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**BOUNDARIES IN ESTATE ADMINISTRATION AND PROTECTIVE
MANAGEMENT: LIMITS ON WHAT CAN BE DONE**

by

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(I) INTRODUCTION

1 The object of this paper is:

- a) to identify boundaries marking out, or between, various types of jurisdiction routinely encountered in management of the affairs of a person who is, or may be, by reason of incapacity or death, unable to manage his or her own affairs;
- b) to identify problems that may be encountered at the limits of, or at a boundary between, different types of jurisdiction; and
- c) to suggest guidelines for dealing with such problems.

2 An exercise preliminary to pursuit of that object is presentation of an overview of the different, but complimentary, types of jurisdiction routinely encountered in management of the affairs of a person who, by reason of incapacity or death, is incapable of self-management.

- 3 This treatment of the topic is not exhaustive, but designed to present a conceptual framework for the identification and solution of problems encountered in practice.
- 4 The protective, probate and family provision jurisdictions of the Supreme Court of NSW provide core insights into management of the affairs of a person who is, or may be, by reason of incapacity or death, unable to manage his or her own affairs. Historically, each head of jurisdiction has been analysed separately, largely in terms of action-based jurisprudence focused on available remedies and greatly influenced by its institutional origins. Recent developments, both legal and social, invite reflection on the availability or otherwise of principles able to provide guidance for practical decision making not confined to historical jurisdictional boundaries.
- 5 Although the protective, probate and family jurisdictions are historically, and conceptually, more or less distinct from each other, and from the common law and equity jurisdictions, they necessarily interact with common law rules and equitable principles. Notable examples of this relate to land ownership and dealings and the law of agency.
- 6 Because managers of the affairs of another (whether described as a manager, guardian, attorney or otherwise) are generally required to serve the interests of the “other” rather than themselves, they are generally held to owe the obligations of a fiduciary to the “other”: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97.
- 7 Adapted to serve the respective purposes of the protective, probate and family provision jurisdictions, equitable principles apply generally to maintain standards required of a fiduciary. Across the board, this can be seen in the liability of a “manager” to account for property under management; constraints on a manager acting in situations in which his, her or its interests conflict with the duties of a manager; and limitations on a manager’s authority to take, retain or be allowed remuneration for the performance of managerial functions.

(II) OVERVIEW OF JURISDICTIONAL TYPES

- 8 The NSW Legal system makes provision (from cradle to grave) for management of the affairs of people who are or may be unable, by reason of incapacity or death, to manage their own affairs.
- 9 Although there are, in some areas of the law, statutory provisions which govern, or affect, law and practice, an understanding of the system as a whole can conveniently be acquired by gauging particular measures against the inherent jurisdiction of the Supreme Court of NSW. Such an approach facilitates a conceptual analysis of law and practice, highlights the continuing importance of the “inherent” jurisdiction of the Supreme Court and provides context for understanding applicable legislation.
- 10 In NSW the expression “inherent” jurisdiction has at least two common levels of meaning in estate administration and protective management.
- 11 It generally refers to the jurisdiction of the Supreme Court preserved by section 22 of the *Supreme Court Act* 1970 NSW, which requires consideration of the “Third Charter of Justice” promulgated under the *New South Wales Act* 1823 (Imp) and the *Australian Courts Act* 1828 (Imp). That legislation conferred jurisdiction on the Court by reference to the jurisdiction of English institutions and officials. It provides the basis of the Court’s jurisdiction in dealing with protective cases (*parens patriae* jurisdiction, relating to “infants” and the mentally ill) and probate cases. The formal reception of English law in NSW, so far as applicable to local circumstances, was fixed at 25 July 1828 by the *Australian Courts Act* 1828. “Inherent” jurisdiction in this sense is often perceived to have a non-statutory origin (notwithstanding dependency on Imperial legislation) but, perhaps, it is more accurately regarded as foundational given its connection with establishment of the Court.
- 12 The expression “inherent” jurisdiction is sometimes also used to describe the jurisdiction conferred on the Supreme Court by section 23 of the *Supreme Court Act* 1970 NSW, which is in the following terms:

“23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.”

- 13 A third usage of the expression “inherent” jurisdiction (invoked by English courts to overcome a perceived want of protective jurisdiction, according to their constitutional framework, in relation to what were once described as “lunacy” cases) is as a description of the functional incidents of a superior court, essentially an implied form of jurisdiction similar to that for which SCA s 23 provides.
- 14 The jurisdiction conferred on the Supreme Court in the 1820s was conferred at a time when law was thought of largely in terms of available “actions” and “remedies” rather than in terms of “underlying principles”.
- 15 Protective and probate cases continue to reflect an orientation towards practice and procedure that appears at times to subordinate principles. Other areas of law were, in the 19th century, reimagined in terms of “scientific” principles that are generally debated as a precondition of consideration of available remedies.
- 16 The protective and probate jurisdictions are historically and conceptually distinct from the common law as developed in the English courts of common law (the Court of King’s Bench, the Court of Common Pleas and the Court of Exchequer). They have much more in common with the equity jurisdiction (much of which is administrative in character), but they are historically and conceptually distinct from the jurisdiction administered by the English Court of Chancery. The protective and probate jurisdictions challenge a modern assumption that the general law (that is, non-statutory law) comprises a binary choice between common law rules and equitable principles.
- 17 The primacy given to remedies in protective and probate cases may reflect three of their intrinsic features. First, they are generally concerned with *management* of people, property and relationships rather than discreet

transactions (often evidenced in writing) or events giving rise to a particular injury and perceptions of a “right” to be vindicated as in a contract or tort law dispute. Secondly, they commonly involve a need to consider different perspectives of an “individual” and the “community” in which he or she lives and dies. Thirdly, although patterns may be discerned in routine cases, the range of problems to be solved in management of protective and probate cases defies simple characterisation in terms of “right” and “wrong”.

