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"ENDURING AGENTS": Creation, Use and Abuse of Enduring Powers of Attorney and Enduring Guardianship Appointments

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I. INTRODUCTION

1 The object of this paper is to provide for undergraduate law students an introduction to legal problems associated with misuse of an enduring power of attorney or an enduring guardianship appointment, placing the topic within the broader context in which it is encountered in legal practice.

2 An enduring power of attorney is a written instrument for the appointment by a natural person (as principal) of an agent who, by force of statute, may have power to bind the principal in the conduct of his or her affairs (including dealings with property) despite the fact that, after execution of the instrument, the principal has lost mental capacity. An enduring power of attorney is presently governed by the *Powers of Attorney Act* 2003 NSW. An earlier prototype of a similar instrument was provided for in Part 16 of the *Conveyancing Act* 1919 NSW from 1985 until repealed by the 2003 Act.

3 An enduring guardianship appointment is a written instrument by which an adult person (as principal) appoints another adult as an agent who, by operation of statute, has power to make decisions for him or her about his or her personal welfare if and when he or she loses mental capacity. An enduring guardianship appointment is governed by the *Guardianship Act* 1987 NSW. Amendments to the Act to make provision for such appointments came into effect in 1998.

4 Both types of instrument provide a mechanism through which a person may provide for management of his or her affairs during an anticipated period of mental incapacity before death. They depend upon the operation of legislation in order to be effective beyond the time the principal becomes mentally incapacitated. That is because, under the general law, the authority of an agent lapses when the principal becomes mentally incapable.

5 In practice, many people execute an enduring power of attorney and an enduring guardianship appointment at the same time, in anticipation of death, that they execute a will. Some also sign an "advance care directive" of the type described in *Hunter and New England Area Health Service v A by his Tutor T* [2009] NSWSC 761; 74 NSWLR 88.

6 An enduring power of attorney is generally associated with the management of the property (that is, "the estate") of a person although it is not, in terms, expressed that way. Subject to the terms of Part 2 of the *Powers of Attorney Act* 2003, and as contemplated by sections 8 and 9 of the Act, an enduring power of attorney generally confers on the attorney "the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do".

7 This formula may assist a third party who deals with the attorney to bind the principal because of the ostensible authority of the attorney (*Taheri v Vitek* (2014) 87 NSWLR 403), at least where the third party has no notice of a breach of duty on the part of the attorney; but, as between the attorney and his or her principal, it cannot be taken at face value without consideration of whether the

attorney has acted in breach of fiduciary obligations owed to the principal (*Estate Tornya, Deceased* [2020] NSWSC 1230).

8 An enduring guardianship appointment is generally associated with the management of "the person" of a person in that (as contemplated by section 6E of the *Guardianship Act* 1987 NSW) it authorises an enduring guardian to make decisions about where the principal (styled "appointor") is to live, what health care he or she is to receive, what other kinds of personal services he or she is to receive, and what medical or dental treatment he or she is to receive, as well as any other function relating to the appointor's person that is specified in the instrument.

9 Both types of instrument need to be understood in a broader context, including the following:

(a) The concept of "mental (in)capacity" that attends the execution and operation of an "enduring" instrument and its contrast with the concept of "(in)capacity for self-management" that informs an exercise of protective jurisdiction of the Supreme Court of New South Wales or the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT").

(b) The jurisdiction of the Court to make decisions (upon an exercise of protective, probate, family provision or equity jurisdiction) affecting the person or estate of a person who is, by reason of incapacity or death, unable to manage his or her own affairs.

(c) The fiduciary character of obligations owed by an enduring attorney and an enduring guardian to the person who appointed them.

(d) The dual character of an enduring power of attorney, by which the acts of an attorney may bind the principal to a third party even though the attorney may be in breach of fiduciary

obligations to the principal and liable to account to the principal for misappropriated property or compensation.

(e) The legislation governing the appointment of:

(i) a protected estate manager by the Court, pursuant to section 41 of the *NSW Trustee and Guardian Act* 2009 NSW.

(ii) a financial manager (pursuant to Part 3A of the *Guardianship Act* 1987, particularly sections 25E, 25G and 25M) or a guardian (pursuant to Part 3 of the Act, particularly sections 14-18) by NCAT.

10 The terminology used to describe concepts in this area of the law, as in most areas of the law, depends upon context for its meaning. The word "guardianship" and its derivatives, for example, sometimes refer to arrangements for the protection of both the estate (property) and the person (the body) of a person in need of protection. Sometimes they refer simply to arrangements for the protection of "the person" of a person in need of protection.

11 A dispute about the validity or efficacy of an enduring power of attorney or an enduring guardianship appointment often results in the appointment of a "protected estate manager" or a "financial manager" (which are functionally equivalent), in the case of a dispute about property, or the appointment of a "guardian" by NCAT (or an equivalent appointment, of a "*committee* of the person", upon an exercise of the Court's inherent jurisdiction) in the case of a dispute about management of "the person" of an incapable person.

12 An appointment of a protected estate manager by the Court, or a financial manager by NCAT, engages the administrative oversight of the NSW Trustee under the *NSW Trustee and Guardian Act* 2009 NSW. Although an enduring power of attorney can be reviewed by the Court or NCAT, an enduring attorney

is not subject to the same supervision as a protected estate manager or financial manager. The administrative regime for which the 2009 Act provides allows for a more formal management of risk than is involved in the management of an incapable person's affairs by an enduring attorney.

13 The operation and utility of enduring instruments, and the risks associated with them, can best be understood if they are conceptually placed within the framework of the Court's jurisdiction for dealing with a person in need of protection (our central personality) whose deceased estate may, in due course, be administered within the probate registry of the Court and be made the subject of an application for a grant by the Court of family provision.

14 Upon a consideration of each type of the Court's jurisdiction, questions may arise as to the nature and value of the estate of the central personality and, more particularly, whether any property has been diverted away from the estate by a person (a) purporting to act as an enduring attorney; or (b) exercising influence over the vulnerable person as an enduring attorney or an enduring guardian.

II. THE PRESCRIBED FORM OF AN ENDURING POWER OF ATTORNEY

15 As contemplated by section 8 of the *Powers of Attorney Act* 2003 NSW, the "prescribed form" of an enduring power of attorney can be found in the *Powers of Attorney Regulation* 2016 NSW, Schedule 2, Form 2.

16 That form includes a statement of "background information" addressed to a person contemplating the execution of an enduring power of attorney, part of which is extracted here:

> "An enduring power of attorney is a legal document that allows you (the 'principal') to nominate one or more persons (referred to as 'attorneys') to act on your behalf. An enduring power of attorney gives the attorney the authority to manage your legal and financial affairs, including buying and selling real estate, shares and other assets, operating your bank accounts and spending money on your behalf.
>
> The attorney's power continues even if for any reason you lose your mental capacity to manage your own affairs. Once you lose your mental capacity you

cannot revoke this power of attorney. If you want the power of attorney to cease if you lose your mental capacity, use the general power of attorney form [prescribed as Form 1 of Schedule 2 to the *Powers of Attorney Regulation* 2016 NSW]. An attorney under an enduring power of attorney cannot make decisions about your lifestyle or health. These decisions can only be made by a guardian (whether an enduring guardian appointed by you or a guardian appointed by the Civil and Administrative Tribunal or the Supreme Court).

The prescribed witness certificate in … this form must be completed. Before acting as your attorney, the attorney … must sign the acceptance [provided for in the form].

Please read the Important information set out at the end of this document. It includes notes to assist in completing this document and more fully explains the role and responsibilities of an attorney."

17 The "Important information" includes the following extracted statements:

- "A power of attorney is an important and powerful legal document. You should get legal advice before you sign it.

- It is important that you trust the person you are appointing as attorney to make financial decisions on your behalf. Your attorney must be over 18 years old and must not be bankrupt or insolvent. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements.

- A power of attorney cannot be used for health or lifestyle decisions. You should appoint an enduring guardian under the *Guardianship Act* 1987 if you want a particular person to make these decisions. … .

- Clause 2 of the power of attorney contains powers [by reference to sections 11(2), 12(2) and 13(2) of the *Powers of Attorney Act* 2003] which will permit your attorney to use your money and assets for the attorney or anyone else as provided. You should only tick a box in clause 2 if you want your attorney to have that power.

  [Section 11(2) provides for an attorney to have authority to give reasonable gifts. Section 12(2) provides for an attorney to have authority to confer benefits on himself or herself to meet his or her reasonable living and medical expenses. Section 13(2) provides for an attorney to be authorised to confer benefits on named persons to meet their reasonable living and medical expenses.]

- This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.

- Your attorney must keep the attorney's own money and property separate from your money and property, unless you are joint owners, or operate joint bank accounts. Your attorney should keep reasonable accounts and records about your money and property. The cost of providing and maintaining these records by the attorney may be recoverable from you.

- If your attorney is signing certain documents that affect real estate, the power of attorney must be registered at Land and Property Information. …

- An attorney must always act in your best interest. If your attorney does not follow your directions or does not act in your best interest, you should consider revoking the power of attorney. You will only be able to do so while you retain your mental capacity. If you revoke the power of attorney you should notify the attorney, preferably in writing, that they are no longer your attorney. The attorney must stop acting immediately once they have knowledge of the revocation.

- This power of attorney does not automatically revoke earlier powers of attorney made by you. If you have made an earlier power of attorney that you do not want to continue, you must revoke the earlier power of attorney. It is advisable that you notify the attorney, preferably in writing, of the revocation, if you have not already done so. You should also give notice of the revocation to anyone who is aware of the earlier power of attorney, such as a bank."

18 For an enduring power of attorney to be effective, it must not only conform with a prescribed form, but its execution must be witnessed by a person qualified to do so who certifies that he or she has explained the effect of the instrument to the principal before it was signed and the principal appeared to understand the effect of the instrument. Section 19 of the *Powers of Attorney Act* 2003 NSW provides as follows:

> **"19 Creation of enduring power of attorney**(cf 1919 No 6, s 163F (2))

(1) An instrument that creates a power of attorney creates an ***enduring power of attorney*** for the purposes of this Act if:

(a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and

(b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and

(c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that:

(i) the person explained the effect of the instrument to the principal before it was signed, and

(ii) the principal appeared to understand the effect of the power of attorney, and

(iii) the person is a prescribed witness, and

(iv) the person is not an attorney under the power of attorney, and

(v) the person witnessed the signing of the power of attorney by the principal.

(2) In this section:

prescribed witness means:

(a) a registrar of the Local Court, or

(b) an Australian legal practitioner, or

(c) a licensee under the *Conveyancers Licensing Act 2003*, or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act 1964*, who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or

(d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or

(e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph."

19 For an enduring power of attorney to be effective it must also be formally accepted by the attorney, who is required to sign statements to the following effect:

"(a) I accept that I must always act in the principal's best interests.

(b) I accept that as attorney I must keep my own money and property separate from the principal's money and property.

(c) I accept that I should keep reasonable accounts and records of the principal's money and property.

(d) I accept that, unless expressly authorised, I cannot gain a benefit from being an attorney.

(e) I accept that I must act honestly in all matters concerning the principal's legal and financial affairs.

Failure to do any of the above may incur civil and/or criminal penalties."

20 The prescribed form of an enduring power of attorney needs to be read with sections 9-13 of the *Powers of Attorney Act* 2003 NSW:

> **"9 Powers conferred by prescribed power of attorney(cf 1919 No 6, s 163B (1) and (3))**
>
> (1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.
>
> (2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.
>
> **10 Prescribed power of attorney does not confer authority to act as trustee(cf 1919 No 6, s 163B (2) (a))**
>
> A prescribed power of attorney does not confer authority to exercise any function as a trustee that is conferred or imposed on the principal.
>
> **11 Prescribed power of attorney does not generally confer authority to give gifts**
>
> (1) A prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.
>
> **Note—**
>
> This subsection restates a rule of the general law. Accordingly, whether a gift of all or any of the property of a principal is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles

and rules of the common law and equity concerning the interpretation of powers of attorney.

(2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to give the kinds of gifts that are specified by that Schedule for that expression.

12 Prescribed power of attorney does not generally confer authority to confer benefits on attorneys(cf 1919 No 6, s 163B (2) (b))

(1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit.

Note—

This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on an attorney is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

(2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule for that expression.

13 Prescribed power of attorney does not generally confer authority to confer benefits on third parties

(1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.

Note—

This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on a third party is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

(2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on a third party the kinds of benefits that are specified by that Schedule for that expression."

21 Schedule 3 to the *Powers of Attorney Act 2003* NSW is in the following terms:

"Schedule 3 Prescribed expressions and authorisations for prescribed powers of attorney

(Sections 11 (2), 12 (2) and 13 (2))

1 Authority to give gifts

(1) The prescribed expression for the purposes of section 11 (2) is as follows:

I authorise my attorney to give reasonable gifts as provided by section 11 (2) of the Powers of Attorney Act 2003.

(2) The prescribed expression authorises an attorney to give a gift only if:

(a) the gift is:

(i) to a relative or close friend of the principal, and

(ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage), or

(b) the gift is a donation of the nature that the principal made when the principal had capacity or the principal might reasonably be expected to make,

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

(3) In this clause:

close friend of a principal means another individual who has a close personal relationship with the principal and a personal interest in the principal's welfare.

relative of a principal means:

(a) a mother, father, spouse (including wife or husband), daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the principal, or

(b) if the principal is a party to a registered relationship or interstate registered relationship, within the meaning of the Relationships Register Act 2010, or a domestic relationship within the meaning of the Property (Relationships) Act 1984, any person who is a relative, of the kind mentioned in paragraph (a), of either party to the relationship.

2 Authority to confer benefits on attorney

(1) The prescribed expression for the purposes of section 12 (2) is as follows:

I authorise my attorney to confer benefits on the attorney to meet the attorney's reasonable living and medical expenses as provided by section 12 (2) of the Powers of Attorney Act 2003.

(2) The prescribed expression authorises an attorney to confer a benefit on the attorney only if:

(a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the attorney in respect of any of the following:

(i) housing,

(ii) food,

(iii) education,

(iv) transportation,

(v) medical care and medication, and

(b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

3 Authority to confer benefits on third parties

(1) The prescribed expression for the purposes of section 13 (2) is as follows:

I authorise my attorney to confer benefits on [insert name(s) and address(es) of each third party] to meet their reasonable living and medical expenses as provided by section 13 (2) of the Powers of Attorney Act 2003.

(2) The prescribed expression authorises an attorney to confer a benefit on a named third party only if:

(a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the third party in respect of any of the following:

(i) housing,

(ii) food,

(iii) education,

(iv) transportation,

(v) medical care and medication, and

(b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate."

22 Section 14 of the *Powers of Attorney Act* 2003 NSW provides that Schedule 3 of the Act may be replaced or amended by regulations, but no such regulations have yet been promulgated.

III. THE PRESCRIBED FORM OF AN ENDURING GUARDIANSHIP APPOINTMENT

23 As contemplated by section 6C of the *Guardianship Act* 1987 NSW, the "prescribed form" of an instrument appointing a person as an enduring guardian is found in the *Guardianship Regulation* 2016 NSW, Form 1.

