be closer to passing a Turing test than anything which has preceded it. It is especially good at generating catchy (and often cringe-worthy) titles to judges' speeches (see the annexure). However, the software has no knowledge of the world, although it has an immense knowledge of the ways in which humans have used words in all kinds of situations so long as they have been posted on the internet. Consistently with this, it makes basic arithmetical errors – the fourth example is an odd way of answering the question, but every line in the reasoning is correct, save for the last because neither the product of 969 and $0.5^{16} * 0.5^3$ (which is what it has written) nor the quotient of those numbers (which is what the reasons leading up to that line suggest, and which is also the correct answer) is anything like 0.0028.

But if the question is how much of an outlier is the result of 3 appeals allowed and 16 dismissed, what I really want to know is how unlikely is it if I am tossing a coin 19 times for there to be 16 or more results one way, and 3 or fewer results the other way. The answer to that is just over 0.4%, or around 1 in 230.⁵ That is quite unlikely, but I think it just goes to show how careful one must be in drawing conclusions from statistics. We are instinctively attracted to the idea of seeing meaning in the data, even where the only thing there is is noise.

³ See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [35]-[50].

⁴ The problem is equivalent to asking how many different combinations of 3 heads and 16 tails there will be if 19 coins are placed in a row. There are obviously 2^{19} ways in which the coins may be lined up, and (albeit less obviously), of those there are ${}^{19}C_3$ which have precisely 3 heads.

⁵ It is $({}^{19}C_0 + {}^{19}C_1 + {}^{19}C_2 + {}^{19}C_3) \times 2 / 2^{19}$. If that is too mysterious, see <https://www.omnicalculator.com/statistics/binomial-distribution>.

There's one final thing to say about the table of cases as a whole. You won't see *Jennison v Jennison* on it, that interesting late December Court of Appeal decision on New South Wales probate. But that's not because the table is inaccurate or incomplete.

B. The three decisions where appeals were allowed

The foregoing may seem a long way removed from a review of recent succession cases. Whatever statistical conclusion you might draw, it seems worthwhile to look briefly at the three decisions in the last three years where an appeal was allowed.

***Lim v Lim* [2023] NSWCA 84**

In *Lim v Lim* [2023] NSWCA 84 the Court of Appeal overturned the decision at first instance that an 89 year old testator lacked capacity to make a new will a month before her death. Kirk JA, with whom Bell CJ and Griffiths AJA agreed, commenced with four propositions of general application.

The first was that the *Banks v Goodfellow* formulation should not be read like a statute. That is a recurring theme in recent decisions. It is decidedly strange that a test in the 21st century should be formulated in terms of "insane delusions", and indeed that medical practitioners should be expressing opinions based on Sir Alexander Cockburn's formulation in one memorable part of a lengthy reserved judgment which cites extensively including from contemporary French, German and Italian jurists (including Troplong, Sacaze, du Saulle, Demolombe, Castlenau, Hoffbauer and Mazzoni) and United States decisions. I am as sure as one can be of a judge who died almost a century and a half ago that he would be bemused that we continue to cite his reasons in a decision which was as up to date with medical and legal developments as he could make it as at 1870. There have, after all, been a series of decisions of the High Court emphasising the need not to read the words of a judgment as if they were the words of a statute.⁶ These cases have regularly endorsed a passage from Gummow J's reasons written for the Full Court of the Federal Court a year before he was elevated to the High Court, in *Brennan v*

⁶ *Comcare v PVYW* (2013) 250 CLR 246; [2013] HCA 41 at [15]-[16]; *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307; [2014] HCA 15 at [32]; *Military and Compensation Commission v May* (2016) 257 CLR 468; [2016] HCA 19 at [52].

Comcare:⁷

The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.

That said, it seems unlikely that any Australian court will, or could, replace *Banks v Goodfellow* on its own initiative. If and when Australian Parliaments find time to do so, they may draw upon legislation such as the *Mental Capacity Act 2005* (UK).

The second point made by Kirk JA is that the issue is one of *capacity* and it “need not be shown that the testator in fact turned their mind to, for example, the extent of their property”.⁸

The third is a practical point: the simpler the will and the less surprising its contents, the easier it may be to establish both testamentary capacity and knowledge and approval.⁹ That is obvious, but has consequences for solicitors involved in taking instructions – the questions asked and recommendations for mental assessment may depend not merely on the acuity of the client, but also the nature of the will. I suspect that practitioners who are actually involved in drafting wills do this instinctively.¹⁰

Fourthly, Kirk JA also doubted the utility of the familiar language of presumptions and shifting burdens and suspicious circumstances. He wrote:¹¹

⁷ (1994) 50 FCR 555 at 572.

⁸ At [8], citing *King v Hudson* [2009] NSWSC 1013 at [51] per Ward J; *Dickman v Holley* [2013] NSWSC 18 at [159] per White J; *Simon v Byford* [2014] WTLR 1097; [2014] EWCA Civ 280 at [40]-[41].

⁹ At [9]-[10].

¹⁰ Cf the wisdom in *Macteldir Pty Ltd v Dimovski* [2005] FCA 1528; 226 ALR 773 at [34]: “The Barrister had this view intuitively. He had practised for over 20 years. He did not look up the Rules or research the position for this precise proposition beyond what might be called the Darling Downs line of authority. He was not aware of Order 35 rule 11. That was less than perfect, but his intuitive appreciation was soundly based. It is understandable that he was taken by surprise by the respondents’ proposition. Not all legal practice is based on textual support of thought processes. Experience and knowledge can, sometimes, entirely legitimately, provide the foundation for prudent and proper action”.

¹¹ At [13]-[15].

Although it is not necessary to resolve the issue here, there is reason to doubt the utility now of the language of presumptions, shifting burdens, and suspicious circumstances. Writing extrajudicially, Justice Lindsay has observed:

Although conventional, this style of language does not sit comfortably with the way a modern probate suit is heard by a judge sitting alone, without a jury, receiving almost all the evidence on both sides of a question by affidavits, upon which deponents are selectively cross examined. In the modern form of “judge alone (case managed) trial” it is generally artificial, at least at a final hearing, to analyse a case in terms of a “prima facie case” or dispositive “presumptions”. By the time a judge is called upon to determine a case, it generally must be determined on all the evidence then before the Court, drawing whatever inferences may be available from that evidence. ...

With specific reference to testamentary capacity, in *Carr v Homersham*, at [47], Basten JA explained:

To speak of there being a “doubt” as to testamentary capacity is to say little more than that a real issue has been raised on the evidence, which requires the resolution of the court. Unless such an issue has been raised, testamentary capacity need not be addressed; its existence will be presumed. Once the issue is raised, the court must resolve it; that must be done by a consideration of all the evidence and the inferences which may be drawn from it. It is true that the court must be affirmatively satisfied as to testamentary capacity, but in doing so, it should be alert to the fact that to find incapacity and thus invalidate a formally valid will is, in the words of Gleeson CJ, “a grave matter.” A doubt which does not preclude the probability that the testator enjoyed testamentary capacity cannot warrant a finding of invalidity.

