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PLANNING : THE FUTURE IN FOCUS**

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**RECENT DEVELOPMENTS, FIDUCIARY OBLIGATIONS, THE
LIABILITY TO ACCOUNT AND VULNERABLE PEOPLE**

by

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Probate & Protective List Judge, Equity Division (14 May 2017)

INTRODUCTION

- 1 Participants in this Conference have the benefit of insightful papers directed towards particular topics of current interest to practitioners specialising in estate administration (including estate planning) in the context of the estates of persons who, now or prospectively, are unable, by reason of death or incapacity, to manage their own affairs.
- 2 The topics canvassed include: (a) the NSW Law Reform Commission's current review of the *Guardianship Act 1987 NSW*; (b) the Family Provision jurisdiction for which chapter 3 of the *Succession Act 2006 NSW* provides; (c) the capital gains tax implications of a sale of a deceased person's residence; (d) complexities involved in the creation and administration of testamentary trusts; (e) succession planning for small business owners; (f) principles governing the construction, or rectification, of wills, the conduct of a construction suit and applications for judicial advice; (g) issues relating to

superannuation death benefits; (h) strategies for minimisation of professional negligence claims against lawyers practising in wills and estates; and (i) innovation in wills and estates practice, including use of precedents online, document automation, artificial intelligence and lawyer substitutes.

- 3 As advertised, the Conference sessions have been structured to address the changing law, where experts see the practice of law heading, and how practitioners can adjust their practices for an optimum future result.
- 4 The object of the present paper is to notice some recent developments in estate administration and, more particularly, to reflect upon the nature of estate administration (including estate planning) in a world that has experienced, and is likely in the future to continue to experience, a process of “privatisation” and “commercialisation” in the context of changing concepts of “family”.

THE NATURE OF ESTATE ADMINISTRATION LAW IN PROTECTIVE, PROBATE AND FAMILY PROVISION CASES

- 5 To achieve that object it is necessary, as a preliminary, to traverse ground covered elsewhere, notably (for my part) in a paper published as “A Province of Modern Equity: Management of Life, Death and Estate Administration” (2016) 43 *Australian Bar Review* 9, the substance of which can be accessed on the website of the Supreme Court of NSW as a speech presented on 26 May 2015.
- 6 In that paper, I drew to attention:
 - (a) the historical, and functional, separateness *and* interconnectedness of the protective, probate and family provision jurisdictions of the Supreme Court of NSW, administered in the Court’s Equity Division;

- (b) the purposive character of each of those heads of jurisdiction;
- (c) changes to law and practice (particularly the modern concept of a “statutory will”, governed by a the *Succession Act* 2006, sections 18-26, and the equally modern concepts of an “enduring power of attorney”, currently governed by the *Powers of Attorney Act* 2003 NSW, and an “enduring guardian”, governed by the *Guardianship Act* 1987) which have led to a blurring of historical, jurisdictional boundaries; and
- (d) a paradigm shift in our perception and practice of law that tends to view “death”, now, less as an *event* and more as a *process* that may commence before, and extend beyond, *physical death*.

7 A feature, or consequence, of this paradigm shift is that Australians increasingly live in, and expect to enjoy the benefits (or hope to minimise strictures) of, a “managed” society.

8 References to a paradigm shift, and to a managed society, are a means of highlighting processes of estate planning, management and distribution that may: (a) commence with a person’s execution of an enduring power of attorney, an enduring guardianship appointment and a will; and (b) conclude only when, after that person’s death, the possibility of claims for family provision relief is, for practical purposes, eliminated.

RECENT DEVELOPMENTS

Available Papers

9 Papers published by me on the website of the Supreme Court (as “judicial speeches”) traverse developments in the heads of jurisdiction (particularly the protective and probate jurisdictions) bearing directly upon the administration of estates of persons who, by reason of death or incapacity, are incapable of managing their own affairs.

- 10 In the present context reference might be made to papers recorded as delivered on 18 September 2016 (“Operation of the Probate and Protective Lists”); 25 October 2016 (“The Role of ‘Purpose’ in Estates Litigation”); 16 November 2016 (“The Literary Executor and The Lighthouse”); 24 January 2017 (“Concepts, Patterns and Problems in Probate Litigation”); and 11 March 2017 (“The Incapacitated Plaintiff and Personal Injury Compensation Proceedings”).
- 11 The last of these papers provides the most comprehensive summary of how, and why, the Supreme Court’s Protective List operates as it does – with precedent orders.