- 18 The tendency of action-based jurisprudence is to elevate procedural forms, encourage problems to be recast as a contestable “right” to a particular form of order, and divert attention away from the underlying purpose of an exercise of jurisdiction. This can be seen most clearly in the procedural complexity, and obscurity of technical language, commonly encountered upon an exercise of probate jurisdiction. An emphasis on “management” in dealing with protective and probate cases lends itself to reflection on the *purpose* served by an exercise of jurisdiction in those types of cases: What is to be done, and why?
- 19 If the protective, probate and family provision jurisdictions are imagined in successive encounters of a life lived from infancy to old age, extending into the next generation, a pattern emerges from an examination of their purposive character viewed through the prism of a person living, in dying, in community. The protective jurisdiction privileges, and protects, an individual in need of protection; problems are viewed through the prism of that individual. The probate jurisdiction gives effect to a perspective which transitions from that of a person at the end of his or her life to that of members of his or her community (family) recognised as entitled to enjoy his or her inheritance. The family provision jurisdiction acknowledges an individual’s “testamentary freedom” but qualifies it in favour of those for whom he or she “ought” to have made provision. The purposive character of one head of jurisdiction merges with that of the next in management of people, property and relationships.
- 20 The present tendency of the law in operation (reinforced by the abolition of trial by jury in civil proceedings) is towards purpose driven management

decision making involving the exercise of discretionary powers of an increasingly administrative (rather than an adversarial, adjudicative) character.

- 21 In an area of law deeply engaged with the general law (for example, the law of torts in providing a remedy for an assault of a person and the law of property) there is necessarily a place for analysis of some problems in terms of a “right” to a remedy; but where the focus of the law is on management of an estate the primary “right” any person may have is an entitlement analogous to the right of a beneficiary to due administration of trust property according to the purpose of an exercise of jurisdiction affecting the estate. One person with an un-contestable “right” is the central individual affected by the exercise of jurisdiction (upon an exercise of protective jurisdiction, a person incapable of managing his or her own affairs; upon an exercise of probate or family provision jurisdiction, a testator or intestate person); but even such rights as he or she may have are qualified by the regulatory requirements or expectations of the community in which he or she lives and dies. A person incapable of managing his or her affairs comes under regulatory control which, in some circumstances, can override his or her preferences. There comes a point in the administration of a deceased estate, when executorial duties have been completed, when primary consideration may be given to the entitlements of beneficiaries, including persons for whom the testator “ought” to have made provision.
- 22 Upon an exercise of probate, family provision or general equitable jurisdiction, the Court generally examines *past* events relating to a *particular* transaction with a view to restoration of an estate then to be duly administered. Upon an exercise of protective jurisdiction, the focus is generally upon securing control of an estate, in the interests of a person in need of protection, and considering whether there is a need for, and utility in, a *system* of management going forward, assessing *future* risks.
- 23 The *protective* jurisdiction of the Supreme Court (based, historically, on the English Lord Chancellor’s lunacy jurisdiction and his infancy or wardship

jurisdiction or, as they may be variously described, his *parens patriae* jurisdiction) exists for the purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. The Court focuses upon the welfare and interests of a person incapable of managing his or her affairs, testing everything against whether what is done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.

- 24 The *probate* jurisdiction (formerly described as “ecclesiastical jurisdiction”, historically derived from England’s Ecclesiastical Courts) looks to the due and proper administration of a particular estate, having regard to duly expressed testamentary intentions of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person’s testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR NSW 187 at 189 and 191. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight* [2013] NSWSC 1229 at [20].
- 25 The jurisdiction conferred on the Court in the 19th century has since been supplemented by legislation which takes into account more recent social developments and, in particular, changing perceptions of “incapacity” and “family”.
- 26 In broad terms, the protective jurisdiction has been supplemented by the following legislative developments:
- a) Establishment of a statutory court (presently the Children’s Court of NSW) to exercise jurisdiction concerning children and young persons (“infants” or “minors” under the general law) in need of care or

protection, administratively supported by executive government instrumentalities (the Department of Youth and Communities Services, the Crown Solicitor's Office and Legal Aid NSW).

- b) Establishment of a statute-based administrative structure empowering the NSW Trustee (rather than an officer of the Court, historically a "Master in Lunacy" or "Protective Commissioner") to supervise the management of protected estates, to manage such an estate, and incidentally to provide executive government assistance to the Court upon an exercise of protective jurisdiction.
- c) Establishment of a statutory tribunal (presently the NSW Civil and Administrative Tribunal, "NCAT", *via* its Guardianship Division) to exercise jurisdiction over a person who is unable to manage his or her own affairs (by the appointment of a "financial manager", the functional equivalent of a "committee of the estate" available upon the exercise of the Court's inherent protective jurisdiction or a protected estate manager appointed by the Court under section 41 of the *NSW Trustee and Guardian Act* 2009 NSW) or his or her person (by the appointment of a "guardian", functionally a limited form of equivalent to a "committee of a person" able to be appointed by the Court upon an exercise of its inherent protective jurisdiction), with incidental powers to grant medical consents and the like (perhaps analogous to a grant of relief by the Court in the form of a partial administration order without having to make an order for the general administration of a trust) and to review appointments of enduring attorneys and guardians.
- d) Establishment of the statutory devices of an enduring power of attorney and an enduring guardianship appointment as a means of a person (in exercise of a private right, not dependent upon a determination of a court or tribunal exercising protective jurisdiction) nominating another to manage his or her affairs, or person, after the intervention of mental incapacity, a condition which at common law generally terminates a private arrangement operative under the law of agency.

- e) Establishment of a procedure for the Court to authorise the making of a “statutory will” on behalf of a person lacking testamentary capacity.
- f) Authorization of the Court to make an order for management of the estate of a person who has been missing for 90 days or more: *NSW Trustee and Guardian Act 2009 NSW*, section 54.