Much the same may be said of knowledge and approval (see also *Mekhail v Hana* at [164]-[173]).

Thus there are now (at least) three decisions of the Court of Appeal deprecating the traditional approach of shifting onuses and suspicious circumstances. In *Mekhail v Hana* I referred to English decisions which have departed from the traditional approach.¹² Once again there is no little irony, or so it seems to me, that whereas in Australia we continue to apply somewhat technical rules about shifting onuses and suspicious circumstances, in England – which is the source of those rules – they seem no longer to be applied. In *Gill v Woodall*,¹³ Lord Neuberger MR approved a single stage approach, applicable to cases where, as here, there has been a lengthy trial on all issues. His Lordship said:¹⁴

¹² [2019] NSWCA 197.

¹³ [2011] Ch 380; [2010] EWCA Civ 1430.

¹⁴ Above, at [21]-[22].

The Judge approached the issue of knowledge and approval on a two stage basis. He first asked whether Dr Gill had established sufficient facts to “excite the suspicion of the court”, which really amounts to establishing a prima facie case that Mrs Gill did not in fact know of and approve the contents of the Will. Secondly, having held that Dr Gill had excited the suspicion of the court, he then turned to consider whether or not those suspicions were allayed by the RSPCA, who were of course supporting the Will. This approach accords with Parke B’s analysis in *Butlin* ... and it is reflected in the approach in a number of other cases.

Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix’s knowledge and approval appears to me to be questionable. In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs LJ in *In re Crerar* (unreported) but see (1956) 106 LJ 694, 695, cited and followed by Latey J in *In re Morris* [1971] P 62, 78, namely, that the court should:

“consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.”

This has been reiterated in *Greaves v Stolkin*¹⁵ and *Simon v Byford*.¹⁶ Although it is exceptionally difficult as an outsider to be confident of how this translates into practice, it seems to be applied at the coalface.¹⁷ It is also consistent with a 2022 decision of Lindsay J to which I shall come. Naturally it is necessary for the other side to appreciate that there is a challenge based on suspicious circumstances, but in most contested cases that will be clear from the exchanges between the parties prior to trial.

Such passages are also useful to the profession more broadly, flagging the possibility of a

¹⁵ [2013] EWCA 1140; [2013] WTLR 1793 at [68]-[73].

¹⁶ [2014] EWCA Civ 280; [2014] WTLR 1097 at [47].

¹⁷ See for example *Ingram v Abraham (Re Estate of Joanna Louise Abraham)* [2023] EWHC 1982 (Ch) at [11]-[13] and [261], *Todd v Parsons* [2019] EWHC 3366 (Ch) at [149]-[152] and *Reeves v Drew* [2022] EWHC 159 (Ch) [336]-[338], including at [338] “In my view, it is not helpful to consider this question by reference to shifting burdens of proof”.

future change in the law. Changes in judge-made law are thereby made less jarring, especially in jurisdictions which eschew prospective overruling. It is an important, albeit under-appreciated, aspect of judicial technique.¹⁸

Finally, Kirk JA observed that whether *Briginshaw* applies in a probate cases depends on the facts in issue. It is one thing to say that an ageing testator has been preyed upon, it is another merely to assert that there was a lack of capacity.

The primary judge, partly influenced by the principles in *Briginshaw*, was unable to be satisfied of either capacity or knowledge and approval (principally, the former). After a careful review of the evidence, the Court of Appeal found to the contrary. The task of the Court of Appeal is to conduct a real review of the trial, and findings of fact are not immune from that review. It is obvious, but perhaps worth saying, that a binary issue such as whether a testator lacked competence, or whether a claimant was in fact in a de facto relationship with the deceased for the purposes of a claim for family provision, is much more susceptible to appellate review than a discretionary decision such as the amount of family provision to order.

***Sun v Chapman* [2022] NSWCA 132**

The main issues in *Sun v Chapman* [2022] NSWCA 132 was whether the primary judge had erred in concluding that the de facto relationship between the deceased and the plaintiff had ended prior to his death, for the purposes of a claim for family provision, and if she were not, whether there were factors warranting making a family provision order on the basis of a close personal relationship. Brereton JA and I considered that it was insufficient, in an appeal raising a factual challenge as to whether a criterion for a claimant to be an eligible person for the purposes of s 57(1) of the *Succession Act* has been met, for a respondent to submit that the issue was an evaluative one, and is therefore to be accorded the deference given to a discretionary decision which admitted of a range of lawfully correct outcomes. White JA did not go so far, but doubted that a decision proceeding on the contrary basis, *Yesilhat v Calokerinos* [2021] NSWCA 110, was correct,

¹⁸ See further M Leeming, “Penalties in Australia, the United Kingdom and Singapore – Storm-Warnings, Statutes and Style” (2022) 51 *Australian Bar Review* 377-390.

stating at [115]:

whether the parties are or were in a de facto relationship is not a discretionary decision. Although the decision involves matters of evaluation, the evaluation is not of the strength of an applicant's claim on a testator's testamentary bounty including his or her moral claim on the deceased and present and future needs; but rather requires a characterisation of facts as found against the statutory phrase as to whether the parties were living together as a couple having regard to the indicia provided for in s 21C. Such a question appears to me to be more analogous to a question as to whether, at any particular time, there was a relationship of dependency between the applicant and the deceased (*Succession Act* s 57(1)(e)(i)). It has been held that the appellate standard of review in *Warren v Coombes* (1979) 142 CLR 531; [1979] HCA 9 rather than *House v The King* is applicable to that issue (*Page v Page* [2017] NSWCA 141 at [39] and [41] per Leeming JA (with whose reasons on this issue Basten JA agreed (at [21])); *Spata v Tumino* (2018) 95 NSWLR 706; [2018] NSWCA 17 at [53]-[55] per Payne JA (with whom Macfarlan JA (at [1]) and Sackville AJA (at [140] agreed)).

However, his Honour did not need to express a concluded view, because even if it were necessary to show *House v The King* error, such error was made out.¹⁹

At the factual level, the deceased died aged 97, and Ms Sun was some forty years his junior. They had met at a caravan park, and some evidence suggested she had accepted his invitation to live with him as his carer when he was in his late 70s. She said they had had an intimate relationship for about four or five years after they were living together. The fact that the plaintiff and deceased had arguments (including arguments resulting in the police being called), that the deceased threatened (but never acted upon the threats) to obtain a substitute carer, and that the deceased and the plaintiff ceased to share a home when he was admitted into hospital (where she regularly visited him) were, in Brereton JA's words, "not atypical of, let alone inconsistent with, a marriage-like relationship". Brereton JA also added at [194] that "whether the basis of Ms Sun's eligibility is a subsisting de facto relationship or a close personal relationship makes no practical difference in this case: in either case, no one had a stronger moral claim on the deceased than Ms Sun". White JA and I were of the same view.

The class of de facto relationships, like the class of marriages, is a broad one, and while there are some which might be considered "normal" there are others which have features

¹⁹ More recently, see Bell CJ's further comments in *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93 at [2]-[5] on this nuanced topic.

that seem unusual. That does not mean that they fall outside the class. “Human relationship are infinitely mutable”, and involuntary and enduring separation, as a couple grow old, will not entail that a relationship has ended.²⁰

***Bassett v Bassett* [2021] NSWCA 320**

In *Bassett v Bassett* [2021] NSWCA 320 there was the not unfamiliar case of a couple who lived on the land, with one son who worked alongside his parents and who had been given substantial tracts of land while his parents were alive, but who was substantially left out of the will, leading to claims based on estoppel and, in the alternative, for family provision. There was also a large question as to the (large) costs generated over years of litigation. And there were important interrelationships between costs and the substantive claim. The equitable and statutory claims were split, and the adult son failed in his estoppel claim, resulting in an adverse costs order – which was then relied upon in order to establish a need for family provision. Further, the result of the costs spent by all members of this Tolstoyan family was that the farm (or large portions of it) would have to be sold.

The joint judgment of the Court of Appeal overturned an order for provision in favour of the son, and gave some advice that is surely known to all in this audience, but nonetheless bears repetition:²¹

But the topic of costs (which have necessarily continued to mount as a result of the appeal and application for leave to cross-appeal in which all parties were represented by senior counsel) cannot be left without noting that this case stands as yet another depressing although salutary example of the manner in which claims on the bounty of a deceased parent by adult siblings can be ruinous in a host of ways, as has frequently been commented upon by judges of the Equity Division and in this Court: see, for example, *Neale v Neale* [2015] NSWCA 206 at [36]; *Harris v Harris* [2018] NSWCA 334 at [8]; *Sung v Malaxos (No 2)* [2015] NSWSC 290 at [12]–[13]; *Olsen v Olsen* [2019] NSWSC 217 at [48]; *Katramados v Hasapis (No 2)* [2018] NSWSC 1604 at [42]; *Clarke v Croucher* [2015] NSWSC 230 at [38]; and *Poche v Poche* [2020] NSWSC 835.

It is not merely the financial burden of the litigation. In the present case, family relations have become embittered, unlikely ever to be repaired, and at least two of the four siblings gave evidence as to the seriously adverse health consequences they had suffered as a result of the proceedings. One also attributed a relationship

²⁰ Cf *Fairbairn v Radecki* [2022] HCA 18; 400 ALR 613 at [28] and [37].

²¹ At [32]–[35].

breakdown to the pressure of the proceedings.

The powerful corollary of this is the desirability of early mediation and the need for parties to appreciate at the outset of such proceedings the importance of compromise and the potentially devastating consequences of attritional internecine warfare through the courts. This Court cannot ordinarily prevent parties seeking relief under the *Succession Act* but, as the primary judge observed at the end of the costs judgment (see [348]), parties in family provision cases should not proceed on the assumption that their costs will necessarily be indemnified out of the estate nor should parties assume, when representing an estate but ultimately in furtherance or defence of their own personal interests, that they will recover their costs even if the claim is unsuccessful.

Practitioners in this area should ensure that their clients are fully cognisant of these hard realities when considering whether to embark upon family provision litigation, or the desirability of compromise.

C. Three recent decisions where appeals were dismissed

Ritossa v Ritossa [2023] NSWCA 14

Ritossa is an unusual interlocutory appeal from a decision to appoint an interim administrator pursuant to s 73 of the *Probate and Administration Act* over the deceased's estate (principally, two lots of land at Maroubra) pending a contested probate hearing between two brothers who were the only children of the deceased. In light of delays in the litigation, an administrator was appointed. Section 73 is expressed in general terms. Yet in *Gooley v Gooley* Williams J had said:²²

In my opinion, ... [a search for] “*necessity*” or “*sufficient reason*” for the appointment of an administrator *pendente lite* is directed to a need for the Court to be satisfied that, in all the circumstances of the case, the assets of the deceased estate are in some jeopardy, and the appointment of an administrator *pendente lite* will remove, or at least reduce, that jeopardy. As the plaintiffs' submissions acknowledged, it is not necessary that the jeopardy arise from some misconduct on the part of a person dealing with or claiming to preserve the assets of the deceased estate. ...

That statement appears to have been seized upon by one of the brothers, leading to the primary judge saying:

A court giving effect to the purposive nature of probate proceedings, and the particular object of the appointment of an interim administrator pending the determination of a probate suit, is not required, as a condition precedent to the

²² [2020] NSWSC 798 at [125].

appointment of an administrator, to make a formal finding that an estate is or would be “in jeopardy” absent the appointment of an administrator. Reference to an estate being “in some jeopardy” is a convenient way of giving practical expression to a perceived “necessity” or “sufficient reason” for engagement with the object of the appointment of an administrator. This requires an exercise of judgement in each case, not a formalistic search for “jeopardy”, as the plaintiff in the present proceedings urged upon the Court. I do not understand Williams J to have suggested otherwise.

No question of principle or public importance or a reasonably clear injustice going beyond the merely arguable was made out, and so leave was refused. However, Bell CJ added the following comments about the broad power to appoint an administrator:²³

Section 73 of the Act is expressed in broad terms and, as has regularly been said by the High Court and this Court, it is important not to “gloss” statutory provisions: see, for example, *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423; [2006] HCA 45 at [61], citing *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 180 which rejected placing “an unwarranted gloss upon the relatively plain words of the Act”; *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62 at [89]; *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180; [2006] HCA 22 at [28], [107], [110] and [113]; *Totaan v R* [2022] NSWCCA 75 at [78].

This is especially so where powers conferred on a superior court are concerned: see *Owners of Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 where it was said that “[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words”; see also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 and 290; [1988] HCA 13; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203 and 205; [1992] HCA 28 (*Knight*). As Gaudron J observed in *Knight* at 205, the “necessity for the power to be exercised judicially tends in favour of the most liberal construction”.

The primary judge was correct to emphasise the broad nature of the power to appoint an interim administrator, and to resist the notion urged upon him by the Applicant of the need to find some tangible evidence of “jeopardy” to the estate as a pre-condition to, or prerequisite of, appointment.

It was quite wrong to rely upon references to “jeopardy” in *Greenway v McKay* (1911) 12 CLR 310, a case on the inherent jurisdiction rather than a statutory jurisdiction, and which concerned the appointment of an administrator *ad litem* as opposed to *pendente lite*. Bell CJ said:²⁴

²³ At [40]-[42].

²⁴ At [44].

“Jeopardy” to an estate may present the or a paradigm case for the appointment of an interim administrator but that concept should not be given the status of a or the criterion for the exercise of the discretion reposed in the Court to appoint an interim administrator, whether in its inherent jurisdiction or when exercising the power conferred by s 73 of the Act.

Gleeson JA and White JA agreed. Similar reasoning may be seen in *Chisak v Presot* [2022] NSWCA 100 at [57], where White JA doubted that it is legitimate to read the phrase “partly dependent” as requiring that the dependency be “significant” as opposed to “more than minimal” in s 57(1)(e)(i) of the *Succession Act*.

***Daley v Donaldson* [2022] NSWCA 96**

Daley v Donaldson [2022] NSWCA 96 was another interlocutory appeal from the refusal of the primary judge (Hallen J) to make consent orders following a mediation, from which the executrix had subsequently resiled. There were three children of the deceased father, two of whom were estranged, and had been brought up by their mother and stepfather, and separated from their biological father shortly after birth. They received small legacies under his will. The executrix was their sister. Importantly, the applicant had formally been adopted by the mother and stepfather, in Queensland, although the full details of that only came to light after the mediation. At the forefront of the appeal was the effect that adoption had upon the plaintiff’s claim. The Queensland adoption was recognised by s 102 of the *Adoption Act 2000* (NSW) and taken to have the effect of an adoption under the New South Wales statute. Attention then turned on ss 95 and 97:

95 General effect of adoption orders (cf AC Act s 35 (1) and (4))

(1) An adoption order made by the Court gives sole parental responsibility for a child to the person or persons named in the order (***the adoptive parent or adoptive parents***).

(2) For the purposes of the law of New South Wales, if an adoption order is made—

(a) the adopted child has the same rights in relation to the adoptive parent, or adoptive parents, as a child born to the adoptive parent or adoptive parents,

(b) the adoptive parent or adoptive parents have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents,

(c) the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child,

(d) the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child.

Note—

For example, for the purposes of a distribution on intestacy, an adopted child is regarded as a child of the adoptive parent or parents and the child's family relationships are determined accordingly. See section 109 of the *Succession Act 2006*.

(3) Despite subsection (1), an adopted child does not cease to be regarded in law as the child of a birth parent or adoptive parent, and the birth parent or adoptive parent does not cease to be regarded in law as the parent of the child, if an adoption order is made in relation to a step parent with whom the birth parent or adoptive parent is living.

(4) For the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if an adoption order or discharge order had not been made continues to exist for the purposes of that law in addition to any relationship that exists under this section by virtue of the order.

...

97 Effect of orders as regards property (cf AC Act ss 35 (2) and (3) and 36)

(1) Section 95 does not have effect so as to deprive an adopted child of any vested or contingent property right acquired by the child before the making of the adoption order."

The plaintiff's forensic goal was to avoid the operation of s 95(2)(d), whereby he ceased to be regarded in law as the child of the deceased and therefore not an eligible person within s 57(1)(c) of the *Succession Act*. He drew upon s 95(3), which preserved the status of a birth parent if the adoption was by a step parent. But this was held only to apply to birth parents with whom the step parent was living. He also said that his entitlement to make a claim had existed prior to the adoption, and was preserved by s 97, and that argument was also rejected.

There were two matters of more general importance. One was a confirmation that the Court must, even if the parties agree, be satisfied that the preconditions to making a family provision order are made out. The second is that after the primary judge reserved, the plaintiff supplied further evidence and, by implication, applied to re-open. It was said at [54] that:

It is important that parties and practitioners, bound as they are by the duties in s 56

of the *Civil Procedure Act*, attend to the significance of achieving finality at an interlocutory hearing of what was, after all, a relatively small claim in relation to a relatively small estate. It should not be thought that it is ordinarily appropriate, when directions are made permitting supplementary submissions on a point which should have been advanced at the hearing, to make an informal application to re-open, without a motion, and unaccompanied by a supporting affidavit explaining why after a hearing which occupied most of a day it was sought to re-open, on an issue which had been explicitly raised by the primary judge.

***Hana v Shad Legal Services Pty Ltd* [2021] NSWCA 258**

Thirdly, I shall draw to your attention *Hana v Shad Legal Services Pty Ltd* [2021] NSWCA 258, which is not a decision on succession law *per se*, but a professional negligence appeal where the breach arose out of a probate case. In August 2019, the Court of Appeal allowed an appeal and set aside a contested grant of probate in a knowledge and approval case.²⁵

The testator had met with the solicitor, once, and in the presence of the new sole beneficiary's mother, prior to making his most recent will. The new executrix and her son had lied to the solicitor about their relationship with the deceased, thereby preventing him from making appropriate inquiries as to why the deceased was disinheriting her family. The executrix thereupon sued the solicitor for negligence for failing to take reasonable care in the preparation and drafting of the will. The pleading was struck out as an abuse of process, with leave to replead, on the basis that as drafted it challenged the ultimate finding in the probate proceedings, namely, whether "the testator or testatrix knew the contents of the [2014 Will] and appreciated its effect, so that it can be said that the will contains the real intention and reflects the true will of the testator or testatrix".

Brereton JA encapsulated the conclusion at [71]:

The hypothetical (non-negligent) counterfactual proposed is not that available evidence was obtained and adduced, which might have resulted in a different outcome; but that the deceased executed the 2014 Will in circumstances which did not attract suspicion. In substance, that amounts to a contention that the earlier judgment was wrong to reject the proposition that the 2014 Will embodied her testamentary intentions. That involves a collateral attack on the earlier adverse conclusion. It may well be open to the applicant to plead that the deceased's intention was to leave her entire estate to her, and that by reason of the respondent's (alleged) negligence that intention was defeated – but not by

²⁵ *Mekhail v Hana; Mekail v Hana* [2019] NSWCA 197.

contending that, contrary to the earlier judgment, the 2014 Will in fact embodied her testamentary intentions. As the claim as presently pleaded depends on that contention, the primary judge was right to conclude that it was an abuse of process.

D. Other decisions

***Re Estate Capelin, deceased* (2022) 107 NSWLR 461; [2022] NSWSC 236**

May I draw to your attention this decision of Lindsay J. The dispute was between two nephews of the deceased whose partner predeceased him and who had no children.²⁶ One nephew sought an order that the most recent will, made 18 months before he died aged 77, be admitted to probate in common form. The other filed a caveat. The judgment is an extraordinarily valuable account of caveats in probate practice, and of probate practice itself, both ancient and contemporary, which cannot readily be summarised shortly. Happily, this is that rarissima avis, a probate decision reported in the New South Wales Law Reports. The so-called classic statement of Powell J in *Azzopardi v Smart*²⁷ that a caveator is required, on the return of a summons seeking an order that the caveat cease to be in force, to be able to tender evidence raising at least a prima facie case of the ground of invalidity relied upon, was disapproved, notwithstanding that (as Lindsay J explicitly acknowledged) it had been cited without disapprobation by the High Court. His Honour regarded it as a departure from the current and former statute, and inconsistent with modern methods of case management.

Jennison v Jennison

The most alert of you will by now be thinking, as this presentation draws to an end, that I have not fulfilled my word. What of that interesting decision of the Court of Appeal delivered on 21 December 2022 which will never be published in the New South Wales Law Reports? Some of you may be thinking it is one of those fake decisions generated by Chat-GPT, but in fact it is a real decision about NSW probate. But it is a decision of the Court of Appeal of England and Wales, now reported in the most recent loose part of the law reports [2023] Ch 225. And I wonder what Chat-GPT would say if you asked for the probability of a New South Wales probate case being reported in the English Law reports!

²⁶ Ominously, his Honour recorded at [22] that both nephews were solicitors.

²⁷ (1992) 27 NSWLR 232.

The deceased died domiciled in New South Wales in 2007. His will appointed his widow as executrix, and she obtained a grant of probate in 2008. A decade later, she sued her brother and his wife in England, for breach of trust said to have been committed in Sheffield. After commencing in the High Court of Justice, the grant was resealed under the *Colonial Probates Act 1892*, the proceeding was remitted to the County Court, where the point was taken that the widow lacked standing because she was a foreign executor when the proceeding was commenced. The County Court dismissed the objection of the brother and sister-in-law, and they appealed.

Newey LJ writing for the Court of Appeal distinguished the position in England that an executor took title from the death of the deceased, and can sue immediately thereafter, although needing to have obtained probate by the time of hearing in order to prove title. In contrast, an administrator lacks title until granted letters of administration, and cannot commence proceedings earlier,²⁸ referring to *Ingall v Moran*²⁹ and the later decisions of *Milburn-Snell v Evans*³⁰ and *Jogie v Sealy*,³¹ where it was also held that the doctrine of relation back could not cure proceedings which were incompetent when commenced. However, in the case of persons domiciled abroad, proceedings traditionally could not be commenced without a local grant, a result which was ameliorated by Victorian legislation permitting resealing, which was extended by the 1892 statute. The statute provided that when a court of probate in a British possession had granted probate, the probate could be resealed by a court of probate in the United Kingdom “and **thereupon** shall be of like force and effect, and have the same operation in the United Kingdom, as if granted by that court”. The Court of Appeal disagreed with the County Court judge who had held that the resealing had retrospective effect, basing its decision upon the statutory text and in particular the word “thereupon”. The next question was whether even so the County Court judge was correct, because the Privy Council in *Chetty v Chetty* [1916] AC 603 had proceeded on the basis that an executor derived title and authority from the will and not from the grant of probate, including in the case of a foreign will. The Court of Appeal followed that decision, but then asked the further question whether *Chetty v Chetty* was

²⁸ At [18].

²⁹ [1944] KB 160.

³⁰ [2012] 1 WLR 41.

³¹ [2022] UKPC 32.

only authority for cases where the foreign jurisdiction treated the executor's title as acquired from the date of death.

That was the context in which the Court of Appeal explained that under ss 44 and 61 of (what it called) the *Wills Probate and Administration Act 1898* (NSW), "until probate, or administration, or an order to collect is granted in respect of the deceased person's estate, the real and personal estate of such deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforesaid the personal estate and effects vested in the Ordinary in England", but upon grant the estate was taken to vest in the executor or administrator as from the date of death. That in turn leads to a large outstanding question in this country as to the effect of those questions. Emmett J when sitting in the Federal Court, and the Full Court dismissing an appeal, held that notwithstanding the retrospective vesting in the executor following the grant of probate, the executor could not commence proceedings which should therefore be dismissed.³² The Federal Court had relied in part upon *Bone v Commissioner of Stamp Duties (NSW)*,³³ a decision from which the Privy Council allowed an appeal.³⁴ The Privy Council said that:³⁵

The appointment of a debtor as executor has undoubtedly the effect at law that the cause of action in debt is extinguished: the liability of the debtor as such is extinguished, granted that the executor proves the will, with effect from the death. The reason is that at law the executor cannot sue himself: and their Lordships as at present advised see no sufficient reason for holding that the interim vesting of the estate in the Public Trustee under the law of New South Wales pending the grant of probate affects that general position.

White JA who delivered the leading judgment in *Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell* [2019] NSWCA 299; 19 BPR 39,853 expressed some surprise that the passage reproduced above had not been mentioned.³⁶ His Honour concluded that:³⁷

The better view is that the executor's authority to deal with the estate can be exercised before grant by virtue of the authority derived from the will, and that the

³² *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268; [2000] FCA 1761; *Byers v Overton Investments Pty Ltd* (2001) 109 FCR 554; [2001] FCA 760 at [24]-[28].

³³ (1974) 132 CLR 38 at 46; [1974] HCA 29.

³⁴ *Commissioner of Stamp Duties (NSW) v Bone* (1976) 135 CLR 223.

³⁵ At 227.

³⁶ At [158].

³⁷ At [168].

vesting of the legal estate in the NSW Trustee is only for the purpose of avoiding a feared hiatus in the vesting of the legal estate. An executor may require a grant of probate to authenticate the holding of the legal estate, but that should not affect his ability to deal with the assets of the estate. On the grant of probate, s 44 would retrospectively validate a purported disposition of the legal estate.

After identifying the problems with estates being administered without a grant, his Honour said:³⁸

In my view, the nettle should be grasped. Is it the case that before a grant of probate a bank cannot transfer moneys standing to the credit of a deceased's account into an estate account in the name of the executor? Can an executor, before or without the grant of probate, not use those moneys to pay debts, funeral or testamentary expenses? Can an executor, before or without grant of probate, not transfer chattels to those entitled under the will? In my view on a purposive construction of ss 44 and 61 of the *Probate and Administration Act*, considering the background of those provisions, the executor does have such powers.

His Honour said that the title of the NSW Trustee was a bare legal title carrying no active duties, because the Ordinary in England in 1858 had no powers or duties, that the executor was the beneficial owners in accordance with the reasoning in *Livingstone's* case, that the executor has title derived from the will which is only removed minimally by ss 44 and 61, and s 44 should not be read as subject to limitations derived from s 61 or the general law.

However, and perhaps unfortunately for the purposes of *Jennison v Jennison* and this talk, Bathurst CJ and Macfarlan JA while acknowledging the force of White JA's reasons, did not determine the point. In *Jennison* the Court of Appeal was taken to *Deigan*, stated that White JA's judgment was "erudite",³⁹ but likewise did not express a view, confining themselves with the proposition that an executor did not have legal title to the testator's estate before a grant of probate. Ultimately, Newey LJ regarded the question whether the executor had legal title to be governed by the law of England and Wales, and proceeded on the basis that what was held in *Chetty v Chetty* was in point, such that the widow was regarded as having title upon her husband's death. Thus she had title when the proceedings were commenced in England irrespective of the absence of a local grant or resealing.

³⁸ At [173].

³⁹ At [46].

Conclusions

Be careful with statistics. Don't leap to conclusions about the meaning of words. The approach to construing a statute might not mean reading a court's decision about the statute and applying the reasons as if they were a statute. The most interesting Court of Appeal decision on New South Wales probate might not be a decision of the New South Wales Court of Appeal. Be careful with costs in small claims. Be careful with adoptions. Be especially careful with generative AI; it will not tell you much about trends that appear in judgments in the Court of Appeal and in the Equity Division.

Generative AI is good at generating titles which are essentially meaningless, and much less good at responding to questions which admit of a single answer. If this paper has any lasting legacy, it may be the annexure which is, thanks to Chat GPT 3.5, surely a solution to presenters over the next decade looking for catchy titles for their talks at this conference.

Annexure A: Chat-GPT 3.5 question

Chat-GPT was asked the following question, four times:

“What is the probability of flipping a coin 19 times and it landing on heads 16 times, tails 3 times? Think step by step and provide reasons for the answer.”