24 The prescribed form includes a statement of "important information" addressed to a person contemplating execution of an enduring guardianship appointment, including the following extract:

> "An enduring guardianship appointment is an important document. It allows someone else to make medical and lifestyle decisions on your behalf. You should get legal or medical advice (or both) before you sign it. It is important that you trust the person you appoint as your enduring guardian to make appropriate lifestyle decisions on your behalf. It is recommended you inform this person of your wishes about lifestyle decisions and involve them in discussions about your views or goals. If these change, it is important to let your enduring guardian know. An enduring guardian can only make lifestyle decisions such as health decisions. You should make an enduring Power of Attorney if you want someone to make financial decisions on your behalf if you lose capacity. If you appoint more than 1 enduring guardian, you should indicate whether the enduring guardians are to act jointly, severally or jointly and severally. Enduring guardians who are appointed jointly are only able to make decisions if they all agree about the decision. Enduring guardians who are appointed severally or jointly and severally are able to make decisions independently of each other. If you appoint an alternative enduring guardian, they will only have authority to act as your guardian if the first appointed enduring guardian/s dies, resigns or becomes incapacitated. Each enduring guardian must sign their acceptance on the appointment for it to be effective. If someone signs the appointment on your behalf, they must be at least 18 years old. They must not be the person being appointed as an enduring guardian. They cannot also witness the execution of the appointment. If you marry after you appoint an enduring guardian then the appointment will automatically be revoked (unless you married your enduring guardian). Your enduring guardian can resign at any time, by giving you notice in writing. If you have lost capacity to make decisions at that time then your enduring guardian can only resign with the approval of the NSW Civil and Administrative Tribunal. Enduring guardianship appointments are not automatically accessible on any public register. Therefore, it is important that key people are aware of the appointment so they can contact the enduring guardian if required. You should provide a copy of the enduring guardianship appointment to your enduring guardian and keep a copy in a safe place. You should also let close friends or family know about it and give a copy to your solicitor, doctor and health service provider. …"

25 The prescribed form of an enduring guardianship appointment must be read in the context of sections 6A and 6E-6G (amongst other provisions) of the *Guardianship Act* 1987 NSW:

> **"6A When appointment has effect**
>
> (1) An appointment under this Part—
>
> (a) has effect only during such period of time as the appointor is a person in need of a guardian, and
>
> (b) unless revoked or suspended under this Part, has effect during all such periods.
>
> (2) A person appointed under this Part is appointed as an *enduring guardian*.
>
> …
>
> **6E Functions of enduring guardians**
>
> (1) Subject to subsection (2), an instrument appointing a person as an enduring guardian authorises the appointee, while the appointment has effect, to exercise the following functions—
>
> (a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
>
> (b) deciding the health care that the appointor is to receive,
>
> (c) deciding the other kinds of personal services that the appointor is to receive,
>
> (d) giving consent under Part 5 to the carrying out of medical or dental treatment on the appointor,
>
> (e) any other function relating to the appointor's person that is specified in the instrument.
>
> (2) The instrument of appointment may limit or exclude the authority it confers in relation to any one or more of the functions specified in subsection (1).
>
> (2A) For the purpose of exercising a function that an appointee is authorised to exercise by an instrument appointing the appointee as an enduring guardian, the appointee has the same right of access to information about the appointor as the appointor has.
>
> (2B) Nothing in the *Privacy and Personal Information Protection Act 1998* prevents a public sector agency (within the meaning of that Act) from disclosing information about an appointor to an appointee if the agency is satisfied that the disclosure of the information would assist the appointee to exercise his or her functions as an enduring guardian.

(2C) Nothing in subsection (2A) affects the operation of the *Health Records and Information Privacy Act 2002* in relation to the disclosure of health information about an appointor to an appointee.

Note—

Section 7 of the *Health Records and Information Privacy Act 2002* (when read with section 8 of that Act) provides that a guardian of an individual may do any act authorised, permitted or required by that Act on behalf of an individual who is incapable of doing that act. An individual is incapable of doing an act for the purposes of section 7 if the individual is incapable, by reason of age, injury, illness or physical or mental impairment, of understanding the general nature and effect of the act or communicating the individual's intentions with respect to the act. If the individual is capable of doing the act, then the guardian may not do the act on behalf of the individual unless expressly authorised to do so.

(3) The functions authorised by an instrument appointing an enduring guardian are, unless the Tribunal otherwise directs, to be exercised in accordance with any lawful directions contained in the instrument.

6F Ancillary powers of enduring guardian

An enduring guardian may, on behalf of the appointor, sign and do all such things as are necessary to give effect to any function of the enduring guardian.

6G Acts of enduring guardian take effect as acts of appointor

A decision made, an action taken and a consent given by an enduring guardian in the exercise of a function of the enduring guardian have effect as if—

(a) the decision had been made, the action taken and the consent given by the appointor, and

(b) the appointor had the legal capacity to do so (if the appointor would have that legal capacity but for his or her disability)."

26 The expression "person in need of a guardian" used in section 6A of the *Guardianship Act* 1987 is defined in section 3(1) of the Act to mean "a person who, because of a disability, is totally or partially incapable of managing his or her person". Section 3(2) provides that a reference to a person who has a disability is a reference to a person: (a) who is intellectually, physically, psychologically, or sensorily disabled; (b) who is of advanced age; (c) who is a mentally ill person within the meaning of the *Mental Health Act* 2007; or (d) who is otherwise disabled, and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision of social habilitation".

27 Section 6C of the *Guardianship Act* 1987 requires an enduring guardianship appointment not only to be in the prescribed form, signed by the appointor and endorsed with the appointee's acceptance of his or her appointment. The execution of the instrument by the appointor and appointee must be witnessed by one or more qualified witnesses, and each witness must certify that the person or persons whose execution of the instrument is witnessed executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument. That is the essence of the section, although it contains more particular detail.

IV. HELP IS AT HAND

28 Each of the prescribed instruments invites a reader to contact the NSW Trustee and Guardian ("the NSW Trustee") or NCAT for further information.

29 In practice, much of the work involved in the review of an enduring power of attorney or an enduring guardianship appointment is undertaken by the Guardianship Division of NCAT, which has jurisdiction to make a financial management order (in lieu of an enduring power of attorney) or a guardianship order (in lieu of an enduring guardianship appointment). NCAT is accustomed to dealing with members of the public and self-represented parties.

30 The NSW Trustee is a statutory corporation constituted by the *NSW Trustee and Guardian Act* 2009 NSW with the status of a NSW Government Agency. It works closely with the Public Guardian, a public servant whose office is governed by the *Guardianship Act* 1987 NSW. As with NCAT, the NSW Trustee and the Public Guardian are accustomed to dealing with members of the public. In practice, although independent of the Court and NCAT, they perform functions in the nature of executive assistance for both NCAT and the Court in relation to protective cases.

31 The NSW Trustee is sometimes described as the financial manager "of last resort" because if a management order is to be made by the Court or NCAT and there is no other person "suitable" to be appointed to that office, the NSW Trustee routinely accepts an appointment. Similarly, the Public Guardian is

commonly described as the guardian "of last resort" because she is routinely available for appointment as a guardian (by NCAT), or as a committee of the person (by the Court), if there is no other "suitable" person available.

V. QUESTIONS OF (IN)CAPACITY

32 As their prescribed forms state, an enduring power of attorney and an enduring guardianship appointment can only be made or revoked effectively by a person who has the mental capacity to do so. A document executed by a person lacking the requisite mental capacity is not legally effective.

33 Questions of "(in)capacity" often arise in other contexts as well: for example, in deciding whether a person has, or had, testamentary capacity; and in deciding whether a person has, or had, the mental capacity to transact business.

34 The meaning of the word "capacity" and its variants can vary according to context, and involve widely different legal contexts. A reference to "(in)capacity" implicitly invites attention to the question, "(In)capacity for what?" What is it a person is said to be, or to have been, incapable of doing?

35 In the criminal law, the *McNaghten Rules* (1843) 10 Cl. & F. 200 are famous. Their focus was upon the capacity of a person to know that what he or she was doing was "wrong", a central concern of the criminal law.