The Institutional setting in Protective Cases

- 12 In several judgments I have endeavoured to explain development of the institutional setting in which changes in law and practice must now be assessed. Those judgments have generally surveyed territory from the perspective of an exercise of the Supreme Court’s *protective* jurisdiction, where change is most noticeable: *PB v BB* [2013] NSWSC 1223; *M v M* [2013] NSWSC 1495; *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245.
- 13 NSW has moved from a system in which the Protective Commissioner was often seen as the protected estate (financial) manager of *first* resort to one in which his successor (the NSW Trustee) regards itself as the manager of *last* resort.
- 14 In this new world: (a) individuals have been encouraged to prepare for the onset of incapacity by execution of enduring powers of attorney and enduring guardianship appointments; and (b) there is greater scope for the appointment of a private manager for reward other than a licensed trustee company.

- 15 Devolution of management functions formerly routinely exercised by the equivalent of the NSW Trustee (the Protective Commissioner) or a licensed trustee company (a statutory trustee company) has occasioned fresh consideration of how managers can be identified as “suitable” for appointment, supervised, removed or replaced and generally held to account.
- 16 If this process of devolution is to continue (as must be expected), recognition must be given to a need to ensure that the NSW Trustee is appropriately resourced to discharge its supervisory functions. The work of the Court, no less than the public interest generally, requires that the executive functions performed by the NSW Trustee be performed efficiently and to a high standard.

Probate Law and Practice

- 17 In light of current law and practice, consideration may be given to particular aspects of administration of the Court’s *probate* jurisdiction. For example: Upon what basis can, and should, a grant of probate in solemn form be made and what are the principles governing revocation of a grant of administration (eg, *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786)? In light of increasing numbers of “informal wills” (governed by the *Succession Act*, section 8) what is the current status of procedural “presumptions” in probate litigation; are they better seen as *inferences* based upon common experience (*Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107)? Should the Court entertain contested proceedings for a grant of probate without ensuring that the proceedings have been prepared for hearing on the basis that they might reasonably be expected to culminate in a solemn grant (*Estate Sue* [2016] NSWSC 721)? Fundamental though they may be, these types of question go very much to questions of administration and practice rather than abstract law.

“Distribution Orders” in Administration of Intestacies

- 18 Changing times have also invited suggestions for law reform, reflecting on current social conditions. In *Re Estate Wilson, deceased* [2017] NSWSC, a “distribution order” was made under section 134, in Part 4.4, of the *Succession Act* for administration of the intestate estate of an Aboriginal man. It was made in circumstances that gave rise to consideration whether Parliament might usefully amend the general rules of intestacy (for which Part 4.2 and 4.3 of the Act provide) to confer on the Court a dispensing power designed to enable *any* intestate estate to be the subject of an order designed to effect a “just and equitable” distribution.
- 19 Legislative reform of this character might be thought likely to arise from a need for flexibility in dealing, *inter alia*, with: (a) increasingly complex family relationships, unattended by the formality of marriage or a legally recognised “*de facto* relationship”, falling short of an available family provision claim; or (b) family relationships, in fact and law, consequent upon adoption in an era of open adoptions.
- 20 The concept of a “distribution order” dealing with an intestate estate has scope for operation in the context of multiple “spouses” of a deceased person (*Succession Act*, sections 125(1)(b) and 126) as well as in the context of an indigenous intestate estate, although it has yet to become commonplace.

“Undue Influence” at the Intersection of the Probate and Equity Jurisdictions

- 21 Not all questions about “law reform” involve legislation. If *obiter* in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475 (about the potential operation of equitable principles governing “undue influence” in circumstances in which a finding of “undue influence” in probate is unavailable) is to be taken up, attention needs to be given at first instance to the constitution, pleadings, evidence and findings required to engage equity jurisdiction. See *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[2007]; *Re Gardiner* [2016] VSC 541 at [58]-[89] and *Re Przychodski* [2016] VSC 781 at [51]-[54].

22 Whether (and, if so, how) the probate concept of undue influence (coercion) might be affected by an exercise of equity jurisdiction remains to be seen, but the possibility of interaction between the two types of jurisdiction is presently abroad.

Enforcement of a Fiduciary & