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CHILDREN: THE PARENS PATRIAE, AND SUPERVISORY, JURISDICTION OF THE SUPREME COURT OF NSW

by

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I. INTRODUCTION

1 The object of this paper is to present, from a variety of perspectives, insights into the nature, scope, purpose and practice of the Supreme Court of NSW's "general law" (that is, non-statutory) jurisdiction over children, informed by an examination of the historical origins of the Court's jurisdiction.

2 The "*parens patriae* jurisdiction" of the Court (as the Court's "inherent", "protective" or "wardship" jurisdiction over children is variously known) is vested in each judge constituting the Court; but, for the convenient

administration of justice, business involving an exercise of the jurisdiction is assigned to the Equity Division of the Court.

3 Within the Equity Division, the "(Probate and) Protective List" focuses primarily upon orders for the management of the estates (property) of those (of whatever age) who are incapable of managing their affairs. In practice, cases involving the protection of "infants" (or, as they may be called, "minors" or "young people") in their "person" – as distinct from their "estates" – are dealt with by judges across the Equity Division, not limited to the Protective List Judge.

II. THE NATURE OF PARENS PATRIAE JURISDICTION AS "SUPERVISORY JURISDICTION"

4 Analyses of the protective jurisdiction of the Court do not clearly distinguish between "substantive law" and "adjectival law" concepts, or between "right" and "remedy". A different perspective of the law, and its operation, is required. That different perspective focuses on concepts of *management.*

5 *The jurisdiction of the Court exists for a purpose (to care for those unable to take care of themselves), and that purpose informs every exercise of the jurisdiction*. Closely aligned with the prerogative powers of government, the jurisdiction is concerned not so much with "rights, obligations and remedies" *inter partes* as with prudential management of the affairs (ie, the person and estate) of a particular individual unable to manage his or her own affairs. The focus for attention is the individual.

6 The *parens patriae* jurisdiction is sometimes spoken of as "supervisory": PW Young, C Croft and ML Smith, *On* Equity (Law Book Co, Sydney, 2009), paragraphs [4.170] and [4.190]. Such a characterisation draws a contrast with the Court's adjudicative function in adversarial litigation. It also recognises that the role of the Court is generally, literally, to supervise a manager, guardian or the like entrusted with day-to-day responsibility for management of the affairs of an incapable person, intervening only where

necessary to protect the incapable person: *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 326; *RH v CAH* [1984] 1 NSWLR 694 at 707.

7 As a jurisprudential technique, the Court may take upon itself control of, and responsibility for, a person's affairs, or a particular function, and then delegate performance of functions to a person who (at the direction, and under the supervision, of the Court) might, in a colloquial sense, be described as an "officer" of the Court because under the control of the Court.

8 In the language of an earlier era, upon an exercise of protective jurisdiction formerly known as "lunacy jurisdiction", a "committee of the estate" (a manager of property) and a "committee of the person" (a guardian) are examples of such a "delegate". Minds may differ about the aptness of analogies used to describe what are idiosyncratic offices, but it is worthy of notice that a "committee of the estate" (in modern terms, a "protected estate manager" or "financial manager") has been likened to a bailiff of the Court: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [166]-[175].

9 Even if (as has been held in *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193; (2008) 40 Fam LR 122 at [14]) the *parens patriae* jurisdiction does not empower the Court to confer authority on others, such as medical practitioners, in respect of an infant or other incapable person, it is accepted that the Court can assume, and delegate, responsibility for management of the affairs of the person in need of protection.

10 Characterisation of the Court's jurisdiction as "supervisory" is a useful reminder that the Court's intervention in the life of a person incapable of self-management is limited to what is necessary to protect the individual. The underlying assumption is that each person should be allowed, as far as

practicable, to enjoy the freedom of action assumed to be the birthright of an autonomous person.

11 An exercise of the Court's jurisdiction might at times be, or seem to be, coercive. However, it is not intended to be deployed in an authoritarian manner. The welfare and interests of the person in need of protection are paramount concerns in the exercise of a jurisdiction intended to respect the dignity of each person as an individual.

III. THE NSW SUPREME COURT'S ENGLISH CONNECTION, AND ITS LIMITS

12 Inevitably, time must be spent in definition of terms. Even to describe the topic as one relating to general, non-statutory law is to invite disregard of the historical foundations of the Court in legislation of the Imperial Parliament of nineteenth century Britain.

13 That legislation mediates between the Supreme Court as now known and the largely unwritten jurisdiction exercised by English office-bearers in the 1820s.

14 In the 1820s, at the time of establishment of the Supreme Court and the formal application in the colony of New South Wales of so much English law as was applicable to local conditions, the English Crown, as "parent of the nation" (which is to say, the repository of central government powers):

(a) reserved to itself, as a prerogative of government, a power of protective management over the affairs of any person who, by reason of age or infirmity, was deemed incapable of managing his or her own affairs;

(b) in theory at least, recognised a corresponding duty to manage the affairs of such a person, more or less (depending, in the lunacy jurisdiction, on whether the person is an "idiot" or a "lunatic"), for the benefit of that person; and

(c) delegated performance of the Crown's protective functions to the Lord Chancellor, a holder of public office whose duties straddled those of a Minister of the Crown, a member of Parliament and the realm's most senior judge.

15 The Court of Chancery, over which the Lord Chancellor presided, was England's principal court of equity, as distinct from the courts of common law (the Court of Kings Bench, the Court of Common Pleas and the Court of Exchequer) and sundry other courts, all of which ultimately derived their authority from the Crown as the fountain of justice in England.

16 The *protective* jurisdiction(s) of the Crown delegated to the Lord Chancellor was (or were) not, technically, *equitable* jurisdiction. It was (or they were) an incident of the "discretionary" prerogative powers of the Crown as the titular head of executive government. Nevertheless, a delegation of jurisdiction to the Lord Chancellor ensured that an exercise of protective jurisdiction was likely to be informed by equitable principles.

17 Those principles were at a formative stage of development during the early years of NSW's colonisation by Britain.

18 At that time England's court system was fragmented in a way in which the Supreme Court of NSW never was. The Supreme Court was established as a single repository of jurisdiction defined by reference to a multitude of English courts and offices. The fact that, for more than a century until the commencement of the *Supreme Court Act* 1970 NSW in 1972, the Supreme Court chose to administer its common law and equitable jurisdiction(s) separately is a reflection of local choices. Care needs to be taken not to view Australian legal history over much through the lens of English legal history.

19 The Crown's delegation of protective functions to the Lord Chancellor in England took two distinct forms:

(a) the delegation of protective jurisdiction over infants was perceived to have been a delegation to the Lord Chancellor as the judge presiding over the Court of Chancery and, thus, in effect, a delegation to that Court *as an institution*; and

(b) the delegation of protective jurisdiction over idiots (natural fools), lunatics and those who, although not lunatics, were as incapable of managing their affairs as was a lunatic was perceived to be a delegation to the Lord Chancellor *personally,* depending for its efficacy on each Lord Chancellor receiving an instrument of delegation.

20 Although not generally recognised, this distinction may have had, for Australian lawyers, a material bearing on the precedential value of English case law in the second half of the 20th century: when, absent a delegation of the Crown's lunacy jurisdiction to the Lord Chancellor, any such jurisdiction was perceived to have become entirely legislative in character.

21 When, in 1990, the House of Lords accepted that the High Court of England and Wales (the English equivalent of the Supreme Court of NSW) had "inherent jurisdiction" to make orders bearing upon management of the affairs of an incapable person (*In Re F (Mental patient: Sterilisation)* [1990] 2 AC1 at 57-58 and 63-65, explained in *In Re L (Vulnerable adults with capacity: Court's jurisdiction (No. 2)* [2012] 3 WLR 1439 at [55], approving *In re SA (A vulnerable adult with capacity: Marriage*) [2006] 1 FLR 867), it was arguably a jurisdiction more *rule-based* than the *purpose-driven* jurisdiction historically exercised by the Lord Chancellor.