36 In probate law, the classic test for testamentary capacity associated with *Banks v Goodfellow* (1870) LR 5 QB, 549 at 565 (explained at length in *Estate Rofe* [2021] NSWSC 257 at [129] and [138]-[147]) focuses upon the capacity of a person "to remember, reflect and reason", pre-requisites for "the due exercise of a power [that is, a power to make a will] involving moral responsibility". The same approach is taken in assessment of a person for whom the Court is asked to make a "Statutory will" under the *Succession Act* 2006 NSW, sections 18-26.

37 In the protective jurisdiction, when consideration is given to the appointment of a committee of the estate (a protected estate, or financial, manager) or a

committee of the person (a guardian), the focus is upon the capacity for self-management of the person in need of protection: *CJ v AKJ* [2015] NSWSC 498. Under modern NSW law, questions about capacity for self-management, are not necessarily one and the same as a question about mental capacity: *David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E437C; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [252]. Upon an exercise of protective jurisdiction the Court is concerned with the "functional capacity" of a person in need of protection (that is, his or her ability to function in the making of decisions about his or her affairs), rather than his or her mental capacity or any form of "status" as a mentally ill person.

38 Similar principles may arise upon consideration of whether a person has capacity to manage litigation without a tutor: *Rappard v Williams* [2013] NSWSC 1279 at [62]-[63]; *A v A* [2015] NSWSC 1778 at [53]-[82], *IA v TA* [2016] NSWCA 179 at [55]; *Re WS* [2017] NSWSC 745.

39 In contract law, a person will lack the mental capacity to enter into a binding transaction if they are not capable of understanding the general nature of what they are doing or they do not have the capacity to understand the transaction when it is explained to them: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438; *Hanna v Raoul* [2018] NSWCA 201.

40 The capacity to make a voluntary settlement *inter vivos* (that is, a gift) has been held to require the same capacity as is required to make a valid will, rather than the capacity required for a transaction for consideration: *Crago v McIntyre* [1976] 1 NSWLR 729. Whether that is so in a particular case may depend upon the nature of the particular transaction.

41 In broad overview, the following general observations can be made about concepts of "(in)capacity" in Australian (NSW) law:

(a) Generally, concepts of "(in)capacity" are premised upon the ideal of a free society constituted by autonomous individuals living and dying in community, with special regard directed

towards those individuals not able (without assistance) satisfactorily to transact "business" on their own account. Even where "infants" as a class are regarded as lacking legal capacity, an assessment of the capacity of an individual infant (eg, to consent to medical treatment) may require an assessment of the maturity of the particular individual: *Marion's Case* (1992) 175 CLR 218 at 237-238.

(b) The law does not prescribe any fixed standard of capacity as requisite for the validity of all transactions. It requires, in relation to each particular piece of business the subject of a transaction, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he or she is doing: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438.

(c) Australian law generally views questions of "(in)capacity" as:

(i) individual specific, and

(ii) task specific.

(d) Accordingly, implicit in consideration of any question of "capacity" is the question, "capacity, for what?"

(e) That question might lead to a series of related questions such as:

(i) capacity, to perform what functions?

(ii) capacity, when?

(iii) capacity, to be assessed by whom and according to what criteria?

(iv) incapacitated, why?

42 As has been noted, an enduring power of attorney requires for its validity a certificate by an authorised witness that he or she explained the effect of the instrument to the principal before it was signed and the principal appeared to understand the effect of the power of attorney. A similar certificate is required upon execution of an enduring guardianship appointment.

43 What is required of an authorised witness to execution of an enduring power of attorney or an enduring guardianship appointment may depend upon the personal circumstances of the principal, including an explanation of the nature and effect of the instrument presented for execution but not necessarily limited to that topic. Some discussion may be necessary of the nature of the work likely to be required of an appointee, the suitability of the appointee for performance of that work, and the nature of the principal's personal relationships with members of family, significant others and, importantly, the appointee. A good starting point may, generally, be to take the principal through the prescribed form, including the explanatory notes on the prescribed form, with an explanation of the terms there used and non-leading questions designed to ascertain whether the principal understands each instrument to be signed and any risks, as well as benefits, attaching to execution of each instrument.

44 How one approaches a question of "(in)capacity" as a lawyer can depend critically upon the purpose of the inquiry as to capacity, and any time perspective inherent in the inquiry:

(a) If consideration is being given by a legal adviser to a proposal that a person (especially a vulnerable person) transact a particular item of business (eg, entry into a contract, the making of a will, or the execution of an enduring power of attorney or an enduring guardianship appointment) the focus for attention may be on, not only the welfare of the subject person, but on both a prudent assessment of capacity (in accordance with *Gibbons v Wright*) and the creation of contemporaneous evidence of the

process and fact of assessment so that it is available against the possibility of future litigation.

(b) If consideration is being given to whether a financial manager or guardian should be appointed, the focus for attention is the present time, looking forward with a view to risk management, and the tasks to be performed by a person in need of protection. A focus, here, is on a system for prospective decision-making.

(c) If consideration is being given to a challenge to the validity of a past transaction, the focus for attention may be directed, not only to an *ex post facto* assessment of capacity, but to how such an assessment might connect with a variety of other concepts, including *non est factum* (a common law concept); undue influence, fiduciary obligations, unconscionable conduct (equity concepts); and statutory remedies available under legislation such as the *Contracts Review Act* 1980 NSW. *Hanna v Raoul* [2018] NSWCA 201 provides an example of this, all the more relevant because a finding of contractual incapacity was displaced on appeal, but supplemented by findings of unconscionability and "unjust contract".

45 Where an assessment of capacity is sought to be made *ex post facto* in relation to a person now deceased, the process of assessment may be purely forensic in character, essentially clinical.

46 Where, however, an assessment of capacity is required in relation to a living person (a person whose present and prospective welfare might be affected by the assessment) there is a sense in which the stakes are higher. Difficult decisions may have to be made about whether particular steps should, or should not, be taken to effect an assessment of capacity; to protect a person whose capacity may be in doubt; and to involve others in decision making affecting the subject person.

47 It is not uncommon that, when a person descends into a fog of dementia and lacks the mental capacity or will to manage his or her own person or affairs, friction about how to manage the person's affairs manifests itself in disputation between family members and any person designated as the person's attorney or guardian.

48 A signpost of a person's descent into dementia may be his or her execution, in rapid succession, of multiple, inconsistent instruments (prepared by solicitors not previously known to the person) in favour of competing claimants on his or her bounty, each vying to take control of the property and person of a vulnerable person perceived to have accessible wealth.

49 A lawyer charged with the preparation of an enduring power of attorney or an enduring guardianship appointment should generally, for this reason (amongst others), make inquiries designed to elicit whether any similar instruments have been executed in the past and, if so, whether the authority of any existing enduring attorney or enduring guardian is to be revoked. The preparation of an enduring power of attorney or an enduring guardianship appointment is no mere formality.

50 Quite apart from the formalities required by legislation governing the execution, and operation, of an enduring power of attorney and an enduring guardianship appointment, prudence may require that decisions of this nature be made in consultation with a lawyer, a doctor, some other suitably qualified professional familiar with the personal circumstances of the principal or family so as to act in the best interests of a vulnerable person and to share the load of responsible decision-making.

VI. THE NATURE OF THE SUPREME COURT'S JURISDICTION

51 In discussion of the meaning of "(in)capacity" mention has been made of various types of the jurisdiction of the Supreme Court encountered in dealing with questions of "(in)capacity", including particularly the Court's protective, probate and equity jurisdictions. That invites inquiry about the sources and nature of the Court's jurisdiction to deal with a vulnerable person.

52 The Court is presently constituted by the *Supreme Court Act* 1970 NSW, sections 22 and 23 of which provide as follows:

> "[22] **Continuance**. The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.
>
> [23] **Jurisdiction generally**. The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales."

53 These sections are not the only source of the Court's jurisdiction, but they provide a point of entry into an understanding of the Court's "inherent jurisdiction", which provides a frame of reference for discussion of larger questions.

54 Although the inherent jurisdiction of the Court preserved by section 22 of the *Supreme Court Act* 1970 NSW can be traced back to British "Imperial" legislation of colonial times, much of the Court's jurisdiction is, in fact, conferred by modern, local statutes. In the present context, note the following:

(a) The Court has a power to review an enduring power of attorney under the *Powers of Attorney Act* 2003 NSW, and a power to review an enduring guardianship appointment under the *Guardianship Act* 1987 NSW.

(b) By virtue of the *Civil and Administrative Tribunal Act* 2013 NSW (Schedule 6), an appeal lies from NCAT's Guardianship Division to the Court.

(c) The *NSW Trustee and Guardian Act* 2009 NSW confers on the Court power to make an order that the estate of an incapable person be the subject of protective management (the functional equivalent of a financial management order of NCAT), under the Act and powers to supervise estates under management (and the work of the NSW Trustee in its supervision of managed estates) under the Act.

(d) The *Probate and Administration Act* 1898 NSW and the *Succession Act* 2006 NSW confer powers on the Court in relation to the administration of a deceased estate, including:

(i) power to authorise the making of a statutory will on behalf of a person who lacks testamentary capacity; and

(ii) power to make a family provision order affecting the estate of a deceased person.

55 Statutory powers conferred on the Court may inform an exercise of the Court's inherent jurisdiction but, in the absence of a clear legislative intention to do so, they do not abrogate the inherent jurisdiction.

56 Although section 23 of the *Supreme Court Act* 1970 NSW is sometimes described as a source of the Court's inherent jurisdiction, the expression "inherent jurisdiction" is more often reserved for the jurisdiction conferred on the Court at the time of its establishment by the British authorities in the 1820s.

57 The Court was established, with its first sitting on 17 May 1824, by a Charter dated 13 October 1823 (known colloquially as the *Third Charter of Justice*) published by the Crown pursuant to authority conferred by the Imperial statute, known colloquially as the *New South Wales Act* 1823 (Imp), the operation of which was extended by the *Australian Courts Act* 1828 (Imp), section 24 of which fixed 25 July 1828 as the date for reception of English law in New South Wales as far as applicable to local conditions.

58 By virtue of its establishment as a superior court of record in the 1820s (with jurisdiction originally defined by reference to English courts and judicial officeholders of that time), the Court has an inherent jurisdiction (preserved by section 22 of the *Supreme Court of Act* 1970 NSW) that includes what we now describe as its protective, probate and equity jurisdictions.

59 The Court's family provision jurisdiction is statutory. It was first conferred on the Court by the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 NSW, later repealed and replaced by the *Family Provision Act* 1982 NSW, in its turn replaced by Chapter 3 of the *Succession Act* 2006 NSW, where it presently resides.

60 In the 1820s, the protective jurisdiction was known as part of the Crown's *parens patriae* jurisdiction. The expression *parens patriae* is Latin for "parent of the nation". The jurisdiction comprised two distinct, but since largely merged, branches. The "infancy" or "wardship" jurisdiction of the Lord Chancellor of England (acting as a delegate of the Crown) was exercised in relation to minors. The "lunacy" jurisdiction of the Lord Chancellor (exercised by a separate delegation) was exercised in relation to people who, in modern terminology, lacked mental capacity or, at least, capacity to care for themselves.

61 Historically, the people who were the subject of that jurisdiction were classified as "idiots" or "natural fools" (if they were mentally incapacitated from birth) or "lunatics" (if their incapacity was temporary or intermittent). The distinction between these two types of mentally ill person was a function of feudalism because the Crown had different entitlements to enjoyment of a mentally ill person's property depending upon the status of such a person as found by a jury. The Crown took control of the property of such a person. If the person was found to be a lunatic rather than an idiot the Crown was required to manage his or her property upon an assumption that it should be kept available for him or her if and when lucid.

62 The feudal distinction, and associated royal entitlements, are no longer the law. They are only of historical interest. In the decades immediately before and after 1800 the focus of the law shifted from feudalism to emphasis upon the paramountcy of the welfare and interests of an incapable person. Gradually, the language of feudal times was displaced. In New South Wales, the "lunacy jurisdiction" was renamed "the protective jurisdiction" upon enactment of the *Mental Health Act* 1958 NSW.

63 The probate jurisdiction conferred on the Court was originally known as "ecclesiastical jurisdiction" because it was in England exercised by church courts. It was not until 1890 that it was rebadged in NSW as "probate" jurisdiction.

64 The equity jurisdiction of the Court was conferred by reference to the jurisdiction of the Lord Chancellor sitting in his Court of Chancery, an historical construct of the Crown.

65 The protective and probate jurisdictions of the Court are presently managed within the Court's Equity Division. Their historical origins are, however, distinct from the historical origins of the Court's equity jurisdiction.

66 As has been noted, the infancy and lunacy jurisdiction (together, the Court's protective jurisdiction) and the equity jurisdiction have in common origins in different types of jurisdiction exercised in England by the Lord Chancellor. Although the probate jurisdiction (originally exercised in England by church courts) is idiosyncratic, it was influenced (for many years before English law was received in Australia) by equity's treatment of the executor or administrator of a deceased estate as a fiduciary, liable to account in accordance with equitable principles. Equity's concept of a "fiduciary" may be taken also to have influenced the development of the protective jurisdiction by focusing upon the importance of decision-making through the prism of the person in need of protection.

67 The protective, probate, and (perhaps to a lesser extent) the equity jurisdictions have a strong managerial flavour. They are often concerned with the management of people, property and relationships rather than adversarial contests between competing claims of right.

68 Sometimes standing apart from those types of jurisdiction is the Court's common law jurisdiction, conferred by reference to the English Courts of Common Law of the 1820s: the Court of King's Bench, the Court of Common Pleas and the Court of the Exchequer. Their focus has generally been upon

the adjudication of competing claims of right, historically determined by a jury instructed to present to a trial judge a binary verdict: verdict for the plaintiff or verdict for the defendant, guilty or not guilty. Characteristically, the common law developed by trial of an *action* for damages or some other common-law remedy designed to enforce a legal right or provide a remedy for wrongful conduct. Typical common law actions are claims for damages for a breach of contract or tortious conduct, such as trespass or negligence.

69 The general law of agency is a special area of the law developed through the interaction of common law rules and equitable principles. The rights and obligations of a principal and his or her agent may be governed by a deed, a contract, a grant of authority in the nature of a grant of property or some other instrument of appointment (essentially common law concepts) but agents generally owe the (equitable) obligations of a fiduciary to the principal upon whose behalf, and in whose interests, an agent is tasked to act.

70 Historically, in England, the Court of Chancery (presided over by the Lord Chancellor, or another equity judge, sitting alone without a jury) could, in a *suit* instituted for that purpose, intervene to restrain a person from exercising a legal "right" if, according to equitable principles, enforcement of the legal right would be "against good conscience"; that is, if it would be "inequitable" or "unconscionable" for that person to insist upon his or her strict legal rights.

71 All types of the Court's jurisdiction are governed by the purpose for which each type of jurisdiction exists. This is particularly apparent in relation to an exercise of protective or probate jurisdiction because of the strong managerial flavour of cases that invoke those types of jurisdiction and their tendency to focus on the management (administration) of an estate (property).

VII. THE PURPOSIVE CHARACTER OF THE COURT'S JURISDICTION

72 In the modern setting, Australian law plays a role in the management of a person's person and his or her affairs generally from cradle to grave. From the perspective of a lawyer, "death" has become more of a process than an event as arrangements are routinely made for the management of the estate (and

often the person) of a person in anticipation of incapacity for self-management preceding death and in anticipation of disputation in the course of administration of a deceased estate.