- 27 In practice, an exercise of protective jurisdiction (or jurisdiction bearing that character) by the Supreme Court relating to children focuses upon: (a) the management of a child’s estate consequent upon an award of personal injury compensation; (b) an exercise of inherent jurisdiction in exceptional circumstances where proceedings in the Children’s Court are not adequate to the occasion or protective orders are required to detain in secure premises a child in need of protection; or (c) authorisation of a will by a minor, or authorisation of a statutory will for an incapacitated minor, where required. In practice, there is little occasion to refer to section 21 of the *Imperial Acts Application Act 1969 NSW* (empowering a guardian of a minor to take custody of and manage property of the minor), the *Infants’ Custody and Settlements Act 1899 NSW* (dealing with custody of a minor and, in section 16, appointment of a trustee of a minor’s settlement moneys) or the *Guardianship of Infants Act 1916 NSW* (governing the rights of parents as guardians of a minor and access orders for grandparents).
- 28 As the law presently stands, NSW has no legislation authorising or regulating an “advance care directive” (*Hunter and New England Area Health Service v A by his tutor T* (2009) 74 NSWLR 88) or “euthanasia”. Such legislation, if enacted, would sit at the boundary between life and death, and possibly (like a statutory will) further blur historical distinctions between the protective and probate jurisdictions.
- 29 The Supreme Court’s inherent probate jurisdiction (until 1890 described as “ecclesiastical” jurisdiction) is rarely articulated because it has long been supplemented by legislation that largely covers the field. Although other legislation (such as the *Conveyancing Act 1919 NSW*, the *Trustee Act 1925*

NSW or the *Imperial Acts Application Act* 1969 NSW, sections 12-15) may need to be consulted from time to time, most “probate cases” are currently dealt with in the context of the *Succession Act* 2006 NSW and the *Probate and Administration Act* 1898 NSW, formerly the *Wills, Probate and Administration Act* 1898 NSW. The law governing wills (developed on lines first established by the *Wills Act* 1837 (Eng)) and intestacies (conceptually grounded upon the *Statute of Distribution(s) Act* 1670 (Eng) but since much developed) is currently found in the *Succession Act* 2006 NSW, together with provisions governing the Court’s family provision jurisdiction. For the most part, the law governing the administration of deceased estates is currently found in the *Probate and Administration Act* 1898 NSW and Part 78 of the *Supreme Court Rules* 1970 NSW (“the Probate Rules”).

30 Relatively recent legislative developments that have profoundly affected the probate jurisdiction are the following:

- a) Empowerment of the Supreme Court to order that a will be rectified: *Succession Act* 2006 NSW, section 27.
- b) Empowerment of the Court to order that an “informal” will be admitted to probate: *Succession Act* 2006, section 8.
- c) Empowerment of the Court to authorise the making of a will for a person lacking testamentary capacity: *Succession Act*, sections 18-26.
- d) Enactment of a scheme for the distribution of an intestate estate that includes provision for a discretionary distribution order where there are multiple spouses (*Succession Act*, sections 122-126) or an indigenous estate the subject of a customary law claim (*Succession Act*, sections 133-135; *Re Estate Wilson* (2017) 93 NSWLR 119; *Estate Tighe* [2018] NSWSC 163).

- 31 A common feature of these legislative developments is that they trend in the direction of conferring upon the Court discretionary powers in management of a deceased estate, albeit that (in relation to an order for rectification, admission of an informal will or the authorization of a statutory will) a central criterion for the Court's consideration is attribution of an "intention" to a testator. The conferral of such powers on the Court, upon an exercise of probate jurisdiction, can, in some cases, pre-empt a claim for family provision relief or bring about in practice something akin to an assimilation of the two types of jurisdiction.
- 32 The *family provision* jurisdiction (conferred and governed by legislation) operates as an adjunct to the probate jurisdiction, looking to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (out of a deceased person's estate or notional estate) in whose favour, because they have been left without "adequate provision for their proper maintenance, education or advancement in life", an order for provision "ought" to be made.
- 33 The family provision jurisdiction, in combination with the protective and probate jurisdictions, invites reflection on the proposition that, in law, "death" is no longer simply a physical *event* but a *process* which begins when a person anticipates functional incapacity and death by executing an enduring power of attorney, an enduring guardianship appointment and a will and ends when the time for a claimant on that person's estate can, as a practical matter, no longer reasonably expect to be granted provision out of the person's deceased estate.
- 34 A lawyer practising in this area needs to be able to view the process of death prospectively (in estate planning), retrospectively (upon an examination of facts bearing upon identification of assets of a deceased estate) and in current day, real time. Misuse of an enduring power of attorney, deploying it as a "will substitute" to transfer an incapacitated person's property to the attorney or a third party, in breach of a fiduciary obligation owed by the

attorney to the incapacitated person, may entitle the incapacitated person's deceased estate to recover property or compensation as an estate asset. The necessity for both a forward and a backward glance on the pathway to, and beyond, a physical death is what, for a lawyer, distinguishes "death" as a process rather than merely as an event.

- 35 A lawyer who facilitates misuse of an enduring power of attorney by aiding an attorney to effect a transaction which disregards the interests of an incapable principal might expose himself or herself to a civil liability in negligence, if not as a party privy to a breach of fiduciary obligations. A lawyer who fails to advise a legal personal representative client to consider whether property of the deceased was, during the lifetime of the deceased, misapplied by a person (such as a financial manager, guardian or enduring attorney) who owed the deceased the obligations of a fiduciary, giving rise to the possibility of a recovery of estate property or compensation, might expose the client to personal liability in *devastavit*. *Bird v Bird (No 4)* [2012] NSWSC 648 at [104]-[105]; *Smith v Smith* [2017] NSWSC 408 at [130]-[134].
- 36 The jurisdictional categories of 19th century Anglo-Australian law no longer, on their own, accommodate a full understanding of the law and practice relating to management of the affairs of a person incapable of self-management by reason of incapacity or death.
- 37 The statutory constructs of: (a) a court authorised or "statutory" will; (b) an enduring power of attorney; and (c) an enduring guardianship appointment have features which, in perception or practice, cross the jurisdictional boundaries of the protective and probate jurisdictions and may affect on exercise of family provision jurisdiction.
- 38 So too, in some cases, an order for management of the estate of a missing person (made under section 54 of the NSW Trustee and Guardian Act 2009 NSW) may stand on the border between the protective and probate jurisdictions, operating in a way that pre-empts an exercise of probate jurisdiction. That is because the Court and the NSW Trustee are empowered

to make orders for an estate under management to be applied in the payment of the managed person's debts and for the maintenance of his or her family: *NSW Trustee and Guardian Act 2009*, section 65.

- 39 This whole area of the law cannot be appreciated without recognition of changing concepts of "family", the increasingly transactional nature of family business and, possibly, divergent approaches to medical treatment and death in an atomised family setting.
- 40 A difficulty inherent in any attempt to describe the law relating to management of the affairs of a person who is unable, by reason of incapacity or death, to manage his or her own affairs is that there is no one descriptive label that covers the field in all contexts. Consideration has to be given to management (administration) of a person's "estate" (property) before, in anticipation of and after death, as well as management of the person's "person" (guardianship) and related topics. The word "guardianship" sometimes refers to protection of an "estate" no less than to protection of "the person". "Estate administration" does not allow for orders affecting "the person". "Elder law" does not allow for the fact that similar principles govern the young as well as the old. "Succession law" embraces wills, intestacies, family provision cases and the administration of a deceased estate, the business of the living only incidentally and not the management of the estate or person of an incapacitated person.
- 41 In *A Concise History of the Common Law* (5th edition, 1956), Professor TFT Plucknett described the law of succession as "an attempt to express the family in terms of property." Despite the inadequacy of descriptive labels, that observation has resonance beyond the concept of "succession law", narrowly defined. Whatever type of jurisdiction is examined, a concept of "family" is close to the centre of attention. And "family" is generally a function of community.
- 42 Australian law implicitly operates within the paradigm, and adopting the perspective, of an individual living and dying in community. At different times

of an individual's life different emphases are given to the rights and obligations of an individual and "community" (including "family") *vis-à-vis* each other. Shakespeare's "Seven Ages of Man" may start with "a childhood" and end with a "second childhood", but each age brings a different perspective on life and death.

- 43 In a life that runs "full term" into old age, an ordinary sequence of events might require consideration of the protective jurisdiction (during infancy or incapacity before death), the probate jurisdiction (in anticipation of death and its aftermath) and the family provision jurisdiction (in the context of estate planning and administration of a deceased estate) with ancillary topics addressed along the way. As a matter of convenience that is the analytical structure of what follows.

(III) EQUITY, A LIABILITY TO ACCOUNT AND CONFLICTS BETWEEN DUTY AND INTEREST OR BETWEEN INTERESTS

- 44 The purposive character of the protective, probate and family provision jurisdictions is on display in considering the liability of a fiduciary, upon an exercise of equitable jurisdiction, to account for property under management and to avoid conflicts between duty and interest or between competing interests.

- 45 As a general proposition, applied upon an exercise of equitable jurisdiction for the purpose of maintaining standards, a fiduciary cannot: (a) obtain an unauthorised profit or gain from performance of the duties of the fiduciary office; or (b) act in a situation in which there is a conflict between duty and interest or between competing interests.

- 46 This proposition is open to modification in giving effect to the purposes respectively served by an exercise of protective, probate and family provision jurisdiction. For example:

- a) Upon an exercise of protective jurisdiction, it is recognised that a “manager” (whether described as a manager, guardian, attorney or otherwise) may not be held to be a strict liability to account for enjoyment of property under management incidental to due performance of the obligations of a manager: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 416 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433; *Crossingham v Crossingham* [2012] NSWSC 95; *Woodward v Woodward* [2015] NSWSC 1793; *Downer v Longham* [2017] NSWSC 113; *Smith v Smith* [2017] NSWSC 408.
- b) Upon an exercise of probate jurisdiction, it is recognised that it is open to a testator to appoint as his or her executor a person whose interests are in conflict with the interests of the testator’s deceased estate.
- c) Upon an exercise of family provision jurisdiction, it is recognised that, in seeking to uphold the will of a testator, a legal personal representative of a deceased person, acting for an estate responding to a claim for family provision, may consult with and act upon views expressed by beneficiaries whose interests are in conflict. Equally, in order to minimise costs that might ultimately have to be borne by a deceased estate, a solicitor may be able to act for multiple family provision claimants.

47 Where the manager (however described) of an estate subject to an exercise of protective or probate (and, incidentally, family provision) jurisdiction is, or may be, personally liable for a breach of duty the Court may relieve the manager, either wholly or partly, from personal liability for the breach. In the case of a trustee the jurisdiction to grant that relief is grounded in the *Trustee Act* 1925 NSW, section 85. As the office of a protected estate manager or financial manager is not, of itself, the office of a trustee, the jurisdiction to excuse a breach of duty is grounded in the Court’s inherent protective jurisdiction: *C v W (No 2)* [2016] NSWSC 945; *Downie v Longham* [2017] NSWSC 113; *Re LSC and GC* [2016] NSWSC 1896.

48 Subject to one qualification, whatever its jurisprudential foundation, a breach of duty cannot, or will not, be excused unless it appears to the Court that the manager has acted honestly and reasonably and ought fairly to be excused. At least in theory, upon an exercise of protective jurisdiction a manager who has not complied with that standard may nevertheless be granted relief if such an order is found to be in the interests, and for the benefit, of the incapable person.

(IV) THE PROTECTIVE JURISDICTION AND ANCILLARY BUSINESS

49 The protective jurisdiction is directed to the protection of persons who, lacking capacity to care for themselves, are in need of protection. The concept of “(in)capacity” is accordingly central. What is meant by “(in)capacity” depends on context. The meaning of the term “(in)capacity” is responsive to the question, “(in)capacity for what purpose?” *Testamentary* capacity is assessed by reference to whether a testator has capacity for the purpose of making a will, with an ability to remember, to reflect and to reason. Capacity for *self-management* depends upon whether a person is able to make decisions about the conduct of his or her affairs sensibly and without an undue risk of exploitation. An assessment of testamentary capacity, if not made in real time, is generally made in retrospect. An assessment of capacity for self-management is routinely made in real time and involves a forward-looking perspective in the management of risk.