22 Consciously distinguished from (but, at the same time, said to be substantially the same as) *parens patriae* jurisdiction, the newly discovered English "inherent jurisdiction" (as articulated in *In re* SA [2006] 1 FLR 867 at [76]-[79]) is directed to protection of "*a vulnerable adult* who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either

(i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent".

23 Having recognised the existence of an "inherent jurisdiction" to protect vulnerable adults, and the like, English Courts appear to be engaged in a process of developing it as an adjunct to laws for the protection of persons who lack "capacity" of an ill-defined character: Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016), Chapter 4; Brenda Hale, *Mental Health Law* (Thomson Reuters, England, 6th ed, 2017), paragraph [9.023].

24 In NSW, the focus for attention in articulation of *parens patriae* jurisdiction is on the *purposive* character of the jurisdiction and *functional* incapacity *for self-management*; it is *not* tied to concepts of "mental illness". This approach, based upon *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259, and case law there mentioned, owes much to the law as developed by Lord Eldon in early nineteenth century England. The High Court of Australia expressly quoted from Lord Eldon's judgment in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 389 ER 236 at 243. Reference might also have been made to other early English decisions, such as those identified in *PB v BB* [2013] NSWSC 1223: *Ridgeway v Darwin* (1802) 8 Ves 65; 32 ER 275; *Ex parte Cranmer* (1806) 12 Ves 445; 33 ER 168 at 170-171; *Sherwood v Sanderson* (1815) 19 Ves 280; 34 ER 521; and *In re Holmes* (1827) 4 Russ 182.

25 As explained in *Gibbons v Wright* (1954) 91 CLR 423 at 434-438, the general law does not prescribe a fixed standard of "capacity" required for the transaction of business: the level of capacity required of a person is *relative to the particular business to be transacted by him or her*, and the purpose of the law served by an inquiry into the person's capacity.

26 The utility of any attempt to define the expression "(in)capable of managing his or her affairs" – the key expression in NSW legislation and in *parens patriae* jurisdiction derived from the Lord Chancellor's lunacy jurisdiction – depends on whether (and, if so, to what extent) it is, in the particular case, revealing of reasoning justifying a finding that a person is or is not (as the case may be) "capable of managing *his or her* affairs" as that expression is commonly understood, having regard to the protective purpose of the jurisdiction being exercised and the principle that the welfare and interests of the person in need of protection are paramount: *CJ v AKJ* [2015] NSWSC 498 at [27]-[42].

27 Citation of modern English case law in an Australian setting needs to be alive to subtle differences between English and Australian systems of law. In NSW, there is, or may be, a closer correlation between the different (historical) branches of *parens patriae* jurisdiction, and NSW law may be less rule-based than English law.

IV. THE NATURE, AND MODERN DEVELOPMENT, OF *PARENS PATRIAE* JURISDICTION GENERALLY

28 Be that as it may, by the 1820s the Lord Chancellor's "infancy jurisdiction" (on the one hand) and his "lunacy jurisdiction" (on the other) were seen as having been assimilated in all but *procedural* norms. The Chancellor's infancy jurisdiction was largely integrated with equity procedures, unattended by use of a jury. Upon an exercise of lunacy jurisdiction, the Chancellor issued writs for a jury to determine whether a person perceived to be in need of protection was an "idiot" or "lunatic", as the nature of the case might require. That said, the *principles* governing management of the affairs of a person in need of protection were substantially the same.

29 In formal terms, by the 1820s the Lord Chancellor's protective jurisdiction did not depend for its existence on an entitlement to property residing in the person in need of protection. Nevertheless, in practical terms, an absence of

such an entitlement rendered the jurisdiction beyond the reach of ordinary people. This was because (as Lord Eldon remarked in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243) an absence of a property entitlement meant that the Chancellor (and the Court of Chancery) lacked the means to exercise jurisdiction.

30 In the nineteenth century, from about the time NSW acquired public institutions approximating those found in England (a governor presiding over executive government, a superior court exercising judicial functions, and a local legislature), the administration of public affairs in both countries evolved from one based to some extent on private ownership of public offices into one based solely upon a professional bureaucracy underpinned by, and working within, a legislative framework.

31 This is important to note because the protective jurisdiction of the Supreme Court (defined by reference to the office of Lord Chancellor in England in the 1820s) had to accommodate itself to the growth of an executive government staffed by professionals and the creation, by statute, of decision-makers charged with the performance of functions which, in early colonial times, were performed by a small group of people personified in the Lord Chancellor and his staff.

32 The inherent, protective jurisdiction of the Supreme Court of NSW, in common with the experience of other courts in the common law world, has been adapted to the modern welfare state by the Court emphasising its character as a "reserve power" deployed to deal with circumstances "exceptional" or "unforeseen" and, therefore, not readily dealt with by public officials working within a legislative framework designed for routine cases.

33 In a sense, the protective jurisdiction (in all its manifestations) has always borne the character of a supervisory "reserve power" available to deal with "exceptional" or "unforeseen" cases. That is because: (a) the jurisdiction is founded upon an assumption that the community it serves is comprised of

autonomous, self-governing individuals; and (b) the necessity for the jurisdiction is commensurate with the community's need to place somewhere the care of individuals who, in fact, cannot take care of themselves.

34 Although the protective jurisdiction is not part of the Supreme Court's equitable jurisdiction as conventional English legal history would have it (Young, Croft and Smith, *On Equity*, paragraph [4.160]) and it is not routinely dealt with in equity texts (apart from *On Equity*), there is much about it reminiscent of Aristotle's classic definition of "equity", coupled with his description of "prudence (practical wisdom)", in *The Nicomachean Ethics.*

35 Aristotle (in Book V Chapter 10) described the essential character of equity as being a rectification of law insofar as the law is defective on account of its generality: "… when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances".

36 In speaking of "prudence", or "practical wisdom", as a virtue (Book VI Chapter 5) Aristotle spoke of a "prudent" person as one able to deliberate rightly about what is good and advantageous, conducive to a good life, calculated successfully with a view to some serious end.

37 Earlier generations than ours generally adopted, or accommodated, Aristotle's definition of equity in their own exposition of the subject. See, for example, Story *Commentaries on Equity Jurisprudence* (1st English edition), London, 1884), Chapter 1, paragraph [3]. Sometimes, as did Blackstone in his *Commentaries on the Laws of England* (1st edition, 1765-1769), Volume 1, pages 61-62), this was done through a citation of Grotius (*De Aequitate*) who, himself, adopted Aristotle.

38 Most modern equity texts (including, as a prime early example, FW Maitland's classic, *Equity: a Course of Lectures* (Cambridge University Press, 1909), Lecture 1 embrace the idea that "equity jurisdiction" cannot be *defined* at all – certainly not exhaustively – but can only *described* by reference to an account of its historical origins in the English legal system.

39 The protective jurisdiction of the Supreme Court is not beyond definition in contemporary terms, but neither is it able to be understood in all its dimensions without historical exposition. The context in which it must be understood includes historical context.

40 The key to a correct understanding of the jurisdiction is to recognise, and (difficult though this is) to keep in mind, that it is governed by the protective purpose it serves. So governed, everything done, or not done, on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the person in need of protection.

V. AN HISTORICAL EXPOSITION OF CURRENT LAW : THE COURT'S "INHERENT" PARENS PATRIAE JURISDICTION, *VIA* SCA s22

41 By virtue of Imperial legislation (4 Geo IV c 96, the *New South Wales Act* 1823, section 9; 9 Geo IV c 83, the *Australian Courts Act* 1828, section 11) and Letters Patent (the *Third Charter of Justice*, 13 October 1823, clause 18), continued in operation by section 22 of the *Supreme Court Act* 1970 NSW, the Supreme Court of NSW is possessed of jurisdiction over "infants" (generally known in NSW as "*parens patriae*" jurisdiction or, less often, as "wardship" or "inherent" jurisdiction) which, at the time of establishment of the Court in the 1820s, was exercised in England by the Lord Chancellor on a delegation to the office of Lord Chancellor by the Crown.