73 The protective jurisdiction of the Court has its origins in the obligation of the Crown, as *parens patriae*, to take care of those who are unable to take care of themselves: *Marion's Case* (1992) 175 CLR 218 at 258-259. The protective function of the Crown or, as we now commonly say, the State (part of which is performed by the Court and NCAT on an exercise of protective jurisdiction) is liable to be engaged in relation to any person, of whatever age and circumstance, who is unable to care for himself or herself or is otherwise vulnerable to exploitation. The protective jurisdiction is governed by "the paramountcy (or welfare) principle", according to which the welfare and interests of an incapable person are the paramount concern of the Court. This is reflected in section 4 of the *Guardianship Act* 1987 NSW and section 39 of the *NSW Trustee and Guardian Act* 2009 NSW.

74 The probate jurisdiction of the Court takes its current name from the form of order made by the Court upon proof of the validity of a will of a deceased person. A will is "admitted to probate" upon proof that it is the last will of a free and capable testator. A grant of probate is both an order of the Court and an instrument of title to property forming part of the estate of the deceased person whose will is admitted to probate: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [228]-[233].

75 The primary field of operation of the probate jurisdiction is the "administration" of a deceased "estate". Disputation about the appointment of a "testamentary guardian" (that is, a guardian of children appointed by a will of a testator) is comparatively rare, and can be passed over upon a consideration of ordinary practice. For practical purposes, the probate jurisdiction is concerned with "succession" to property in anticipation of, on or consequentially upon death.

76 The purpose of an exercise of probate jurisdiction is to advance the due and proper administration of a particular deceased estate, having regard to any 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 191-192.

77 The family provision jurisdiction conferred on the Court by Chapter 3 of the *Succession Act* 2006 empowers the Court to make an order that provision (such as a legacy) be made out of the estate or "notional estate" of a deceased person for the maintenance, education and advancement in life of an "eligible person" who (within 12 months of the date of death of the deceased or such other time as the Court may allow) applies for a family provision order. The concept of an "eligible person" is defined by section 57 of the *Succession Act*. It goes beyond the concept of a traditional "family", for example, in permitting an application for a family provision order to be made by a person who was, at some time or another, wholly or partly dependent upon the deceased and a member of his or her household. Implicit in the identification of persons "eligible" to apply for a family provision order is identification of the "community" in which the deceased lived and died.

78 The legislation permits the Court to designate property as "notional estate" of the deceased if it was disposed of by the deceased within the three years preceding his or her death. To that extent, the concept of a deceased's "estate" upon an exercise of family provision jurisdiction is broader than applies in other branches of the law.

79 The "process" of death begins when, in anticipation of incapacity preceding death, a person executes a will, an enduring power of attorney and an enduring guardian appointment. It ends only when, after a physical death, the time for an "eligible person" to make an application for a family provision order expires and is unlikely to be extended by an order of the Court.

80 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, and dying, in community.

81 The protective jurisdiction privileges, and protects, an individual in need of protection; problems are viewed through the prism of that individual: *Marion's Case* (1992) 175 CLR 218 at 258-259. 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: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 QdR 1 at 25 [48].

82 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 interest of a beneficiary before completion of executorial duties in administration of a deceased estate is an entitlement to due administration of the estate, rather than an interest in particular assets of the estate: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 717C-F, upholding *Livingston v Commissioner of Stamp Duties* (Qld) (1960) 107 CLR 411 at 435, 451 and 459. Once the character of a legal personal representative passes from that of an executor to that of a trustee, his or her obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229 at [20].

83 The family provision jurisdiction acknowledges an individual's "testamentary freedom" but qualifies it by empowering the Court to make an order for provision out of a deceased estate for those members of his or her "community" for whom he or she "ought" to have made provision.

84 In *Bassett v Bassett* [2021] NSWCA 320 at [171] the Court of Appeal described the following statement as a "useful summary" of the approach to be taken to an exercise of the Court's evaluative jurisdiction in dealing with an application for a family provision order:

> "In the exercise of its statutory powers in the determination of an application for a family provision order (in particular, sections 59(1)(c) and 59(2) of the Succession Act), the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 1[0]7 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific statutory criteria referred to in section 60(2) of the Act so far as they may be material."

85 The purposive character of one head of jurisdiction merges with that of the next in management of people, property and relationships.

86 The equity jurisdiction is never far away from an exercise of protective, probate or family provision jurisdiction because all three of those jurisdictions commonly require that an incapable person's property be accounted for and (by reference to principles designed to uphold standards of behaviour in opposition to conduct that is against good conscience) a court exercising equity jurisdiction can make orders that misconduct be restrained, that duties be performed, that a misappropriated property be returned, or that compensation for a misappropriation be paid. An equity court is characteristically able to mould its orders to meet the justice of the case. A predisposition of equity is to protect the weak against the strong.

VIII. IDENTIFICATION OF AN ESTATE AND ACCOUNTING FOR PROPERTY

87 The common denominator as a person moves in life (through the spectrum of the Court's protective, probate and family provision jurisdictions) is a need for management of property or accounting for dealings with it. The concept of "an estate" is common to each of the types of jurisdiction engaged as one moves from incapacity to death and beyond.

88 In exercising protective jurisdiction it is generally necessary to know something of the nature and value of the estate of the person in need of protection in order to know his or her personal circumstances and the nature of his or her affairs requiring protective management. That is true whether the case at hand

involves a review of an enduring power of attorney or enduring guardianship appointment or consideration of the necessity for a management or guardianship order.

89 An essential step in the administration of a deceased estate, upon an exercise of probate jurisdiction, is the identification, and collection, of estate property so that a deceased person's liabilities can be met before estate assets are distributed.

90 An equally essential step in the exercise of family provision jurisdiction is identification of property comprising the "actual" estate, and property potentially available for designation as "notional" estate, so that an assessment can be made of the property available for the making of a family provision order.

91 Upon an exercise of any one of the protective, probate or family provision jurisdictions, the "property" of the central personality may include a right to recover property or equitable compensation arising from improper conduct on the part of an enduring attorney (or an enduring guardian).

IX. INTERSECTIONS BETWEEN THE PROTECTIVE AND EQUITY JURISDICTIONS

92 Where property is transferred away from a vulnerable person, a person appointed to represent his or her estate before death (a "financial manager" or equivalent), or a legal personal representative (an executor or administrator) appointed to represent his or her estate after death, may institute proceedings in the Supreme Court to recover for the estate either that property or compensation upon an exercise of the Court's equity jurisdiction. The "causes of action" commonly relied upon in such proceedings (to use a common law expression to refer, perhaps too loosely, to claims in equity) are known by the labels "undue influence", "unconscionable conduct" and "breach of fiduciary obligations".

93 The Court's protective and equity jurisdictions intersect in practice because people involved in "management" of the affairs of an incapable person (to use

a neutral expression) commonly occupy a “fiduciary office” or have a “fiduciary relationship” with the incapable person, a person who by reason of a disability may be vulnerable to exploitation.

94 The critical feature of a fiduciary relationship, and the attendant obligations of a fiduciary, can be identified by reference to the observations of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97:

> “The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v Boardman* [1967] 2 AC 46 at 127), viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company and partners. The critical feature of these relationships is the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of the other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion, to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions “for”, “on behalf of” and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibilities.
>
> It is partly because the fiduciary’s exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. …”

95 Fiduciary obligations may be owed to an incapable person by a member of family, a friend or a carer who holds appointments as the person’s enduring attorney and enduring guardian and who occupies a position of ascendancy over the person under care.

96 The categories of fiduciary relationships are not closed. Fiduciary relationships are of different types, carrying different obligations and they may entail different consequences: *Hospital Products* at 68-69 and 96. An example of this is the relationship between a guardian (by whatever name known) and a person under the care of the guardian where the guardian is entrusted with funds to be expended in the maintenance and support of the person under care. The guardian is not liable to account as a trustee, but has a liability to account

assessed by reference to whether the purpose of his or her appointment has been served. A guardian may be relieved of the obligation of accounting precisely for expenditure and, if he or she fulfils the obligation of maintenance of the person under care, in a manner commensurate with the property available to him or her for the purpose, an account will not be taken: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.