First answer

The probability of flipping a fair coin and getting either heads or tails on a single flip is 0.5 (50%). This is because a fair coin has two equally likely outcomes (heads and tails), and each outcome has a 0.5 probability.

Now, let's break down the probability of flipping a coin 19 times and getting heads 16 times and tails 3 times step by step using the binomial probability formula.

The binomial probability formula calculates the probability of getting exactly k successes in n independent Bernoulli trials, where each trial has a probability p of success.

In this case: n (number of trials) = 19

k (number of successes, i.e., heads) = 16

p (probability of success, i.e., getting heads) = 0.5

The formula for the probability of getting exactly k successes in n trials is:

$$P(X = k) = \binom{n}{k} * p^k * (1 - p)^{(n - k)}$$

where $\binom{n}{k}$ is the binomial coefficient, given by:

$$\binom{n}{k} = n! / (k! * (n - k)!)$$

Let's plug in the values:

$$\binom{n}{k} = 19! / (16! * (19 - 16)!) = (19 * 18 * 17) / (3 * 2 * 1) = 969$$

$$p^k = 0.5^{16}$$

$$(1 - p)^{(n - k)} = 0.5^3$$

Putting it all together:

$$P(X = 16) = 969 * 0.5^{16} * 0.5^3 = 969 * 0.5^{19}$$

Calculating this value:

$$P(X = 16) = 969 * 0.00000190734 \approx 0.00184843429$$

So, the probability of flipping a coin 19 times and getting heads 16 times and tails 3 times is approximately 0.00185, or about 0.185%.

This is a very low probability, which makes sense because getting such a specific sequence of outcomes (16 heads and 3 tails) out of 19 coin flips is relatively unlikely.

Second answer (to the same question)

The probability of flipping a fair coin and getting heads or tails is always 0.5 (50%), assuming the coin is unbiased and has no other external factors affecting the outcome. Each individual flip of a fair coin is independent of the previous flips, meaning that the outcome of one flip doesn't affect the outcome of the next flip.

Given this, let's break down the scenario of flipping a fair coin 19 times and getting heads 16 times and tails 3 times:

The probability of getting heads on the first flip is 0.5 (50%).

The probability of getting heads on the second flip is also 0.5 (50%), independent of the first flip.

Continuing this logic, the probability of getting heads on the third flip, fourth flip, and so on up to the 16th flip is 0.5 each time.

Similarly, the probability of getting tails on the 17th flip, 18th flip, and 19th flip is 0.5 each time.

Since each flip is independent and has a 0.5 probability of being heads or tails, the probability of getting a specific sequence of outcomes is the product of the individual probabilities for each outcome.

Probability of getting heads 16 times: $(0.5)^{16}$

Probability of getting tails 3 times: $(0.5)^3$

Now, multiply these probabilities together to get the probability of the specific sequence of 16 heads and 3 tails:

Probability = $(0.5)^{16} * (0.5)^3 = 0.5^{(16+3)} = 0.5^{19}$

Calculating this:

Probability = $0.5^{19} \approx 0.00000190734$

So, the probability of flipping a fair coin 19 times and getting heads 16 times and tails 3 times is approximately 0.00000190734, which is a very small probability. This makes sense because getting such a specific sequence of outcomes is highly unlikely due to the randomness of coin flips.

Third answer to the same question

The probability of flipping a fair coin and getting either heads or tails on a single flip is 0.5 (50%), assuming the coin is unbiased and has equal chances of landing on either side.

Now, when you're flipping a fair coin multiple times, the outcomes of each flip are independent events. This means that the outcome of one flip does not affect the outcome of another flip. Therefore, the probability of a specific sequence of flips (e.g., getting 16 heads followed by 3 tails) is the product of the individual probabilities of each flip.

In this case, you want to calculate the probability of getting 16 heads (H) followed by 3 tails (T) in a specific order. Since each flip is independent and has a probability of 0.5 for either outcome, the probability of getting 16 heads followed by 3 tails can be calculated as:

$$\text{Probability} = P(\text{HHHHHHHHHHHHHHHHHTTT})$$

Here, $P(H)$ is the probability of getting heads, which is 0.5, and $P(T)$ is the probability of getting tails, also 0.5.

So, the probability of getting 16 heads followed by 3 tails is:

$$0.5^{16} \text{ (for the heads)} * 0.5^3 \text{ (for the tails)} = 0.5^{19}$$

Calculating this, you get:

$$0.5^{19} = 0.00000190734$$

So, the probability of flipping a coin 19 times and having it land on heads 16 times followed by tails 3 times is approximately 0.00000190734, or about 0.00019%. It's a very low probability because it's a very specific sequence out of all the possible sequences of 19 coin flips.

Fourth answer to the same question

The probability of flipping a coin 19 times and getting heads 16 times and tails 3 times can be calculated using the binomial distribution formula. The binomial distribution is used when you have a fixed number of independent trials (in this case, coin flips), and each trial has two possible outcomes (heads or tails) with a constant probability of success (probability of getting heads).

The formula for the probability of getting exactly "k" successes (heads in this case) in "n" trials, where the probability of success on a single trial is "p," is given by:

$$P(X = k) = \binom{n}{k} * p^k * (1 - p)^{(n - k)}$$

Where:

$\binom{n}{k}$ is the binomial coefficient, calculated as $n! / (k! * (n - k)!)$, representing the number of ways to choose "k" successes out of "n" trials.

p is the probability of getting a success on a single trial (probability of getting heads).

(1 - p) is the probability of getting a failure on a single trial (probability of getting tails).

X represents the random variable denoting the number of successes.

In this case, n = 19 (number of trials), k = 16 (number of successes), p = 0.5 (since the coin is fair and the probability of getting heads is 0.5), and (1 - p) = 0.5 (probability of getting tails).

Let's plug in these values and calculate the probability:

$$P(X = 16) = \binom{19}{16} * (0.5)^{16} * (0.5)^{(19 - 16)}$$

Calculating $\binom{19}{16}$:

$$\binom{19}{16} = 19! / (16! * (19 - 16)!)$$

$$= (19 * 18 * 17) / (3 * 2 * 1)$$

$$= 969$$

Now plug in the values:

$$P(X = 16) = 969 * (0.5)^{16} * (0.5)^3$$

$$\approx 0.0028$$

So, the probability of flipping a coin 19 times and getting heads 16 times and tails 3 times is approximately 0.0028, or about 0.28%. This is a relatively low probability, which makes sense since it's an uncommon outcome when flipping a fair coin.