42 The *New South Wales Act* 1823 (Imp) and the *Australian Courts Act* 1828 (Imp) are reproduced as appendices (A and B respectively) to Dr JM Bennett's *A History of the Supreme Court of NSW* (Law Book Co, Sydney, 1974). At the time of their enactment each Act was formally cited by

reference to a number (described in England as a “chapter”) in a statute book prepared for the year of the reign of the monarch in which it was enacted. The 1823 Act became known colloquially as “The New South Wales Act”. The 1828 Act was formally given its short title, “The Australian Courts Act”, by the *Short Titles Act*, 1896 (UK).

43 The 1823 Act, read with the *Third Charter of Justice*, established the Supreme Court of NSW as presently constituted. The Act authorised establishment of the Court by royal charter. The *Third Charter of Justice* was that royal charter.

44 The 1828 Act confirmed the jurisdiction of the Court (defined by reference to English institutions) and, by section 24, provided that, so far as applicable, English law as at 25 July 1828 applied in the colony of NSW.

45 Section 24 was a statutory embodiment (with an identified date of application) of a common law principle generally associated with a statement by Sir William Blackstone (*Commentaries on the Laws of England*, 1st ed, 1765-1769, Volume 1, page 107) to the effect that English law was the birthright of an English subject in a settled colony of NSW.

46 The 1823 Act was a temporary enactment rendered permanent by the 1828 Act. Although the 1828 Act contemplated that a new charter would be granted, the letters patent of 1823 were confirmed and not replaced: JM Bennett, *A History of the Supreme Court of New South Wales* (1974), page 30.

47 The terms upon which equitable jurisdiction was conferred on the Court by the 1823 and 1828 Acts respectively differed in a material respect.

48 Section 9 of the 1823 Act enacted that the Court be a “Court of Equity in New South Wales” with “Power and Authority to administer Justice, and to do, exercise and perform all such Acts, Matters and the Things necessary for the

due Execution of such Equitable Jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within England."

49 Section 11 of the 1828 Act was expressed in similar terms, with an added reference to the common law jurisdiction of the Chancellor. It was, in substance, an enactment that the Court be a "Court of Equity in New South Wales" with "Power and Authority to administer Justice, and to do, exercise, and perform all such Acts, Matters, and Things necessary for the due Execution of each equitable Jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within the Realm of England, *and all such Acts, Matters, and Things as can or may be done by the said Lord High Chancellor within the Realm of England, in the exercise of the Common Law Jurisdiction to him belonging*".

50 Why section 9 of the 1823 Act and section 11 of the 1828 Act differ is a matter of speculation, a field entered upon in an appendix to *Estate Polykarpou; Re a charity* [2016] NSWSC 409 (Lindsay J).

51 The Supreme Court as presently constituted was established in the wake of a report by Commissioner JT Bigge entitled *Report of the Commission of Inquiry on the Judicial Establishments of New South Wales and Van Dieman's Land.* The House of Commons ordered that it be printed on 21 February 1823.

52 At page 53 of that report, Bigge recorded his agreement with a proposal of Mr Justice Field (the judge of the Supreme Court constituted by the *Second Charter of Justice* in 1814) that there be "an augmentation of authority to the equity jurisdiction of the Supreme Court… [including] an express authority to appoint guardians to infants and their estates; [and] transfer to the Supreme Court of the custody of idiots and lunatics, now vested in the Governor of the Colony by his commission....".

53 A fair inference from the course of events is that (1) Field J sought augmentation of his jurisdiction; (2) Bigge recommended that it be granted; (3) the draftsman of the 1823 Act and the *Third Charter of Justice* did not

appreciate that a conferral of infancy and lunacy jurisdiction on the new Supreme Court by the Charter might, because that jurisdiction was, or might be, on the common law side of the Chancellor's work, go beyond the Act's conferral of equity jurisdiction; and (4) any formal deficiency in the Constitution of the Court was rectified in the 1828 Act, which provided for the continued operation of the charter.

54 That the Lord Chancellor's power over infants was, or may have been, part of his common law jurisdiction can be confirmed by reference to Joseph Chitty's *A Treatise on the Law of the Prerogatives of the Crown* (London, 1820), pages 155-156.

55 Clause 18 of the *Third Charter of Justice* was in the following terms:

> "And we [meaning the Crown] do hereby authorise the said Supreme Court of New South Wales to appoint Guardians and Keepers of Infants and their Estates according to the order and Course observed in that part of our United Kingdom called England and also Guardians and Keepers of the persons and Estates of Natural Fools and of such as are or shall be deprived of their understanding or reason by the Act of God so as to be unable to govern themselves and their Estates which we hereby authorise and empower the said Court to enquire here and determine by inspection of the Person or by such other ways and means by which the truth may be best discovered and known".

56 It is no accident that the jurisdiction of the Court over infants and its lunacy jurisdiction (comprehended in the Charter's reference to "Natural Fools", and its allusion to lunatics) were mentioned side-by-side.

57 The Court's jurisdiction over infants and its lunacy jurisdiction are closely aligned but historically distinct. As Chitty's treatment of them (in chapter 9 of his work, *Prerogatives of the Crown*) attests, both can be described as "*parens patriae* jurisdiction" and each type of jurisdiction has historical foundations in a delegation by the Crown to the Lord Chancellor.

58 In NSW, since 1958, the Court's lunacy jurisdiction has been known as "the protective jurisdiction": *Mental Health Act* 1958, sections 5, 6, 51 and 52(1); Philip Powell, *The Origins and Development of the Protective Jurisdiction of The Supreme Court of New South Wales* (Forbes Society, 2004) , pages 23-27.

VI. A NEW SOURCE OF "INHERENT" JURISDICTION : THE SUPREME COURT ACT 1970 NSW, SECTION 23

59 With the commencement of the *Supreme Court Act* 1970 NSW on 1 July 1972, the Court acquired, by virtue of section 23 of that Act, a new source of jurisdiction sometimes characterised as "inherent" jurisdiction.

60 Section 23 takes its place as a source of "inherent" jurisdiction in circumstances summarised in *Re AAA; Report on a protected person's attainment of the age of majority* [2016] NSWSC 805 (Lindsay J) at [20]-[27], with emphasis added:

> "[20] The protective jurisdiction of the Court, both inherent and statutory, exists for the protection of an individual in need of protection because of an incapacity for self-management.
>
> [21] Historically, the "inherent" protective jurisdiction of the Court (as it is routinely called) is grounded upon section 9 of the '*New South Wales Act'* of 1823, 4 Geo IV chapter 96 (Imp), and clause 18 of the *Third Charter of Justice* (Letters Patent of 13 October 1823 issued pursuant to the New South Wales Act), the operation of which has been preserved, inter alia, by: (a) the *Australian Courts Act* 1828 (Imp), 9 Geo IV chapter 83, which prescribed the date for reception of English law in New South Wales; and (b) section 22 of the *Supreme Court Act* 1970 NSW.
>
> [22] Since the commencement of **the *Supreme Court Act* 1970, section 23** of that Act (which **provides that the Court has 'all jurisdiction which may be necessary for the administration of justice in New South Wales**) has also been seen as a general source of 'inherent' jurisdiction: *Re Q* (Young J, 29 May 1985, unreported), extracted in *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [75]-[77]; *Re C* [2012] NSWSC 1097 at [64]-[65]; *IR v AR* [2015] NSWSC 1187 at [102]; *Fountain v Alexander* (1982) 150 CLR 615 at 633. Strictly, the section is an independent grant of power: *Re W and L* [2014] NSWSC 1106 at [79]-[82].

[23] **There is a subtle, but potentially important shift in use of the word 'inherent' here which recognises the existence of jurisdiction in the Court untrammelled by perceptions of historical constraints of 19th century English practice and procedure**: *Sutton v Warringah Shire Council* (1985) 4 NSWLR 124 at 131G-132C.

[24] That this was an intended consequence of SCA section 23 can be inferred from the antecedents of the section, opaque as they are on the face of the Reports of the NSW Law Reform Commission and parliamentary debates leading to enactment of the section.

[25] The intended operation of the section can be seen in a paper delivered to the New South Wales Bar Association on 10 November 1970 by Mr RD Conacher, then Deputy Chairman of the NSW Law Reform Commission. The paper was delivered after the *Supreme Court Act* 1970 (Act No. 52) had been enacted but before the commencement of its operation, on 1 July 1972, as amended by the *Law Reform (Law and Equity) Act* 1972 (No. 28) and the *Supreme Court (Amendment) Act* 1972 (No. 41).

[26] Mr Conacher's paper, entitled 'A General Introduction to the Supreme Court Act, 1970' was part of consultation process designed to bed down the introduction of a *Judicature Act* system of court administration. The paper includes the following:

> '[2] [The *Supreme Court Act* 1970] continues the present Supreme Court (s. 22). The reason, or a major reason, for doing that, instead of setting up a new Court, is to avoid disturbing the operation of such things as the federal Constitution….
>
> [3] We will therefore continue to have the Supreme Court set up in 1823 by the *Charter of Justice* and still regulated in some in some respects by that *Charter* and by the Imperial Act 9 Geo. 4 c. 83, the *Australian Courts Act* 1828.
>
> [4] The new Act covers much of the field covered by the *Charter* and the Act of 1828, as indeed does the legislation now in force. The new Act, however, like most earlier legislation on the subject (cf. 15 Vic. No. 17), does not specify what provisions of the *Charter* and the Act of 1828 are no longer to have effect. It leaves them operative to some extent, but does not specify to what extent. This is a piece of tidying-up which remains to be done. The legislative power to override the *Charter* and the Act of 1828 is in section 29 of the *Australian Constitutions Act* 1850 (13 & 14 Vic. c 59).
>
> [5**] For the general grant of judicial power we must therefore still look to these old instruments, together with the very general words of section 23 of the Act**. It reads – 'The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'.

> [6] The *Australian Courts Act* 1828 vested in the Supreme Court jurisdiction similar to that of the Courts of common law at Westminster (s. 3), jurisdiction in equity and at common law similar to that of the Lord Chancellor (s. 11) and ecclesiastical jurisdiction (s. 12). The Charter of Justice empowered the Supreme Court to deal with matters of infancy and lunacy.
>
> [7] **Section 23 of the new Act will not, I believe, have an immediate effect in altering the jurisdiction of the Court. It will rather be the basis for new development as occasion arises, a more serviceable basis than the Acts and *Charter* of the 1820s with their references to the jurisdictions of the English Courts of that time**. It is based on section 16 of the *Judicature Act* 1908 of New Zealand. The New Zealand section was considered by the Court of Appeal in New Zealand in *Ryder v Hall* ((1905) 27 NZLR 385). In that case the section played a part in enabling the Court to hold that it had jurisdiction to give damages in lieu of an injunction, notwithstanding that legislation along the lines of *Lord Cairns' Act* (the *Chancery Amendment Act* 1858, 21 & 22 Vict. c 27; cf. Equity Act, 1901, s 9) had not been enacted in New Zealand. …'
>
> [27] **The current "inherent" jurisdiction of the Court is thus informed by English legal history associated with establishment of the Court by reference to English institutions, and the formal reception of English law in NSW, in the 1820s; but it is not constrained by the procedural norms and jurisdictional demarcations that characterised the fragmented English court system of that time."**

61 The extent to which SCA section 23 has been assimilated with SCA section 22 as a source of *parens patriae* jurisdiction can be seen in the following observations of Mason J in *Fountain v Alexander* (1982) 150 CLR 615 at 633:

> "*The Nature of the Wardship Jurisdiction*
>
> The origin of the wardship jurisdiction was the sovereign's feudal obligation as *parens patriae* to protect the person and property of his subjects, particularly those unable to look after themselves, such as infants. This obligation was delegated to the Chancellor, and passed to the Chancery Court (see *In re D. (A Minor)* [1976] Fam. 185 at 192-193; *Hope v Hope* (1854) 4 De G.M.&G. 328 at 344-345; 43 ER 534 at 540-541). In New South Wales the jurisdiction is now exercised by the Supreme Court under s 23 of the *Supreme Court Act* 1970. The jurisdiction to make a child a ward of court is not dependent upon the child having property the subject of a suit *(Meyer v Meyer* [1978] 2 NSWLR 36 at 39). In exercising the jurisdiction the court has a wide power in relation to the welfare of intants. It has always been recognised that the dominant matter for the consideration of the court is the welfare of the child (*In re McGrath (Infants)* [1893] 1 Ch. 143 at 148). In *In re X. (A Minor)* [1975] Fam. 47 at 57, Lord Denning M.R. said:

> 'No limit has ever been set to the jurisdiction. It has been said to extend 'as far as necessary for protection and education' …. The court has power to protect the ward from any interference with his or her welfare, direct or indirect.' "

62 SCA section 23 might be deployed by reference only to its text, but at the cost of closing minds to rich historical precedents. In all cases, the text should be approached as informed, but not necessarily constrained, by *historical procedures, or procedural norms,* attaching to jurisdictional sources preserved by SCA section 22.

63 When the protective jurisdiction is engaged, deployment of SCA section 23 unconstrained by *the purposive character of "protective jurisdiction"* would be an invitation to error.

64 Unless tied to the protective purpose of "taking care of those unable to take care of themselves", a focus upon what "may be necessary for the administration of justice" might tend to subordinate the welfare and interests of a person in need of protection to the convenience of the Court or others than the person in need of protection.

65 In a case in which there is a person in need of protection, SCA section 23 is best viewed through the same purposive prism as the protective jurisdiction of the Court preserved by SCA section 22.

VII. SEMINAL CASE LAW

Marion's Case : A Good Root of Title for Modern Australian Law

66 For Australian lawyers, a convenient modern statement of the nature, purpose and scope of the *parens patriae* jurisdiction can be found in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259, a case concerned with an application for authorisation of the sterilisation of an intellectually disabled child.

67 In their joint judgment of Mason CJ and Dawson, Toohey and Gaudron JJ made the following observations (with editorial amendment) :

> *"The nature of the welfare jurisdiction*
>
> As already mentioned, the welfare jurisdiction conferred upon the Family Court is similar to the parens patriae jurisdiction. The history of that jurisdiction was discussed at some length by La Forest J. in Re Eve [1986] 2 SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14--21. His Lordship pointed out [at SCR 410; DLR 16] that "[t]he Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined." In Wellesley v. Duke of Beaufort (1827) 2 Russ 1 at 20; 389 ER 236 at 243, Lord Eldon L.C., speaking with reference to the jurisdiction of the Court of Chancery, said:
>
> > '[It] belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.'
>
> When that case was taken on appeal to the House of Lords, Lord Redesdale noted [in *Wellesley v Wellesley* (1828) 2 Bli NSW 124 at 131; 4 ER 1078 at 1081]:
>
> > 'Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way.'
>
> Lord Redesdale went on to say [at 136, 1083] that the jurisdiction extended 'as far as is necessary for protection and education'.
>
> To the same effect were the comments of Lord Manners who stated [at 142; 1085] that '[it] is ... impossible to say what are the limits of that jurisdiction'. The more contemporary descriptions of the parens patriae jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction: See *In re X. (A Minor), [1975] Fam. 47 at 51-52, 57, 60-61, 61-62*. That is not to deny that the jurisdiction must be exercised in accordance with principle. However, as appears from the authorities discussed earlier, the jurisdiction has been exercised in modem times so as to permit medical operations on infants which result in sterilization.
>
> No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the parens patriae jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where

> parents have no power to consent to an operation, as well as cases in which they have the power. [The breadth of the wardship jurisdiction of the English courts was emphasised in *In re R. (A Minor)*]".