50 In recent decades there has been a reorientation of the old lunacy jurisdiction (historically referable to “idiots”, “lunatics” and the like) away from a focus upon mental illness and towards a focus on the functional (in)capacity of a person to manage his or her own affairs or person. A management order can be made in aid of a person who is mentally alert but physically incapable of performing functions necessary for a full life.

Management of an estate (property)

51 Orders for the management of the estate of a person incapable of managing his or her own affairs can be made:

a) by the Supreme Court of NSW, in the form of:

- i. an order for the appointment for a protected estate manager pursuant to the *NSW Trustee and Guardian Act 2009* NSW, section 41; or
- ii. an order for the appointment of a “committee of the estate” upon an exercise of the Court’s inherent jurisdiction.

b) by the Guardianship Division of NCAT (constituted by the *NSW Civil and Administrative Tribunal Act 2013* NSW), in the form of a financial management order under the *Guardianship Act 1987* NSW.

c) by the Mental Health Tribunal (constituted by the *Mental Health Act 2007* NSW) in the form of an order, under sections 43-52 of the *NSW Trustee and Guardian Act 2009*, that management of the affairs of a patient be committed to the NSW Trustee.

52 Each form of order (other than an order for the appointment of a committee of the estate) engages the administrative procedures for which the *NSW Trustee and Guardian Act* provides, empowering and requiring the NSW Trustee to supervise management of protected estates by private managers.

53 As has been noticed, the ambit of the Act extends beyond the case of a person incapable of managing his or her own affairs to authorise management of the affairs of a missing person: section 54.

54 In a case in which there is urgent need of a manager, an ongoing dispute about the capacity of a person for self-management or a dispute about the identity of a prospective manager, the Court not uncommonly appoints the

NSW Trustee as a receiver and manager with powers granted by reference to its powers under the *NSW Trustee and Guardian Act*. *JMK v RDC and PTO v WDO* [2013] NSWSC 1362 at [55]-[56] and [68](5); *L v L* [2014] NSWSC 1686.

Management of the person

- 55 Upon an exercise of its inherent jurisdiction, the Court is empowered to appoint a committee of the person, a form of office similar to the office of a guardian appointed under the *Guardianship Act* 1987 NSW. The Court does not have original jurisdiction to appoint a guardian under the Act.
- 56 The Guardianship Division of NCAT is empowered by the *Guardianship Act* to appoint a guardian, commonly with functions expressly defined by the order as the making of decisions about an incapable person's place of residence, medical and dental care, rights of access to the person and what services he or she should receive.
- 57 A guardianship order made under the *Guardianship Act* activates the administrative procedures (including the work of the Public Guardian) for which the Act provides. An order for the appointment of a committee of the person does not, of itself, do likewise.

Enduring Attorneys and Guardians

- 58 Enduring powers of attorney and enduring guardianship appointments provide a mechanism for individuals to appoint their preferred managers (of their property and their person respectively) without resort to the Court or NCAT.
- 59 Such appointments are reviewable by the Court and NCAT on terms which contemplate that, should it be considered appropriate, an outcome of such a review can be the establishment of a more formal management regime.
- 60 Enduring powers of attorney are presently governed by the *Powers of Attorney Act* 2003 NSW.

61 Enduring Guardianship appointments are presently governed by the *Guardianship Act 1987 NSW*.

General Observations: Boundaries and Limits

62 Necessity for a Territorial Connection. An exercise of the Court's protective jurisdiction requires a territorial connection with Australia (allowing for the operation of the *Jurisdiction of Courts (Cross Vesting)* legislation) in that the person in need of protection or property of that person must generally be within Australia at the time of exercise of the jurisdiction: *PB v BB* [2013] NSWSC 1223; *cf, HS v AS* [2014] NSWSC 1498. A territorial connection might extend to the case of a person in need of protection who, although presently overseas, is domiciled or ordinarily resident in Australia.

63 As a practical matter, protective orders are difficult to enforce unless the person in need of protection is within Australia or there is property within Australia against which orders can be enforced: *cf, IR v AR* [2015] NSWSC 1187.

64 Historically, Two Sources of Jurisdiction. At the core of the protective function of the State (formerly discussed as the *parens patriae* jurisdiction of the Crown delegated to the Lord Chancellor of England, by reference to whose offices jurisdiction was conferred on the Supreme Court) is jurisdiction formerly comprising two distinct forms of jurisdiction: namely, the infancy (or wardship) jurisdiction and the lunacy jurisdiction.

65 In NSW practice, the infancy jurisdiction is often referred to as *parens patriae* jurisdiction as if (contrary to historical fact) it is the only form of jurisdiction entitled to that label. By virtue of legislation, the lunacy jurisdiction has been known in NSW as protective jurisdiction since 1958. In the use of descriptive labels, context is important. In this paper, a reference to protective jurisdiction generally includes a reference to both the infancy jurisdiction and the lunacy jurisdiction, as they once were commonly known.

- 66 For the most part, principles governing the two types of protective jurisdiction (the infancy jurisdiction and the lunacy jurisdiction) have been assimilated. The central principle (sometimes described as “the welfare principle” and sometimes described as “the paramountcy principle”) is that, upon an exercise of the Court’s jurisdiction, the welfare and interests of the person in need of protection are the paramount consideration.
- 67 Although the principles of the two heads of jurisdiction have largely been assimilated, different considerations may apply to minors generally and to minors as they attain their age of majority. Upon the exercise of jurisdiction over a minor, an allowance has to be made for the age and maturity of the individual concerned. And at or about the time a minor attains the age of majority (so that legal incapacity is no more), a protective regime ordinarily must be dispensed with unless the individual is functionally incapable of self-management: *Re AAA; Report on a Protected Person’s Attainment of the Age of Majority* [2016] NSWSC 805.
- 68 The (un)limited character of Protective Jurisdiction. Although it is commonly said that the limits (or scope) of the Court’s protective jurisdiction have not, and cannot, be defined (*Secretary, Department of Health and Community Services v JWB & SMB (Marion’s Case)* (1992) 175 CLR 218 at 158), any exercise of the jurisdiction must conform to principles which govern it, chief amongst which is that whatever is done, or not done, must be for the benefit, and in the interests, of the person in need of protection (*Re Eve* [1986] 2 SCR 388, at 407 *et seq*; (1986) 31 DLR (4th) 1, at 13 *et seq*). The jurisdiction is broad and flexible but not, in practice, truly unlimited.
- 69 Spheres of Control: Management of Estate and Person. Upon an exercise of the Court’s protective jurisdiction a distinction is routinely drawn between management of an estate (property) and management of the person.
- 70 Upon an exercise of inherent jurisdiction, appointment of a “committee of the estate” is functionally similar to the appointment of a protected estate manager by the Court under section 41 of the *NSW Trustee and Guardian Act*

2009 NSW or the appointment of a financial manager by NCAT exercising powers conferred by the *Guardianship Act 1987* NSW. An appointment by the Court of a “committee of the person” is functionally similar to the appointment by NCAT of a “guardian” pursuant to the *Guardianship Act 1987*.

71 The Court does not have an original jurisdiction to appoint a guardian under that Act. Parties unfamiliar with the Court’s inherent jurisdiction not uncommonly fail to recognise that the Court has no jurisdiction to appoint a guardian under the *Guardianship Act 1987* and that, if similar relief is sought, the correct form of application is for the appointment of a committee of the person with or without the functional limitations characteristically expressed in an NCAT guardianship order.

72 There is no clear delineation between the powers of a committee of the estate and the powers of a committee of the person. By reference to their titles, and intuitively, a committee of the estate manages an incapable person’s property, and a committee of the person manages an incapable person’s person. One has custody of an incapable person’s property; the other has custody of the person’s person. Both are officers of the Court. Both are subject to direction by the Court. A “committee” can comprise an individual or several. A single person can, in theory, occupy both the office of a committee of an estate and the office of a committee of the person; but the welfare and interests of an incapable person might best be served by a different person, or persons, occupying each office. Each officeholder is generally bound to cooperate with the other in advancing the welfare and interests of the incapable person. In the case of conflict, an application can be made for directions.

73 Management Orders Suspend Powers of Self-Management and Other Forms of Management. Under the general law, the appointment of a committee of a committee of the estate or a committee of the person *probably* suspends the incapable person’s powers of self-management; anybody who interferes with the performance of a committee’s functions may be guilty of a contempt of court. Appointment of a protected estate manager by the Court (under section 41 of the *NSW Trustee and Guardian Act 2009*) or a “financial

manager” (by NCAT under the *Guardianship Act 1987*) generally does suspend the incapable person’s powers of self-management (*NSW Trustee and Guardian Act 2009* NSW, section 71) or the powers of an enduring attorney (*Powers of Attorney Act 2003* NSW, section 50). The appointment by NCAT of a guardian (under the *Guardianship Act 1987*) suspends the powers of an enduring guardian appointed by the incapable person: *Guardianship Act 1987*, section 61.

- 74 Protective Management Regimes End on Death. The powers of a committee of the estate, protected estate manager or financial manager end upon the death of the incapable person, although there may be residual authority in the winding up of a management regime.
- 75 Will-making Powers. There is no power to make a will on behalf of the incapable person (leaving the incapable person to his or her own devices or an applicant for a statutory will).
- 76 The existence of a management order does not of itself carry the consequence that a person whose estate is under management lacks testamentary capacity.
- 77 Statutory Wills. Although statutory in form, the jurisdiction to make a court-authorized will is protective in nature: *Re Fenwick* (2009) 76 NSWLR 22; *GAU v GAV* [2016] 1 QDR 1; *Small v Phillips* [2019] NSWCA 222; *Small v Phillips (No 2)* [2019] NSWCA 268 The Court must focus on the presumed intention of the person lacking testamentary capacity, but nobody should lose sight of the potential effect on that person (including his or her life sustaining care) of a process of will making that may require his or her community (people who may stand to benefit or lose upon the authorisation of a statutory will) to be consulted. Not all persons engaged in such a process can be assumed to have the incapacitated person’s welfare and interests paramount in their conduct. Statutory will proceedings operate most beneficially when there is clear evidence of the incapacitated person’s intentions and a family settlement that accommodates them.

- 78 Advance Care Directives. The powers of a committee of a person or a guardian do not extend to the making of an advance care directive on behalf of an incapable person.
- 79 Superannuation Investments. The powers of a committee of the estate, a protected estate manager or a financial manager do not extend to investment in a superannuation policy which cedes control of the incapable person's estate to a third party on terms that do not allow estate property to remain available for the incapable person if required or that divert property away from the incapable person's estate upon death: *G v G (No 2)* [2020] NSWSC 818. They do not extend to execution of a death benefit nomination.
- 80 Remuneration. Because the offices of committee of the estate, committee of the person, manager of a protected estate and guardian are each a fiduciary office, there is no entitlement to remuneration for performance of the duties of such an office without an order of the Court or legislative authority: *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245.
- 81 Fiduciary Obligations. The office of an enduring attorney and the office of an enduring guardian are also both fiduciary in character, attracting the obligations owed by a fiduciary to the incapable person for whose benefit the office is held.
- 82 Although a third party dealing with an enduring attorney might be entitled to transact business with an attorney on the basis of the attorney's ostensible authority, an enduring attorney may nevertheless be liable to account to his or her principal for breach of a fiduciary obligation owed to the principal: *Estate Tornya, Deceased* [2020] NSWSC 1230.
- 83 Family Settlements. Where the family of an incapable person reaches agreement as to management of the estate and person of the incapable person an application for the Court's approval of the agreement may require

an exercise, or at least consideration, of each of the protective, probate and family provision jurisdictions: *W v H* [2014] NSWSC 1696.

(V) THE PROBATE JURISDICTION AND ANCILLARY BUSINESS

84 The Nature and Scope of “Probate” Jurisdiction. What is loosely described as “the probate jurisdiction” is generally taken to include the law of wills, grants of probate and administration, and the administration of a deceased estate. So viewed, this jurisdiction is concerned with what happens before or in anticipation of death, as well as what occurs at the time of and after death. Estate planning views the world prospectively, applications for a grant and administration proceedings have variable perspectives depending on context.

85 Although probate proceedings might occasionally focus upon the appointment of testamentary guardians for children, their primary focus is upon the management of property, generally spoken of as the administration of an estate.

86 Necessity for a Territorial Connection. An exercise of probate jurisdiction requires that there be property within the territorial jurisdiction of the Court: *Probate and Administration Act* 1898 NSW, section 40; *Cf*, 4 George IV chapter 96 (the *NSW Act*, 1823) (Imp), section 10; *Third Charter of Justice*, 1823 (Imp), clause 14.

87 Identification of Estate property, Competing Wills and Beneficiaries. A primary focus of an application for a grant of probate (with or without a will annexed) or administration is upon identification of property the subject of the Court’s jurisdiction, competing wills (including informal wills) and publication of notice of an intention to apply for a grant, not limited to service of notice of proceedings for a grant upon persons who might have an interest in the deceased’s estate.

88 Notice of Proceedings and Solemn Form Grants. A will cannot properly be admitted to probate in solemn form unless all interested parties are given due

notice of the application for a grant: *Osborne v Smith* (1960) 105 CLR 153 at 158-159; *Estate Kouvakis* [2014] NSWSC 786 at [249].

- 89 Revocation of a Grant. The amenability of a grant of probate or administration to an order for revocation depends upon the nature of the grant and the ground upon which an order for revocation is sought: *Estate Kouvakis* [2014] NSWSC 786. Where an order for revocation is essentially an application for the appointment of a new “manager” without disturbing entitlements of beneficiaries on a due administration of an estate, the primary focus is, or should be, on what is required for a due administration of the estate, not a “right” of an executor or administrator to remain in office. Where an application for revocation is based upon a challenge to the underlying entitlements of beneficiaries (usually because of a challenge to the validity of a will), different considerations apply.
- 90 Illusive though the distinction between a grant of probate “in common form” and a grant “in solemn form” may be, an application for revocation of a grant of probate ultimately depends upon questions of substance (including, particularly, whether the applicant had notice of proceedings for the grant and an opportunity to intervene in those proceedings) rather than simply whether the grant does, or does not, carry the endorsement “in solemn form”.
- 91 Interim (Special or Limited) Grants of Administration. An interim (special or limited) grant of administration may be essentially a probate equivalent of equity’s appointment of a receiver and manager (an alternative form of interlocutory order) despite the description of such grants in terms of obscure Latin tags. Ideally the powers of a limited form of administration should be set out in the order by which the administrator is appointed, the interim grant made.
- 92 In the absence of an express power to effect a distribution of estate property, an interim grant does not authorise a distribution of property, let alone a final administration of an estate. That said, notwithstanding traditional modes of property practice and procedure, the administration of an estate might

proceed in accordance with orders from time to time made by the Court. A grant of probate or administration is, in essence, itself an order of the Court.

93 A good reason for sticking with conventional forms of grant (a grant of probate or a grant of letters of administration) is that such a grant is not only an order of the Court but also an instrument of title widely recognised throughout the community as such: *Estate Kouvakis* [2014] NSWSC 786 at [228]-[233].

94 Title and Authority to Commence Proceedings. Although it is commonly said that the title of the executor of a will is grounded on the will, and that of an administrator is grounded on an order of the Court, complexities abound. In particular, in NSW proceedings cannot be commenced by an executor on behalf of an estate without an earlier grant of probate or administration or, at least, a claim for a grant in the originating process; otherwise, proceedings are deemed to be a nullity: *Marshall v D G Sundin & Co Pty Ltd* (1989) 16 NSWLR 463; *Deigan v Fussell* [2019] NSWCA 299; *Re Estate Torny, Deceased* [2020] NSWSC 1230.

95 Can Admission of a Statutory Will to Probate be Opposed? Although an application for a statutory will is a legislative form of protective jurisdiction, the effectiveness of such a will depends upon its admission to probate after the death of the person on whose behalf it was made. Unresolved problems with an exercise of probate jurisdiction in this context include consideration of whether, after the death of the incapable person, an earlier unknown will of the person is discovered and whether the orders authorising the making of a statutory will might be liable to be set aside in the event, after the death of the incapable person, persons who should have been given notice of the application for authorisation of a statutory will were not.

96 Undue Influence. An allegation of “undue influence” upon an exercise of probate jurisdiction requires proof of coercion, thus distinguishing it from an allegation of “undue influence” upon an exercise of equity jurisdiction: *Bridgewater v Leahy* (1998) 194 CLR 547 at 474-475; *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[207].

(VI) THE FAMILY PROVISION JURISDICTION AND ANCILLARY BUSINESS

97 A Necessity for a Territorial Connection. The jurisdiction to make a family provision order depends upon the existence of property, in the territorial jurisdiction of the Court, amenable to such an order.

98 Relevance and Discoverability of Overseas Property. If there is property within the territorial jurisdiction of the Court, the Court can take into account property beyond the territorial jurisdiction in making an order for the discovery of property outside the territory or in making an order for provision attaching to property within the jurisdiction: *Estate Grundy* [2018] NSWSC 104.

99 Representative orders in family provision proceedings. Where an application is made for family provision relief in the absence of a prior grant of probate or administration, the Court may make an order in the family provision proceedings for the estate of the deceased person in relation to which a claim is made be represented by means of:

a) a limited form of grant of administration (made under section 91 of the *Succession Act* 2006 NSW) to enable the application for family provision relief to be dealt with; or

b) an order under rule 7.10 of the *Uniform Civil Procedure Rules* 2005 NSW for the estate of the deceased person to be represented by a named person.

