SUPREME COURT
OF QUEENSLAND

STEP Qld Inaugural Trust and Succession Law Conference
Shangri-Law Hotel, Cairns
Friday 2 September 2011, 10:55am

The Hon Paul de Jersey AC
Chief Justice

It is a great pleasure to be with you and to have the opportunity to make these brief observations.

I have just presided at the Valedictory Ceremony for the retiring inaugural Far Northern Judge, Justice Jones, a most distinguished Judge on our Supreme Court since 1997, and I am pleased that he is to address the Conference this afternoon, especially because as I recall he had a not insubstantial succession law practice as a barrister. But beyond that, you will be addressed by the first Far Northern Judge, and a judge who has very successfully met the challenge of assuming that role.

We are in Cairns at a traditionally very busy time of the year, with the Cairns Amateurs proceeding – quite coincidentally of course, and I hope you may have the opportunity to be involved to some extent with that colourful annual event of substantial regional significance.

The work of trusts and estate practitioners is, I would think, intrinsically interesting for its potentially dramatic impact on the lives of real people. We tend immediately to think of the criminal law in that regard, but the aridity of tax and corporations law aside, there are many other areas of the law where outcomes may be critically important to the individual, and where the practitioner should desirably display particular sensitivity.

Your area falls quintessentially within that category.

Family provision, or testator's family maintenance as it was known, provides a good example, described by one commentator (R F Croucher, *Towards Uniform Succession in*

Australia (2009) 83 ALJ 728, 739) as having begun "as a modest intrusion upon testamentary freedom", but "subject to great pressure for expansion". I suggest the extension which has over the years occurred has been justified, though as that commentator notes, it would likely have drawn the ire of the late Justice Hutley, in light of his preface to the third edition of his co-authored *Cases and Materials on Succession*, published after the passage in New South Wales of the *Family Provision Act* in 1982, where he said:

> "The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982'. The Act might have been more properly entitled 'The Act to Promote the Wasting of Estates by Litigation and Lawyers Provisions Act 1982'."

The area in which you practise is beset with a spectrum of very real human concern: the dismay and disappointment of surviving family members at perceived poor treatment, sometimes vindictiveness, on the part of a deceased testator; the potential fracturing of relationships among siblings through claims which can lead to protracted and expensive litigation; at the anterior will-making stage, the range of motivation of the errant testator, from fecklessness to unkindness to venom; the disquieting uncertainty, for those left behind, whether an apparent expression of testamentary disposition will be rejected as just too informal; then there may be the careless or even, regrettably, callous disregard of some testators towards vulnerable and disadvantaged family members; and even at a very practical level, the potential for major disruption and personal deterioration through delays and uncertainties in the issue of death certificates and grants of probate.

Yours is, as I have suggested, an area of the law in which practice can be rendered the more satisfying for its productive outcomes. There is particular satisfaction in the realization that, deploying your lawyerly talents, you have actually helped someone – beyond leaving them with a large account and pile of papers. In my judicial capacity, I was very pleased to be able to deliver a "family provision" judgment in recent years which I am

sure should have done much to alleviate the plight of a woman without privilege or means, and desperately needing help. It was the case of *Goold v Field* [2005] QSC 310, determined some years ago in the year 2005. It was one of the most satisfying judgments I have ever delivered, and it remains quite vividly in my memory after all these years.

Ms Goold had brought an application under s 41(1) of the Queensland *Succession Act* for provision from the estate of her deceased mother. When the mother died, aged 59, she left an estate which by the time of the hearing in 2005, was worth approximately $450,000. The deceased left $140,000 to her father, and the balance to her long-term friend and neighbour, with nothing for her daughter. There was no other dependent. Neither the father nor the neighbour sought to sustain the provisions made in their favour.

The applicant was at relevant times in a situation of substantial deprivation. She lived in a one bedroom former worker's cottage "left over" after the construction of the Somerset Dam. To bring it to habitable condition would cost up to $90,000. She lived a frugal existence, dependent at the time of the hearing on workers' compensation payments. Her health was in precarious condition. Other serious orthopaedic matters apart, she desperately needed dental treatment which would cost almost $40,000.

There was another very sad twist to the case. When the applicant was but an infant, the deceased demanded, for reasons unfathomable, that her husband leave the marriage and take the applicant with him. That occurred. The deceased had no contact with the applicant over the following years, and had said that she did not wish to contact her. On the other hand, the applicant had desperately craved contact with her mother, and by various means sought that contact, but it was always denied. I reached the view there was no basis from which it could be suggested there was any conduct on the part of the applicant which should have disentitled her to provision.

I felt the lion's share of the estate should have gone to the applicant. I was pressed, however, with a number of cases where, notwithstanding the absence of competing

claims, no more than half the estate was awarded to the deserving applicant. I was reminded of an observation by White J in a case called *Gardner*[1] that awards in the range of 40% to 60% of the available estate were sometimes made in such circumstances, although in that case Her Honour awarded only 40%.

I reached a conviction that three-quarters of this estate should go to the applicant, with an adjustment then necessary of course in the provision for the father and the neighbour.

I said this:

> "What strikes me about the present case is the compelling nature of the applicant's claim upon the estate, seen in the context of the vastly disproportionate 'competing claims' of the existing beneficiaries. As I have said, my view is that making adequate provision for her proper maintenance and support, the deceased should have allowed her approximately three-quarters of the estate... Concluding that that provision would have been adequate and appropriate, it would not be right to shrink from varying the will to that extent because that would involve allowing an amount outside a 'range' drawn from other cases."

In the result, the father would have received approximately $34,000 and the neighbour $79,000, with the balance of $340,000 going to the applicant.

Insofar as "ranges" can be distilled from the case law in this area, I rather hoped that my award of three-quarters of the estate in that case operated to lift any applicable range. There was, I should say, no appeal. It is particularly satisfying where, applying the law, you see a beneficial and productive outcome.

I hope you experience similarly satisfying outcomes in your practices.

The Conference presents a most interesting array of papers delivered by very well-informed speakers, and I hope you find this experience both interesting and instructive. May I add, to the welcomes already extended, my welcome as Chief Justice of

[1] (Unreported, Supreme Court of Queensland, White J, OS No 475 of 1991, 29 March 1994)

Queensland, especially to those of you who have come from interstate, and wish you an interesting and instructive experience.