68 A common denominator in *parens patriae* jurisdiction exercised over "infants" on the one hand and, on the other hand, persons (of any age) incapable of managing their own affairs is a want of (legal or functional) capacity for management of their own affairs, be those affairs described as relating to "the person" or "the estate (or property)".

69 "Legal" incapacity is, by its nature, governed by positive law. That the *Minors (Property and Contracts) Act* 1970 NSW, Part 2 (sections 8-15) reduced the "age of majority" from 21 years (long established by the common law) to 18 years illustrates the point.

Gibbons v Wright and Functional (In)capacity

70 Positive law may impose upon a person "incapacity" defined by reference to *status* (eg, as an infant or felon) but the general tendency of the law, with an underlying assumption that each individual person is autonomous, is to define (in)capacity by reference to *functionality*: the ability, or otherwise, to perform a particular function or functions.

71 In the realm of "functionality" the concept of "(in)capacity" depends, for its meaning and operation, on the context in which it is used. It is essentially "relative" rather than "absolute" in character. Its use invites questions such as: (In)capacity for what purpose? (In)capacity to do what?" An answer to these questions depends on the business to be transacted.

72 This needs to be understood even when dealing with a class of people, such as infants, to whom the law attributes the status of an incapacitated person. Whatever such a person's status, the tendency of the law is generally to allow, or require, him or her to perform some, particular functions on his or her own account.

73 Upon a consideration of whether a person has *functional* (in)capacity, the seminal observations of Dixon CJ and Kitto and Taylor JJ in *Gibbons v Wright* (1954) 91 CLR 423 at 437-438 come to mind:

> "The law does not prescribe any fixed standard of sanity [for which we may read "capacity"] as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation…. [The] mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As Hodson LJ remarked [in *Estate of Parkes* [1954] P112 at 136], 'one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject matter of the particular case'.
>
> Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out.… "

74 These observations are consistent with those of the High Court, in *Marion's Case* (1992) 175 CLR 218 at 237-238, to the effect that an infant's incapacity diminishes with his or her growth in understanding.

The Transition from Infant to Adult

75 As a general proposition, the Court's *parens patriae* jurisdiction over children (perhaps, more specifically described as its wardship jurisdiction) generally exists only until an infant attains his or her majority, after which (if a similar jurisdiction is to be exercised) the protective jurisdiction of the Court based on functional incapacity for self-management (historically known as the lunacy jurisdiction) must be invoked.

76 Although the jurisdiction of the Court is "seamless", practical importance may attach to a person's transition from "infancy" to "majority" and, hence, the shift from one jurisdictional foundation to another (from a foundation grounded on legal incapacity to one necessarily grounded only on functional incapacity) should remain in view: eg, *Secretary, Department of Family and Community Services; Re Lee* [2015] NSWSC 1276 at [10]-[12]; *Re AAA; Report on a*

protected person's attainment of the age of majority [2016] NSWSC 805; *Re Anita (No. 3)* [2016] NSWSC 1061 at [50].

Re Eve : An Historical Elaboration of Today's Protective Jurisdiction

77 *Re Eve*, approved by the High Court in *Marion's Case*, provides for Australian lawyers a handy exposition of the *parens patriae* jurisdiction insofar as it derives from the Lord Chancellor's jurisdiction over infants and the Chancellor's related jurisdiction over those incapable of managing their own affairs.

78 By its endorsement of the historical exposition of the law found in *Re Eve*, the High Court can be taken to have accepted that the *parens patriae* jurisdiction over adults and infants is substantially similar.

79 In historical terms, by the time the Supreme Court of NSW was established (in 1824) and NSW received English law (in 1828) there had been an assimilation of the "lunacy" and "wardship" jurisdictions exercised by the Lord Chancellor, in England, as a delegate of the Crown.

80 That assimilation took place in England as a consequence of the falling away of feudal incidents attaching to different categories of persons in need of protection (historically, protected by the Crown exercising control over the property, if not also the person, of such persons), and an associated shift in focus towards decision-making governed by the fundamental principle that the welfare and interests of the particular person in need of protection are paramount: *Re Eve* [1986] 2 SCR 388 at 407-411; 31 DLR (4th) 1 at 14-17.

81 The protective jurisdiction of the Court extends to making orders for protection of "the person" (that is, the body) and "the estate" (that is, property) of a person in need of protection.

82 The protective jurisdiction is not dependent for its existence, or exercise, upon the presence of property; but an entitlement to property residing in a person

(including an infant) incapable of managing his or her affairs may provide an occasion upon which, to protect the interests of that person, the jurisdiction can be called into service: *Re Eve* [1986] SCR 388 at 410-411; (1986) 31 DLR (4^{th}) 1 at 14; *AC v OC (a minor)* [2014] NSWSC 53 at [45]-[47]; *Re W and L (parameters of protected estate management orders)* [2014] NSWSC 1106 at [6].

VIII. A BACKWARD GLANCE AT THE PRESENT : Chitty's Prerogatives of the Crown

83 The expression "*parens patriae*" betrays an historical tendency to deploy Latin tags, and family analogies, to describe concepts which would today be explained by other terminology.

84 "*Parens patriae*" means, literally, "father of the nation" or, if one must be gender neutral, "parent of the nation". It is an expression used to describe particular types of *public interest* litigation or, more broadly, public *administration*.

85 In nineteenth century England, the areas of public administration (including the administration of justice) which attracted description as "*parens patriae*" jurisdiction of the Crown (in modern terms, the state or, perhaps more accurately, executive government) were those relating to administration of the affairs of: (a) infants; (b) idiots and lunatics; and (c) charities.

86 One common denominator in each of these areas is *the absence of a person fully able to enforce rights*, and *the presence of a public interest imperative* in having somebody recognise and enforce such rights. Another is a central focus upon *administration* of affairs, not the litigation of disputes.

87 Whatever may be the machinery of government designed to deal with cases of this type (whether viewed as an administrative framework for dealing with a class of problems or as a decision-making process for solving particular

problems) there remains a need for a repository of power, and authority, to deal with a residual class of unexpected or exceptional cases.

88 In Anglo-Australian law that "reserve power" has been rationalised as vested in the Crown, and (historically) delegated by the Crown to the Lord Chancellor, a public officer whose functions in 19th century England straddled those of the executive and judicial branches of government (as we would now classify them), functions increasingly allocated to judges.

89 In modern times (as illustrated by SCA section 23), our tendency of mind is to rationalise established heads of jurisdiction by reference to what is "necessary for the administration of justice". However, such notions cannot be fully understood without an appreciation of their cultural heritage.

90 Something of the flavour of the Supreme Court's jurisdiction over infants can still usefully be drawn from Chitty's *Prerogatives of the Crown* (1820), at pages 155-157 (with emphasis added, but omitting footnotes), published at about the time the Supreme Court of NSW was established and authorised, and directed, to adapt English law to local conditions:

> "**CHAP. IX.**
>
> ***Of the King* as Parens Patriae**
>
> **SECT. I. – As to Infants, Idiots, and Lunatics.**
>
> The King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled, (or rather it is his Majesty's duty, in return for the allegiance paid him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st. non-age: 2. Idiocy: or 3. Lunacy : to take proper care of themselves and their property.
>
> 1. This superintending power over *infants* was originally in the King by the common law, and was by his Majesty delegated to the Lord Chancellor, who seems to exercise it as a branch of his general jurisdiction; and no separate commission is necessary to legalise the chancellor's jurisdiction in this respect.
>
> By virtue of this power the chancellor may appoint guardians to such infants as are without them. And though his lordship cannot remove a testamentary guardian appointed according to the statute, or consider his misconduct a contempt, unless the infant be a ward of court; yet he may impose restrictions