100 Either of these forms of a “representative order” might enable the Court to determine conveniently proceedings on a claim for family provision relief without the cost and delay of an application for a grant of probate or administration in “probate” proceedings. However, neither form of order, of itself, confers upon an estate representative authority to administer an estate outside of the context of the family provision proceedings. If authority of that

character is sought short of a grant of probate or a grant of administration, an interim grant of administration (with powers defined to meet the particular case) could be made upon an exercise of probate jurisdiction.

101 “Merger” or probate and family provision proceedings. Although the probate and family provision jurisdictions are conceptually separate, and a Court exercising family provision jurisdiction is not entitled to “re-write” a will, particular care needs to be taken to keep each of the two types of jurisdiction separately in mind where a claim for probate or administration and a claim for family provision relief are heard together. In formal terms, evidence admissible on a family provision claim may not be admissible on a probate claim; whereas a family provision claim must be heard and determined in accordance with statutory criteria, a probate claim is generally heard and determined by reference to the general law; and, whereas a grant of family provision relief is explicitly discretionary, a decision whether or not to admit a will to probate is not. In a case management regime, where concurrent claims for probate or administration and family provision relief might jointly be referred for mediation, a natural tendency of parties (if not the Court upon an application for approval of a settlement) might be to allow parties to disregard a testator’s testamentary intentions altogether. Doctrinal purity and the worldly-wise are sometimes uncomfortable companions.

(VII) CONCLUSION

102 The paradigm of Australian law governing management of the affairs of a person who is, or may be, by reason of incapacity or death, unable to manage his or her own affairs is that of an individual living, and dying, in community.

103 The focus of the law shifts as one moves, first, from an exercise of protective jurisdiction (which privileges the perspective of an individual unable to take care of himself or herself), then, to an exercise of probate jurisdiction (which focuses upon a transition from the perspective of an individual to the perspective of his or her beneficiaries, drawn from his or her community) and,

finally, to an exercise of family provision jurisdiction (in which the individual's judgement, or lack of it, is subject to community review).

104 With different emphases depending on the nature of the particular jurisdiction engaged, there are patterns in the analysis of any problem concerning management of the affairs of a person who is, or may be, by reason of incapacity or death, unable to manage his or her own affairs:

- a) In each case, the starting point is identification of an individual (a central identity) whose affairs may be the subject of management.
- b) At an early stage of analysis, there is a need to identify that individual's community (including, particularly, family). Upon an exercise of protective jurisdiction, the primary concern is usually the identification of people, with a *social* interest in the affairs of an incapable person who may assist the Court and the incapable person in management of the incapable person's affairs. Upon an exercise of probate jurisdiction, the emphasis is on identification of those who have a *proprietary* interest in the deceased estate of the person. Upon an exercise of family provision jurisdiction, the focus shifts slightly to require identification, not only of those who have a proprietary interest, but also those who may be eligible to make an application for family provision relief.
- c) In each case, an endeavour should be made to obtain evidence of the intention and preferences of the central person as to management (including prospective disposition) of his or her estate and, upon an exercise of protective jurisdiction, his or her person. Commonly that entails the making of enquiries as to the existence or otherwise of a will (including an informal will), an enduring power of attorney and/or an enduring guardianship appointment. Consideration might also need to be given, upon an exercise of protective jurisdiction, as to whether there is a need, or prospect, of an application being made for a statutory will.

- d) Enquiries ordinarily need to be made about the central person's general financial circumstances, including assets/liabilities and, if the person be living, his or her ordinary income/expenses. Upon an exercise of protective, probate and family provision jurisdiction, this generally entails identification of extant property and a consideration of whether property may have been diverted away from the person's estate by misuse of an enduring power of attorney or otherwise. In the case of an exercise of family provision jurisdiction, the notional estate provisions of chapter 3 of the *Succession Act* 2006 NSW require consideration of all transactions which, in the three years proceeding death, may have diminished the deceased's estate.
- e) Upon an exercise of each jurisdiction, consideration needs to be given to identification of "interested persons" who should, or must, be given notice of any proceedings concerning the estate or person of the central identity. That requires, as has been noted, identification of those with a social interest (upon an exercise of protective jurisdiction), a proprietary interest (upon an exercise of probate jurisdiction), and a proprietary interest or status of an eligible person (upon an exercise of family provision jurisdiction).
- f) At an early stage, consideration needs to be given to identification of a person or persons suitable to act as a "manager" (however described) of the estate of the central person. Generally, a central focus is upon persons nominated in a will to act as an executor or those nominated as an enduring attorney or enduring guardian. In any event, consideration should be given to whether a prospective manager can be one or more natural persons or should be an institutional manager such as a licensed trustee company or the NSW Trustee.
- g) The jurisdiction sought to be invoked should be identified, as should be the most convenient forum in which to apply for such orders as may be required for due management of an estate or the person of an incapable person. For practical purposes, the choice of a forum arises

only in connection with an exercise of protective jurisdiction. There, in relation to routine applications not involving a large estate, a claim for remuneration or other complicating factors, the most expedient forum may be the Guardianship Division of NCAT.

h) In all cases, once the nature of the “final” relief to be sought is identified, consideration should be given to whether it is necessary or appropriate that there be some form of interlocutory relief; e.g., the appointment of a receiver and manager, or an interim administrator, or an interlocutory injunction.

105 Where problems emerge in *management* of an estate or of a person whose affairs are under “management” (as distinct from a dispute about competing claims of “right” such as might require a construction suit), consideration should be given, first, to engaging all potentially interested parties with a view to reaching agreement or, at least building an estoppel in relation to a foreshadowed management decision and, if necessary, to the making of an application for judicial advice or directions.

106 A problem inherent in the management of the affairs of a person who is, or may be, by reason of incapacity or death, unable to manage his or her own affairs is ensuring that decision-making processes remain focused on the purpose of the decisions being made. There is an ever-present risk of a decision being made by reference to an ulterior purpose (commonly in the interests of a person who seeks to influence management of an estate or person otherwise than in the interests of the person whose affairs are under management).

GCL

23 February 2021

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