97 This does not mean that a guardian is in some sense "unaccountable". On the contrary, a guardian is judged in large measure by reference to whether he or she fulfills the purpose of his or her office. Unlike a trustee, a guardian may not be held liable to account for a benefit received from the estate of a person under care if it is merely incidental to the provision of care. An example of an "incidental benefit" might be the guardian's enjoyment of accommodation in the house of the person under care, enjoyed for the purpose of providing care. A guardian who receives or retains more than an incidental benefit from the estate of a person under care may be held liable to account for it to the person under care in the same manner as a trustee may be held accountable to a beneficiary.

98 A fiduciary has a duty of loyalty to his or her principal (sometimes described as a beneficiary) not to place himself or herself in a position of conflict with the principal, nor to obtain a profit or benefit from his or her fiduciary position, without first obtaining the fully informed consent of the principal: *Hospital Products* at 68, 96 and 141; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467. Where that duty is breached, the nature of the case will determine the appropriate remedy, moulded to the circumstances of the particular case.

99 An object of the law governing fiduciaries is to maintain standards of conduct on the part of a party (fiduciary) who exercises a power or discretion affecting the affairs of another party vulnerable to abuse by the fiduciary of his or her position: Paul Finn, *Fiduciary Obligations* (First Edition, 1977; reprint, 2016), paragraph [698]; *Johnson v Buttress* (1936) 56 CLR 113 at 135. The law aims to require a fiduciary to be accountable for an abuse of his or her position.

100 The concept of a “conflict” between a fiduciary and his or her principal is sometimes analysed in terms of a “conflict of interests” (where the interests of fiduciary and principal clash) and a “conflict between duty and interest” (where a fiduciary places himself or herself in a position inconsistent with the performance of his or her duty to the principal). A classic case of both types of conflict is where a fiduciary has a business relationship with his or her principal.

101 Because a vulnerable person might be under the care of a guardian (by whatever name known) who is a member of his or her family, upon an exercise of protective jurisdiction it is sometimes said, not that the guardian must not place himself or herself in a position of conflict, but that he or she should not place himself or herself in an *unacceptable* position of conflict. This is consistent with the purposive concept of a liability to account recognised in *Countess of Bective*. A conflict of interest is bound to be characterised as “unacceptable” if it in any way impedes, or is likely to impede, a guardian’s duty to care for the person under care.

102 For an enduring attorney (eg *Smith v Smith* [2017] NSWSC 408) or a financial manager (eg *Dowdy v Clemson* [2021] NSWSC 1273) who refuses or wilfully fails to recognise the fiduciary obligations of his or her office, the financial consequences of enforcement of his or her liability to account can be significant. *Dowdy v Clemson* demonstrates a need for the burdens of a fiduciary office to be brought home to a person who agrees to accept an appointment to a protective office.

103 An allegation of a breach of fiduciary obligations is commonly associated with (a) an allegation of undue influence; or (b) an allegation of unconscionable conduct (as explained in Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies*, 5th edition, 2015, Chapter 16) in the nature of a “catching bargain”.

104 Undue influence (explained in *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675, informed particularly by *Johnson v Buttress* (1936) 56 CLR 113 at 134-136) looks to the quality of the consent or assent of the weaker party to a

transaction, whilst unconscionable conduct (commonly described by reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 or *Bridgewater v Leahy* (1998) 194 CLR 457 at [75]) looks to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person under special disadvantage.

105 Whereas undue influence may be established by means of a presumption of undue influence in some cases by reason of the relationship between parties (eg doctor and patient), no presumption is available in support of an allegation of unconscionable conduct. It must be proved without the benefit of a presumption.

106 Undue influence denotes an ascendancy by a stronger party over a weaker party such that an impugned transaction is not the free, voluntary and independent act of the weaker party; it is the actual or presumed impairment of the judgement of the weaker party that is the critical element in the grant of relief on the ground of undue influence.

107 Unconscionable conduct focuses more on the unconscientious conduct of a stronger party. It is a ground of relief which is available whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is taken of the opportunity thereby created: *Blomley v Ryan* (1956) 99 CLR 362*; Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447*; Louth v Diprose* (1992) 175 CLR 621*; Bridgewater v Leahy* (1998) 194 CLR 457*.*

108 Upon an exercise of equity jurisdiction directed to the recovery of property or compensation on behalf of the estate of an incapable person (or, after his or her death, on behalf of his or her deceased estate) the focus of attention is generally transactional and often focused on past events. This offers a contrast to much of the work undertaken upon an exercise of protective jurisdiction, which is generally focused upon the availability of systemic protection for the present and future.

109 An unintended consequence of empowerment of the community by widespread usage of enduring powers of attorney is an increase in what is commonly called "financial abuse of vulnerable people". Under the colour of an enduring power of attorney, but in breach of fiduciary obligations owed to an incapacitated principal, it is not beyond common experience that an attorney transfers assets or income of the principal to himself or herself or causes it to be transferred to a third party, commonly a member of family or a family company. Some attorneys treat an enduring power of attorney as a "licence to steal", which it plainly is not.

110 When an enduring power of attorney and an enduring guardianship appointment work well they can work very well. A principal gets to choose who makes decisions on his or her behalf if he or she is unable personally to make them. The principal can make such a choice based upon his or her personal assessment of the trustworthiness and reliability of an agent and the probability that the agent will make empathetic decisions in consultation with him or her. An appointment of an enduring agent is a form of protective management which, by minimising or qualifying experience of "institutionalisation" arising from incapacity, "privatises" the process of protective management.

111 When an enduring power of attorney and an enduring guardianship appointment do not work well, the principal may be exposed to financial or physical abuse, or neglect. If an enduring agent turns out not to be able or willing to perform the fiduciary obligations of the office, the estate and person of the incapacitated principal may suffer significant harm.

112 When conduct of this character is called out during the lifetime of an incapacitated person, there are two types of problem that may quickly emerge. The first is a need to secure the appointment of a person (commonly a financial manager) with power to take control of the affairs of the incapacitated person. The second is a need for a timely investigation of misconduct with a view to commencement of recovery proceedings, generally involving invocation of equity jurisdiction. An exercise of protective jurisdiction can put a stop to ongoing misconduct. An exercise of equity jurisdiction can vindicate the

incapacitated person's rights. The two types of jurisdiction often work in tandem.

113 Questions of accountability of persons directly or indirectly involved in administration of an estate affected by incapacity or death are larger than equitable principles governing the existence of fiduciary relationships and the obligations of fiduciaries. However, those principles underwrite any process of administration of an estate affected by incapacity or death because they provide guidance as to, and opportunities for enforcement of, the standards required of persons (such as enduring attorneys, enduring guardians, financial managers, guardians, executors and trustees) involved in the administration of such an estate.

"FIDUCIARY LAW" AS A MAINSTAY OF ACCOUNTABILITY

114 Questions about accountability often arise in retrospect when a party seeks curial relief for what is alleged to have been a breach of a fiduciary obligation. However, they also commonly arise (but, perhaps, less obviously so) when a court or tribunal is called upon to appoint "a suitable person" to a fiduciary office, necessitating an exercise of risk management (looking forward) in the selection of a person to be relied upon to uphold fiduciary standards.

ACCOUNTABILITY IN A BROADER CONTEXT

115 The nature of "accountability" varies depending on context. There are, for example, subtle but important differences between the nature of the office of an executor or trustee and that of a "guardian" (an expression sometimes used in description of management of an estate as well as management of a person): *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at [37]-57]; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113.

116 A concern for "accountability" affects all who are called upon, or empowered, to make decisions affecting the interests of a person whose estate is under consideration. In the case of a person whose incapacity for self-management

arises from physical or mental incapacity – a living person – similar considerations apply to management of "the person" as apply to management of the person's "estate".

117 In the "standard" case of a person who executes an enduring power of attorney, an enduring guardianship appointment and a will, there is a nuanced change in the operation of fiduciary principles as the person progresses from full capacity to none at all.