> which will prevent such guardian from prejudicing the interests of his award. And it seems to be admitted that guardians at common law may be removed or be compelled to give security if there appear to be any danger of their abusing either the infant's person or estate. It is also a general rule that if a person appointed guardian be attainted, or otherwise become incapable, the trust devolve on the great seal, as the general guardian of all infants. The care of infants is so peculiarly a prerogative of the Crown, delegated to and exercised by the Court of Chancery, that it has also been laid down that the Court may interpose even against that authority and discretion which a father has in general in the education and management of his child. Though perhaps in this case it is necessary that such child should be a ward of the Court.
>
> *The Chancellor may, generally speaking, cause the performance of any thing essential to the welfare or benefit of infants and their properties; and will protect their rights.* Therefore if a man marry a ward of the Court without the consent of the Court, he shall be committed for such contempt, though it appear that he knew not that she was a ward of the Court: and there must be a proper settlement made on the wife before such contempt can be cleared. So the Court will allot maintenance to infants out of their fortunes suitable to their rank and circumstances. But though it is one of the peculiar duties of a Court of Equity to protect the rights of infants, still it will not at any period or under any circumstances act upon such indulgent disposition; and therefore even in equity an infant may be bound by the statute of limitations.
>
> On the other hand the Court of Chancery will assist guardians in compelling their wards to obey their legal desires. Therefore where an infant went to Oxford contrary to the orders of his guardian, who wished him to go to Cambridge, the Court sent a messenger to carry him from Oxford to Cambridge; and, on his removing to Oxford, another messenger was sent to carry him to Cambridge, and keep him there."

91 An exercise of the court's protective jurisdiction over the person or property of an infant is not dependent upon an order being made that the infant be made a "ward of the court": *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 323. The effect of such an order is simply to place the welfare of an infant wholly under the control of the Court, in much the same way (jurisprudentially) as property is brought under the Court's control by the appointment of a receiver and manager.

92 When the Court makes an infant a ward of the Court, the powers otherwise exercisable by a parent in respect of the infant are vested in the Court; no significant step in connection with the infant can be taken without the consent of the Court; and the Court may, in place of parents, make those decisions

which it considers appropriate in the best interests of the infant: *Re Jules* [2008] NSWSC 1193; (2008) 40 Fam LR 122 at [16].

93 The Court's protective jurisdiction can generally be exercised by orders directed to solution of a particular problem without need of an all-encompassing order that an infant be made a ward of the Court.

IX. A SUMMARY STATEMENT OF PRINCIPLES

94 The following propositions about the nature, scope, purpose and exercise of the Court's protective jurisdiction (not intended to be exhaustive of the topic) emerge from its study:

(1) **The jurisdiction exists for the purpose of taking care of those who are not able to take care of themselves**: *Marion's Case* (1992) 175 CLR 218 at 258; *Re Eve* [1986] 2 SCR 388 at 425-426; (1986) 31 DLR (4^{th}) 1 at 28.

(2) The jurisdiction extends to protection of any individual who (by reason of age or infirmity) is incapable of self-management and (a) whose person or property is within the territorial jurisdiction of the Court; or (b) who is a citizen of Australia; or (c) who has been abducted from Australia: M Davies, AS Bell and PLG Brereton (eds), *Nygh's Conflict of Laws in Australia* (Lexis Nexis, Australia, 9^{th} ed, 2014), paragraphs [28.10]-[28.21] and [31.1]; Young Croft and Smith, *On Equity*, paragraph [4.220].

(3) The jurisdiction extends to orders affecting either the person or estate (property) of a person in need of protection, or both: *Re Eve* [1986] 2 SCR 388 at 426; (1986) 31 DLR (4^{th}) 1 at 28. Although terminology may differ depending on context, the jurisdiction extends to appointment of a person to "manage" the person or estate of an incapable person: *IR v AR* [2015] NSWSC 1187 at [100]-[118]. It

extends, also, to the making of orders regulating access allowed to an incapable person: *RH v CAH* [1984] 1 NSWLR 694 at 707.

(4) There is no formal *locus standi* requirement restricting the identity of a person who may apply for an exercise of protective jurisdiction affecting another; a stranger may apply for the making, or revocation, of protective orders. A question of standing ultimately returns to the rationale for the protective jurisdiction itself – the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [92]-[94].

(5) The jurisdiction is discretionary in character: *Re Eve* [1986] 2 SCR 388 at 427 and 437; (1986) 31 DLR (4th) 1 at 29 and 36.

(6) The jurisdiction is not a "consent jurisdiction". Orders of the Court are not made merely because a party, or some other person, seeks it, consents to it or acquiesces in it. The Court is bound to exercise an independent judgement because of the public interest element in the decision to be made and the possibility, if not the fact, that the person in need of protection lacks the mental capacity requisite to informed decision-making: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](a).

(7) **Care needs to be taken, in all decision-making affecting a person in need of protection, to focus on the facts of the particular case, preferably with due consultation with the affected person, his or her family and carers who may be well placed to inform the Court of his or her particular circumstances**: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](d).

(8) Depending on the nature of the case, the jurisdiction may be exercised cautiously (*Re Eve* [1986] 2 SCR 388 at 427; (1986) 31 DLR (4th) 1 at 29), and the fact that jurisdiction exists to make orders upon an exercise of protective jurisdiction does not mean that orders will necessarily be made (*Re Eve* [1986] 2 SCR 388 at 437; (1986) 31 DLR (4th) 1 at 36; *MS v ES* [1983] 3 NSWLR 199 at 203B; *RH v CAH* [1984] 1 NSWLR 694 at 706G).

(9) **The limits (or scope) of the jurisdiction have not been, and cannot be, defined**: *Marion's Case* (1992) 175 CLR 218 at 258.

(10) **The categories of case in which the jurisdiction can be exercised are not closed**. **The jurisdiction is of a very broad nature. It can be invoked in such matters as custody (parental responsibility), protection of property, health problems, religious upbringing and protection against harmful associations**: *Re Eve* [1986] 2 SCR 388 at 426, 427 and 437-438; (1986) 31 DLR (4th) 1 at 28, 28-29 and 36-37.

(11) **The jurisdiction must be exercised in accordance with its informing principle; namely, to do what is necessary for the benefit, and in the interests, of the person in need of protection**: *Re Eve* [1986] 2 SCR 388 at 414 and 427; (1986) 31 DLR (4th) 1 at 19.

(12) **The jurisdiction is to be exercised for the benefit of *that* person, not for the benefit, or convenience, of others or the state; the welfare and interests of the person in need of protection are the paramount consideration**: *Re Eve* [1986] 2 SCR 388 at 427, 429-430 and 434; (1986) 31 DLR (4th) 1 at 29, 31 and 34.

(13) **What is done, or not done, upon an exercise of protective jurisdiction is to be measured against what is for the benefit, and in the interests, of the person in need of protection**: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 Qd R 1 at 25[48].

(14) **The protective jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of the person in need of protection not only what may directly benefit him or her, but what, if he or she were fully capable, he or she would as a right minded and honourable person desire to do**: H S Theobald, *The Law Relating to Lunacy* (London, 1924), page 380; *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-541.

(15) The jurisdiction may be exercised, in the interests of a person in need of protection, against *prospective* as well as *present* harm: *Re Eve* [1986] 2 SCR 388 at 426; (1986) 31 DLR (4th) 1 at 28.

(16) The Court will not risk of the incurring of damage to a person in need of protection which it cannot repair, but it will act rather to prevent damage being done: *Re Eve* [1986] 388 at 428 and 430; (1986) 31 DLR (4th) 1 at 29-30 and 31.

(17) The legal disabilities of infancy are not absolute. Recognition needs to be given to the fact that an infant may be able to manage his or her affairs, depending upon age, maturity and all the circumstances of the case: *AG v AP-G* [2013] NSWSC 272 at [7]; *JP v CP* [2013] NSWSC 273 at [2]. An infant's incapacity to give an informed consent to medical treatment diminishes with his or her growth in understanding and his or her need of protection: *Marion's Case* (1992) 175 CLR 218 at 237-238.

(18) The protective jurisdiction extends to the making of a "secured accommodation order", depriving an infant of his or her liberty in a case in which it is necessary for his or her protection from harm: *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 21; (2009) 41 Fam LR 220 (see also [2009] NSWSC 625 and

[2010] NSWSC 1525); *Re Sally* [2009] NSWSC 1141; *Re Sally* [2011] NSWSC 1696; *Re Anita* [2015] NSWSC 312.

(19) The Court's jurisdiction is not limited to supervision of decisions made by a parent, or some other person taking care, of a person in need of protection; the jurisdiction is not confined to what a guardian, or manager, might do *vis-a-vis* the person in need of protection: *Marion's Case* (1992) 175 CLR 218 at 258-259.

(20) The jurisdiction also extends to:

(a) the appointment of a tutor (*Re P* [2006] NSWSC 1082, approved in *Bobolas v Waverley Council* [2012] NSWCA 126 at [60]-[62]), or some other form of representation (*Re Eve* [1986] 2 SCR 388 at 438; (1986) 31 DLR (4^{th}) 1 at 37), for the conduct of proceedings by or on behalf of the person in need of protection.

(b) approval, or otherwise, of a settlement of proceedings to which a person in need of protection is a party: *Permanent Trustee Company Limited v Mills* (2007) 71 NSWLR 1 at 4-5.

(21) Where necessary to avoid frustration of the purpose for which the protective jurisdiction of the Court exists, the principles governing procedural fairness may be qualified: *J v Lieschke* (1987) 162 CLR 447 at 457.

(22) Upon an exercise of protective jurisdiction, when endeavouring to ascertain what is in the interests and for the benefit of the person in need of protection, the Court is not bound by rules of evidence: *Roberts v Balancio* (1987) 8 NSWLR 436; *Re Victoria* (2002) 29 Fam LR 157; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [7]-[8].

(23) The protective jurisdiction of the Court is not displaced by legislation absent a clear legislative intention that it be so displaced: *Johnson v Director-General of Social Welfare (Victoria)* (1976) 135 CLR 92 at 97 and 100; *Re Eve* [1986] 2 SCR 388 at 426; 31 DLR (4th) 1 at 28; *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294 at 301 [26]-[27].

(24) The Supreme Court may make orders in connection with the welfare of children in, or in a manner analogous to, the *parens patriae* jurisdiction, whether or not they are children of a marriage, because: (a) as was held in *Director-General, NSW Department of Community Services v Y* [1999] NSWSC 644 the *parens patriae* jurisdiction with respect to wardship, custody and care of children was unaffected by the State of NSW's legislative referral of powers to the Commonwealth; or (b) as a result of the *Jurisdiction of Courts (Cross Vesting) Act* 1987 Cth, the Court now enjoys all the jurisdiction of the Family Court of Australia: *Re Jules* [2008] NSWSC 1193; (2008) 40 Fam LR 122 at [7]-[8].

(25) The *parens patriae* jurisdiction is generally reserved for dealing with uncontemplated, or exceptional, situations where it appears necessary for the jurisdiction to be invoked for the protection of those who fall within its ambit: *Re Eve* [1986] 2 SCR 388 at 411; (1986) 31 DLR (4th) 1 at 17.

(26) The Court exercises caution in entertaining *parens patriae* jurisdiction in cases in which the Children's Court of NSW exercises specialist, statutory jurisdiction, subject to an appeal to the District Court of NSW. The Court is concerned not to undermine the integrity of statutory procedures. The standard approach is that of Palmer J in *Re Victoria* [2002] NSWSC 647; 29 Fam LR 157 at [37]-[40], supplemented by that of White J in *Re Frieda and Geoffrey* [2009] NSWSC 133; 40 Fam LR 608. An exercise of *parens patriae* jurisdiction in this context requires "exceptional circumstances".

(27) The Court's jurisdiction may be called in aid specifically to reinforce a statutory appellate procedure (*Re B (No. 1)* [2011] NSWSC 1075 at [58]-[60]; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [116]) or to supplement statutory appointments of financial manager and guardian (*IR v AR* [2015] NSWSC 1187 at [115]-[118]).

(28) Upon an exercise of protective jurisdiction, the Court aims to give effect to a prudential regime for management of the affairs of the person in need of protection (*managing risk* prudentially), without strife, in the simplest and least expensive way, in the interests of that person: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [35](f). The jurisdiction is not encumbered with technicalities: *Re Application of Local Health District; Patient Fay* [2016] NSWSC 624 at [23].

95 Of these propositions, those which particularly inform an exercise of protective jurisdiction are those respectively numbered 1, 7 and 9-14 inclusive.

96 The jurisdiction is governed by the purpose for which it exists rather than by formal rules. It is purpose-driven rather than rule-based. The purposive nature of the jurisdiction lends itself to rising above constraints ostensibly fixed by rules.

97 Insofar as the jurisdiction is sometimes explained in terms of "rules", "exceptions" and "special categories" (as in discussions of medical cases in Young, Croft and Smith, *On Equity*, 2009, paragraph [4.270]) those analytical terms are best viewed as rules of practice, guidelines or descriptive labels rather than any form of jurisdictional limitation. As *Marion's Case* confirms, the limits of the jurisdiction have not been, and cannot be, defined. As explained by *Re Eve* (approved by *Marion's Case*), the jurisdiction is informed by the purpose it serves.

X. ORDERS FOR COSTS IN PROTECTIVE PROCEEDINGS

98 On the question of what, if any, orders for costs can be expected to be made in protective proceedings, attention is drawn to the following observations made in *CAC v Secretary, Department of Family and Community Services (No. 2)* [2015] NSWSC 344 (Lindsay J) at [13]-[22] and [26]-[27]:

> "[13] … [The] starting point is to notice, first, the Court's plenary power to make an order for costs (*Civil Procedure Act* 2005 NSW, section 98) and, secondly, the general rule (embodied in the *Uniform Civil Procedure Rules* 2005 NSW, rule 42.1) that costs follow the event.
>
> [14] The Supreme Court is not a "no costs" jurisdiction. Although the Court has a wide costs jurisdiction, the general rule remains that costs follow the event, unless the Court otherwise orders. Parties to proceedings in the Court conduct litigation at their own risk as to costs.
>
> [15] In the protective jurisdiction, because of the purposive nature of the jurisdiction (confirmed by *Marion's Case* (1992) 175 CLR 218 at 258-259) and accumulated experience, the Court may proceed on the basis that it is generally necessary, and appropriate, to ask "What, in all circumstances, seems the proper order to make in relation to costs?"
>
> [16] This question gives due recognition to the following factors, amongst others:
>
> > (a) The protective jurisdiction of the Court is generally governed by the "welfare principle" (that the welfare and interests of each person in need of protection, here the plaintiff's children, are the paramount consideration) and an associated concern to ensure that whatever is done, or not done, is done in the interests, and for the benefit, of the particular person in need of protection.
> >
> > (b) The Court needs to be alive to the possibility that private individuals who would otherwise be concerned to act to protect a person in need of protection might be deterred from acting if bound to submit to a costs order on an unsuccessful application made by them to the Court, even though reasonably made: *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640F. Cf, *Wilson v Department of Human Services*; *Re Anna (No 2)* [2011] NSWSC 545 at [95]-[108].
> >
> > (c) Taking into account the best interests of children the subject of proceedings, the Court needs to hasten slowly in burdening a parent with an obligation to pay costs, particularly in circumstances in which a final outcome for the children in Children's Court proceedings remains undetermined: *Re Kerry (No 2) - Costs* [2012] NSWCA 194 at [12] and [17]-[18].

(d) Proceedings relating to the welfare of children, or any other person in need of protection, are not adversarial in the sense encountered in ordinary civil litigation but, rather, are attended by a strong, special public interest element.

[17] Where proceedings in the Court invoke not only the Court's protective jurisdiction, but also its jurisdiction (presently embodied, largely, in section 69 of the *Supreme Court Act* NSW) to grant administrative law relief, on an application for judicial review, different considerations may apply than those dominant in purely protective proceedings. That is because there is a separately identifiable public interest element, and a more adversarial flavour, in the supervision of a statutory tribunal or public official, than there is in protective proceedings. Where the Court's administrative law jurisdiction is invoked, there may be more scope for operation of the policy that "costs follow the event" than there is in purely protective proceedings, where the operation of the "welfare principle" militates against adversarial litigation.