Annexure B

That GPT was asked, first “Give me a title for a legal paper on succession law”, then “No give me a title that is more fun”, then “Give me ten”, then “Give me another ten”. The answers to the last two questions are as follows

1. "Succession Shuffle: Unravelling the Legal Dance of Inheritance"
 2. "Heirs and Graces: Navigating the Labyrinth of Succession Law"
 3. "Legacy Puzzle: Piecing Together Succession Law's Enigmatic Rules"
 4. "Beyond the Will: Exploring the Curious Realm of Succession Law"
 5. "Fortune's Handoff: The Playful Legal Landscape of Succession"
 6. "Inheritance Unboxed: An Unconventional Look at Succession Law"
 7. "Heir Today, Gone Tomorrow: The Whimsical World of Succession Legalities"
 8. "Passing the Gavel: A Fun Twist on Succession Law Perspectives"
 9. "Legal Heirlooms and Whimsy: A Delightful Dive into Succession Law"
 10. "Wills and Whimsies: A Playful Approach to Understanding Succession Law"
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1. "Inheriting Chuckles: A Comical Expedition into Succession Law"
 2. "Heir Today, Law Tomorrow: A Playful Spin on Succession"
 3. "Whose Fortune Is It Anyway? A Fun Guide to Succession Law"
 4. "Laws of Inheritance: Where Legalities and Laughter Converge"
 5. "Succession Shenanigans: Navigating the Hilarious Side of Law"
 6. "Wills, Thrills, and Legal Bills: A Fun Look at Succession"
 7. "Passing the Giggles: A Humorous Journey through Succession Law"
 8. "Legally Legacies: An Entertaining Ride into Succession"
 9. "Inheritance Adventures: Exploring Succession Law with a Twist"
 10. "Succession Silliness: Finding Joy in Legal Inheritance"

Annexure C

COURT OF APPEAL DECISIONS IN SUCCESSION LAW: September 2020 – September 2023				
	Case	Coram	Result	Catchwords
1.	Lim v Lim [2023] NSWCA 84 *	Bell CJ; Kirk JA; Griffiths AJA	Appeal allowed	<p>SUCCESSION — Contested probate — Testamentary capacity — Lack of knowledge and approval — Significant change in nature of will — Suggestion of hepatic encephalopathy — Dispute about deceased’s hearing capacity — Dispute about deceased’s ability to understand Mandarin</p> <p>EVIDENCE — Standard of proof — Civil cases — Principle in <i>Briginshaw v Briginshaw</i> — Nature and strength of evidence required to establish a fact depends on nature of fact and on context in which fact sought to be proved — No general requirement of a higher degree of satisfaction in cases of contested probate</p> <p><i>Key paragraphs: [21]-[24]</i></p>
2.	Ritossa v Ritossa [2023] NSWCA 14 *	Bell CJ; Gleeson JA; White JA	Leave to appeal refused	<p>SUCCESSION – probate and administration – appointment of interim administrator where underlying proceedings involved multiple contested wills – interpretation of s 73 of the <i>Probate and Administration Act 1898</i> (NSW) – whether discretion to appoint interim administrator properly exercised – whether necessary to find that estate assets were ‘in jeopardy’ in order for administrator to be appointed – where toxic relationship between parties seeking to propound different wills – where dispute between parties as to management of the estate pending resolution of underlying proceedings</p> <p><i>Key paragraphs: [39]-[44]</i></p>
3.	Scott v Scott [2022] NSWCA 182	Ward P; Meagher JA; Kirk JA	Appeal dismissed	<p>SUCCESSION – family provision – claim by adult daughter for provision pursuant to <i>Succession Act 2006</i> (NSW), s 59 – where deceased’s 2019 will left family home to appellant daughter and small legacy to respondent daughter – where testamentary statement purported to justify 2019 will – where primary judge found will and statement obtained by process of manipulation and sourced to appellant – where earlier will of deceased leaving one-third of estate to each child found to reflect deceased’s fair and considered testamentary judgment – whether primary judge erred in being satisfied that 2019 will did not make adequate provision for respondent’s proper advancement</p>
4.	McGettigan v Coulter [2022] NSWCA 166	Meagher JA; Leeming JA; White JA	Appeal dismissed as incompetent	<p>SUCCESSION – probate and administration – where primary judge granted letters of administration to respondents in respect of deceased’s 2000 will – where applicant challenged validity of that will and propounded 2016 will – where primary judge found applicant had no standing to challenge 2000 will and rejected substance of his challenge – where primary judge found 2016 will fabricated by applicant – whether evidence sufficient to support primary judge’s conclusions</p>

Annexure C

COURT OF APPEAL DECISIONS IN SUCCESSION LAW: September 2020 – September 2023				
	Case	Coram	Result	Catchwords
5.	Sun v Chapman [2022] NSWCA 132	Leeming JA; White JA; Brereton JA	Appeal allowed	SUCCESSION – family provision – claim by alleged de facto partner of the deceased for provision from the deceased’s estate under <i>Succession Act 2006</i> (NSW), Ch 3 – whether eligible person – whether in a de facto relationship at time of death – whether there were factors warranting the making of the application for family provision
6.	Chisak v Presot [2022] NSWCA 100	Macfarlan JA; Gleeson JA; White JA	Appeal dismissed	SUCCESSION – Alleged lack of testamentary capacity – Alleged lack of knowledge and approval SUCCESSION – FAMILY PROVISION – Alternative claim for family provision order under the <i>Succession Act 2006</i> (NSW), Ch 3 – Whether appellant is an ‘eligible person’ under s 57(1) of the <i>Succession Act 2006</i> (NSW) – Whether appellant was wholly or partly dependent upon deceased at any particular time – Whether adequate provision had been made for appellant’s education, maintenance and advancement in life
7.	Daley v Donaldson [2022] NSWCA 96 *	Leeming JA; White JA; Mitchelmore JA	Appeal dismissed	SUCCESSION – application for family provision order by biological son of deceased – approval of compromise under <i>Succession Act 2006</i> (NSW) s 98 – parties entered into compromise following mediation – executrix opposed making orders giving effect to compromise – shortly after compromise reached, executrix came to believe applicant had been formally adopted – primary judge declined to make orders giving effect to settlement – whether adoption order caused applicant no longer to be a child of the deceased for purposes of s 57 of <i>Succession Act</i> – significance of executrix being on notice of the possibility of formal adoption – whether applicant remained a child of the deceased after being formally adopted – whether mistake as to basis of settlement warranted declining to make orders – appeal dismissed <i>Key paragraphs: [31]-[50]</i>
8.	Khadarou v Antarakis [2022] NSWCA 99	White JA; Kirk JA; Basten AJA	Appeal dismissed	SUCCESSION – Family provision – Provision from the deceased’s estate under the <i>Succession Act 2006</i> (NSW), Ch 3 – Whether eligible person – Whether living together – Close friendship between the appellant and the deceased – Appellant regularly provided domestic support and personal care to the deceased
9.	Starr v Miller [2022] NSWCA 46	Macfarlan JA; Meagher JA; White JA	Appeal dismissed	SUCCESSION — contested probate application — whether the deceased had testamentary capacity at the time she gave instructions for and executed the will — whether the deceased knew and approved of the terms of the will — whether deceased’s statement that she was not agreeable to one of her daughters getting any money was a reference to a testamentary gift — whether any “suspicious circumstances”
10.	Bassett v Bassett [2021] NSWCA 320	Bell P; Leeming JA; Payne JA	Appeal allowed	SUCCESSION – Family provision – claim by adult son for provision from the deceased’s estate pursuant to s 59 of the <i>Succession Act 2006</i> (NSW) – where primary judge erred in her conclusion that adequate provision had not been made for the adult son’s proper maintenance and advancement in life – where adult son had remained on farming land