118 Only the law of agency (an amalgam of common law rules and equitable principles) is initially engaged at the time of execution of an enduring power of attorney; but the potential for such a power of attorney to operate ("endure") after the principal becomes incapacitated is present as an inherent contingency.

119 As a principal approaches, or suffers, incapacity the relationship between principal and attorney (if not also between them and third parties dealing with them) changes in character to the extent that (if the principal lacks mental capacity, or even if he or she suffers some lesser form of mental impairment) the attorney ordinarily can no longer obtain from the principal: (a) instructions; or (b) a fully informed consent to business which, absent such consent, may constitute a breach of the attorney's fiduciary obligations to the principal.

120 In a domestic setting, where an attorney is both a member of the "family" of his or her principal and engaged in care of the principal, the fiduciary obligations owed by the attorney to the principal might be less than dictated by the general law of agency. That is because they may be assessed by analogy with the fiduciary obligations owed by a guardian entrusted with funds for the maintenance and support of an incapable person: *Estate Tornya, Deceased* [2020] NSWSC 1230. Any such assessment is likely to require familiarity with an interplay between the Court's equity and protective jurisdictions.

121 In ordinary experience, a person who manages the estate of an incapacitated person as an enduring attorney, in the context of a domestic relationship, is commonly subject to a fiduciary obligation to apply property of the incapacitated

person in the maintenance and support of the incapacitated person; but, by analogy with the case of a guardian entrusted with funds for the maintenance and support of an incapable person, the law generally recognises that the attorney (as an incident of his or her domestic relationship with the incapacitated person) can incidentally benefit from an application of the incapacitated person's property without being required, in equity, to account for any such benefit. Any dispensation from a strict liability to account is subject to a proviso that the attorney must have faithfully discharged his or her duty of supporting and maintaining the incapacitated person: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at [37]-[57]; *Crossingham v Crossingham* [2012] NSWSC 95 at [16] et seq; *Woodward v Woodward* [2015] NSWSC 1793 at [9], [11] and [52]-[56]; *Smith v Smith* [2017] NSWSC 408.

122 This approach is consistent with the recognition that, as between principal and attorney, the primary object of an enduring power of attorney is generally to enable the attorney to act in the management of the principal's affairs, accepting that the attorney may personally obtain some incidental benefit (but no more) from management of the principal's affairs in circumstances in which the principal is incapacitated.

123 The law of agency needs to accommodate the protective jurisdiction when, a principal having lost the mental capacity requisite to managing his or her own affairs, an enduring power of attorney comes into operation as such. Until that time, an enduring power of attorney may operate in a manner indistinguishable from other forms of agency; *Taheri v Vitek* (2014) 87 NSWLR 403 is an illustration of that. After that time, allowance generally has to be made for the physical presence, but mental absence, of a principal who, unable to make independent decisions, needs empathetic protection: *Smith v Smith* [2017] NSWSC 408 at [19].

OPERATION OF AN ENDURING POWER OF ATTORNEY AS THE PRINCIPAL BECOMES INCAPACITATED

124 The legislative reforms which introduced the concept of an enduring power of attorney (by amendment of Part 16 of the *Conveyancing Act* 1919 NSW, now replaced by the *Powers of Attorney Act* 2003 NSW) effected three reforms of present significance.

125 First, they authorised a conferral of authority on an attorney in plenary terms in a standard, short form of instrument. Secondly, they contemplated that in a standard form of power of attorney the attorney might be authorised "to execute an assurance or other document, or do any other act, whereby a benefit" was conferred on the attorney. Thirdly, they authorised a continuing operation of a power of attorney in the event of a loss of mental capacity on the part of the principal.

126 The existence of a "benefits clause" in an enduring power of attorney has given rise to difficulties.

127 In *Taheri v Vitek* (2014) 87 NSWLR 403 the Court of Appeal held that a third party is entitled to rely upon a power of attorney (in the form of Schedule 7 to the *Conveyancing Act* 1919), containing a benefits clause, without inquiry as to whether a transaction effected by the attorney is beneficial to the principal.

128 That has given rise to speculation in some quarters about whether an enduring attorney, authorised by the text of a standard form power of attorney to confer a benefit on himself or herself, remains accountable to his or her incapacitated principal (or the principal's deceased estate) for self-dealing which, absent a benefits clause, would constitute a breach of fiduciary obligations.

129 *Estate Tornya, Deceased* [2020] NSWSC 1230 analyses this problem, noting the importance of distinguishing between: (a) a contest between a principal and a third party who has transacted business with the principal *via* an attorney; and (b) a contest between a principal and attorney, focussing on the existence, nature and extent of any fiduciary obligations owed by the attorney to the

principal. The particular focus of analysis is on a domestic setting in which an enduring attorney who engages in self-dealing is both a member of the family, and a carer, of an incapacitated principal.

130 The judgment suggests that an attorney who acts under an enduring power of attorney, after his or her principal has become incapable, necessarily stands in a fiduciary relationship with the principal, a relationship in which the principal is at a special disadvantage *vis a vis* the attorney in the event that the attorney acts otherwise than conscientiously in the exercise of his or her powers.

131 In summary, the judgment suggests that in those circumstances:

(a) an enduring attorney may be held liable as a fiduciary to account for his or her dealings with property of his or her incapacitated principal if a benefit obtained by the attorney from self-dealing:

(i) is so substantial, or so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act (*Quek v Beggs* (1990) 5 BPR 11,761 at 11,764); or

(ii) flows from an unconscientious taking of advantage of the special disadvantage to which the incapacitated principal is subject *vis a vis* the attorney (*Thorne v Kennedy* (2017) 263 CLR 85 at [38], *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447).

(b) the existence, nature and extent of any liability to account an attorney may have (which is to say, any remedy available to the attorney's incapacitated principal, or the principal's deceased estate) may depend upon whether the attorney is able to persuade the Court that the standard of accounting required of him or her should take into account factors such as those

considered upon an exercise of protective jurisdiction so as to avoid an unreasonable and inequitable application of the law; and

(c) in deciding whether to make an order for an enduring attorney to account for his or her dealings with property of the principal, the Court may take into account the possibility that, had the attorney applied to the Court for an exercise of protective jurisdiction affecting management of the incapacitated person's affairs, the Court might have made orders to the effect that:

(i) the attorney having acted honestly and reasonably, he or she should be relieved of liability for any breach of a fiduciary obligation (whether under section 85 of the *Trustee Act* 1925 NSW or an exercise of analogous protective jurisdiction discussed in *C v W* (No 2) [2016] NSWSC 945); or

(ii) the attorney be granted a voluntary allowance from the estate of the incapacitated person for the maintenance or benefit of the attorney as a member of family (a jurisdiction considered in *Protective Commissioner v D* (2004) 60 NSWLR 513).

CONCLUSION

132 The law governing the execution, and operation, of an enduring power of attorney and an enduring guardianship appointment allows a person (the principal) to plan for management of his or her affairs (his or her estate and his or her person) in anticipation of mental incapacity preceding death.

133 A person who seeks to appoint an enduring attorney or an enduring guardian, or seeks to revoke such an appointment, must have the mental capacity to do so and comply with formal procedures mandated by the legislation that governs such instruments. Although enduring powers of attorney and enduring

guardianship appointments are now commonly executed, the execution of such an instrument must be approached with care.

134 A person who agrees to accept an appointment as an enduring attorney or as an enduring guardian implicitly accepts the obligations of a fiduciary to act only in the interests of the principal.

135 The obligations of a fiduciary can be onerous, including a liability to account to the principal for any unauthorised gain received by the fiduciary.

136 The obligations of a fiduciary may mean that, even if the actions of the fiduciary bind the principal to a transaction with a third party, the fiduciary (commonly, an enduring attorney dealing with property) may have a liability to account to the principal arising from the transaction.

137 Each case turns on its own facts, so close attention must be given to "the facts" of the particular case.

GCL
12 October 2022
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