[18] That said, every case falls to be determined on its particular facts.

[19] In these proceedings, starting from with the proposition that "costs follow the event", but moving quickly to the question "What is the costs order which, in all the circumstances, seems proper?", the supplementary question arises: What is meant by "proper"?

[20] It is not necessary to attempt an exhaustive definition of that term, "proper", or to elevate it beyond its station. The Court has to deal with a wide variety of situations, as variable as the human condition, in exercise of its protective jurisdiction, and in the supervision of the Children's Court.

[21] Nevertheless, in these proceedings, it might be said that costs should not follow the event if, although there is a party capable of being characterised as "the losing party" (uncontroversially, the plaintiff), that party has acted on reasonable (albeit, possibly, mistaken) grounds and has acted reasonably in the conduct of proceedings in the Court.

[22] Here, even if broad latitude is allowed to the plaintiff, he appears to me not to have acted reasonably in either the institution, or the conduct, of the current proceedings….

[26] In these circumstances, the rationale for a departure from the rule that "costs follow the event", ultimately grounded in the purposive character of the Court's protective jurisdiction, is not served by declining to make an order against the plaintiff, as "the losing party", to pay costs of his principal contradictor, the State.

[27] The fact, which I accept, that the plaintiff is impecunious is insufficient reason to displace the rule that "costs follow the event": *Director-General, Family and Community Services; Re Felicity* [2012] NSWCA 272 at [41]-[43]; *Re Felicity; FM v Secretary, Department of Family and Community Services (No 3)* [2014] NSWCA 226 at [60]. So too is the fact that the applicant for costs is the State: cf, *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 107 [92]; *Re Kerry (No2) – Costs* [2012] NSWCA 194 at [9] and [13]. The fact that the plaintiff is currently dependent on the State for his welfare

provides him with no licence to pursue Supreme Court proceedings without exposure to the risk of a costs order."

XI. THE ROLE OF EXECUTIVE GOVERNMENT

99 More than is generally recognised, an effective exercise of the *parens patriae* jurisdiction of the Supreme Court (in all its manifestations) depends upon the availability of an executive arm of government with resources dedicated to providing assistance to the Court. Assistance is generally required in the preparation of cases for hearing, in the conduct of a hearing, and in implementation of the Court's orders.

100 In nineteenth century England, when Charles Dickens wrote of children being made wards of the Court, the Lord Chancellor (wearing two hats, as a Minister of the Crown and as a judge) had subordinate judicial officers and clerks at his disposal to provide administrative support. The tendency of the law, and Anglo-Australian legal systems, since that time has been to confine judges to judging and to separate administrative functions from their courts.

101 A change in administrative arrangements for servicing the Court, or in procedures for the determination of cases, does not, of itself, diminish the jurisdiction of the Court: *In re WM (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552 at 561, 567, 569 and 570.

102 Under current administrative arrangements for discharge of the protective functions of the Crown (the state by another name), the Court is assisted by services available to the public, as well as to the Court, by agencies such as the Department of Youth and Community Affairs, the NSW Trustee, the Public Guardian and the Legal Aid Commission. The Court's judicial burden of decision, and its workload generally, are also rendered less heavy by the work done by specialist, statutory tribunals: The Children's Court of NSW, The Civil and Administrative Tribunal of NSW (NCAT) and the Mental Health Review Tribunal.

103 There is a symbiotic relationship between the Court, in its discharge of judicial functions, and agencies of executive government, in the provision of administrative services necessary for an effective exercise of the Court's jurisdiction.

104 In modern times, due regard must be paid to the concept of a "separation of powers" affecting the different branches of government (legislative, executive and judicial); but, equally, the interconnectedness of their functions must be borne in mind if the public is to be served effectively.

XII. THE NATURE AND ROLE OF ADVOCACY IN *PARENS PATRIAE* CASES

105 Observations in *Re Anita* [2015] NSWSC 312 (Robb J) at [56]-[57] bear repetition:

> "[56] …[The] separate legal representative [of a child] has a fundamentally important role in proceedings in the exercise of the Court's *parens patriae* jurisdiction, involving children or young persons who are at significant risk of harm. That is primarily because it is the separate legal representative who is likely to be the sole person who has independent access to the child or young person, and who can provide independent representation for the child in order to secure their rights, given the consequences of the orders that have been made, and the terms of Article 37 of the *United Nations Convention on the Rights of the Child*….
>
> [57] The role of the separate legal representative is crucial because, even though the role of the Court is by no means passive, it is necessarily reactive. As a practical matter, the Court must respond to information that is placed before it, which might include information that the Court requires that it be given."

106 The public interest element that characterises an exercise of *parens patriae* jurisdiction (and must affect the perspective of all persons involved in the process, not limited to separate legal representatives of a child) invites recognition that disputes which invoke, or require, an exercise of the jurisdiction cannot be viewed simply through the lens of ordinary "adversarial" litigation or "adversarial" advocacy.

107 What is meant by the adjective "adversarial" in this context is not entirely clear; but it can be taken, by disclaimer, to be an indication that primacy is to

be given to pursuit of the *purpose* for which the protective jurisdiction exists, not simply to insistence upon rule-compliance or the vindication of "rights" as such.

108 A *competent* litigant is generally free to pursue his, her or its own private interests, and is presumed to be the best judge of what is in his, her or its own interests and for his, her or its own benefit.

109 Those who represent an *in*competent litigant have a duty (which, for convenience, might be described as a fiduciary *or* a professional duty) to serve that litigant's interests, and to work for his or her benefit, without being able to obtain his or her fully informed instructions or consent to what is to be, or has been, done. That drives, or should drive, an advocate towards charting a course governed by the purposive character of the protective jurisdiction.

110 If in doubt about how to proceed in that environment a representative for an incompetent person can, and generally should, obtain "judicial advice" or the like about how to proceed. A concrete illustration of one (not an exclusive) mechanism for that to be done is found in section 80 of the *Civil Procedure Act* 2005 NSW, which provides that "[on] the application of the tutor for a person under legal incapacity, the Supreme Court may give directions with respect to the tutor's conduct of proceedings, whether before the Supreme Court or any other court, on behalf of the person".

111 The idea underlying procedures for a trustee to obtain judicial advice can be found to operate to the advantage of other office holders (such as a tutor or independent child-representative), and those affected by performance of their duties. An office holder uncertain of how to deal with a particular problem may seek, and act upon, advice from a responsible authority (or even simply a more experienced person) and thereby obtain protection against criticism even if the advice turns out to be erroneous. See, for example, *Law Society v Moulton* [1981] 2 NSWLR 736 at 757. A problem shared might be a problem solved.

XIII. CONCLUSION

112 The *parens patriae* jurisdiction of the Supreme Court of NSW over infants (and other incapable persons) exists for, and is governed by, the protective purpose it serves: to take care of an individual who is incapable of taking care of himself or herself.

113 Whatever is done, or not done, upon an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection.

114 Translated into the vernacular, an emphasis on the *purpose* of an exercise of protective jurisdiction requires everybody to ask, "*Why* should we do this?" An emphasis on the *interests* of the person in need of protection requires everybody to ask, "*What* is in this *for the benefit of that person*?"

115 Both questions often, implicitly, require also a hard-headed assessment of *whether what is proposed to be done is driven by ulterior motives of others*, particularly those (including family and carers) who surround the person in need of protection.

116 The "practical wisdom" of which Aristotle spoke requires (with apologies to the *Gospel of Matthew*, Chapter 10 verse 16) that we all, "in the midst of wolves, strive to be as wise as a serpent and as gentle as a dove". We need to see what is good and bad in a subject for decision, isolate the bad and elevate the good. We need to manage risk prudentially.

GCL

18 November 2017