Annexure C

COURT OF APPEAL DECISIONS IN SUCCESSION LAW: September 2020 – September 2023				
	Case	Coram	Result	Catchwords
				but had received earlier significant benefits from his parents recognised as an “early inheritance” – extent to which anticipated adverse costs liability from non family provision claim should affect analysis of adequate provision
11.	Grant v Grant [2021] NSWCA 181	Basten JA; Leeming JA; White JA	Appeal dismissed	<p>SUCCESSION — Claim by estate to recover property — Where property of deceased transferred by deceased’s daughter by way of gift in favour of deceased’s granddaughter in exercise of power of attorney — Where no power of gift conferred on attorney — Where daughter purportedly acted pursuant to direction in letter — Whether deceased’s signature was forged</p> <p>SUCCESSION — Family provision — Claim by adult child — Where evidence of ill treatment of testatrix by claimant — Where evidence that claimant received substantial benefits from testatrix before death</p>
12.	Lewis v Lewis [2021] NSWCA 168 ***	Meagher JA; Leeming JA; Payne JA	Appeal dismissed	<p>SUCCESSION – contested probate – knowledge and approval – suspicious circumstances – significance of reading out will to capable testator – whether reading out will to capable testator who executes it will discharge onus on propounder – whether sufficient to establish knowledge of contents of will or whether it may be necessary to establish knowledge of its effect – consideration of <i>Tobin v Ezekiel</i> (2012) 83 NSWLR 757; [2012] NSWCA 285 – consideration of “mistake doctrine” – significance of statutory power to rectify wills</p> <p>SUCCESSION – contested probate – severance of testamentary instruments – power to admit only those clauses to probate of which testator has been shown to have known and approved – distinction between omitted clauses which confer bequests and omitted clauses which confer power – <i>Osborne v Smith</i> (1960) 105 CLR 153; [1960] HCA 89 considered and explained</p> <p><i>Key paragraphs: [130]-[165]</i></p>
13.	Wardy v NSW Trustee and Guardian [2021] NSWCA 121	Macfarlan JA; Meagher JA; White JA	Appeal dismissed	<p>SUCCESSION – appropriate substitute for specific devise – property subject of specific devise sold by administrator to pay debt – need to put specific devisees in materially the same position that they would have been in if the sale had not occurred – how rights of beneficiaries should be adjusted – whether substitution of specific property from residuary real estate appropriate – need for equivalence in value</p>
14.	Gill v Garrett [2021] NSWCA 117	Macfarlan JA; Leeming JA; Emmett AJA	Appeal dismissed	<p>SUCCESSION — family provision — claim by member of household for provision from the deceased’s estate under <i>Succession Act 2006</i> (NSW), Ch 3 — whether factors warranting — provision of household care to deceased — conscious misuse of special disadvantage of deceased — significance of reliance upon alleged agreement to leave real estate in will</p>

Annexure C

COURT OF APPEAL DECISIONS IN SUCCESSION LAW: September 2020 – September 2023				
	Case	Coram	Result	Catchwords
15.	Yesilhat v Calokerinos [2021] NSWCA 110	Bathurst CJ; Macfarlan JA; Brereton JA	Appeal dismissed	SUCCESSION – family provision – claim by alleged long-term partner of deceased – whether alleged partner an “eligible person” – whether de facto relationship, close personal relationship or dependent household member relationship – <i>Succession Act</i> ss 57(1)(b), (e), and (f) – requirement of “living” together and need for some common residence
16.	Cooper v Atkin [2021] NSWCA 82	Payne JA; McCallum JA	Leave to appeal refused	SUCCESSION – family provision – claim by adult step-child of the deceased for provision under Ch 3 of the <i>Succession Act 2006</i> (NSW) – whether primary judge did not make an order for provision in the applicant’s favour by reason of disentitling conduct – no question of principle
17.	De Lorenzo v De Lorenzo [2020] NSWCA 351 ***	Gleeson JA; Leeming JA; White JA	Appeal dismissed	SUCCESSION – construction of will – gift of two shares to three children as tenants in common – will stated that if shares not divisible by three, daughter would receive more – whether daughter entitled to both shares under will – consideration of joint ownership of choses in action
18.	Battenberg v Phillips [2020] NSWCA 249	Macfarlan JA; Meagher JA; Emmett AJA	Appeal dismissed	SUCCESSION — Contested probate — Lack of knowledge and approval — Suspicious circumstances — Actual knowledge — Reading will aloud before execution — Sufficiency of evidence
19.	Megerditchian v Khatchadourian [2020] NSWCA 229	Macfarlan JA; Payne JA; Emmett AJA	Appeal dismissed	SUCCESSION – family provision – claim by adult child – judgment in favour of appellant for provision from notional estate – whether adequate provision for the proper maintenance, education or advancement of the appellant
NSW SUPREME COURT – Decisions of Interest: September 2020 – September 2023				
1.	Re Estate Capelin, deceased [2022] NSWSC 236 ***	Lindsay J	[117]	SUCCESSION — Contested probate — Practice and procedure — Caveats — Caveat against grant — Notice of motion for an order that caveat cease to be in force — Whether there is a doubt as to whether the will should be admitted to probate sufficient to warrant investigation in a contested probate suit — Caveator’s case not frivolous but bona fide and reasonable
2.	Starr v Miller; Starr v Miller [2021] NSWSC 426	Hallen J	[646]	SUCCESSION – Contested probate – Lack of testamentary capacity and lack of knowledge and approval asserted – Suspicious circumstances - Application of the test in <i>Banks v Goodfellow</i> – Where deceased suffered a stroke before making Will – Consideration of contemporaneous evidence of solicitor to whom instructions given SUCCESSION — Alternative claims for family provision order under the <i>Succession Act 2006</i> (NSW), Ch 3 — Claim by adult daughters of the deceased — Whether adequate and proper provision not made in the Will of the deceased for each applicant and, if so, the nature and quantum of the provision to be made for her <i>Key paragraphs: [378]-[389]</i>

Annexure C

COURT OF APPEAL DECISIONS IN SUCCESSION LAW: September 2020 – September 2023				
	Case	Coram	Result	Catchwords
3.	O'Donnell v O'Donnell [2022] NSWSC 1742	Robb J	[545]-[547]	SUCCESSION — family provision — jurisdiction — deceased's spouse makes family provision applications in New South Wales and Australian Capital Territory — whether deceased domiciled in New South Wales or Australian Capital Territory at date of death — consideration of principles governing domicile under private international law — deceased dies with moderately large actual estate but potentially substantial notional estate held by discretionary trust and corporate entities — availability of notional estate regime under <i>Succession Act 2006</i> (NSW), Pt 3.3 where deceased found to have been domiciled outside New South Wales at date of death

- *** denotes decisions which have been reported and * denotes decisions which appear interesting although not reported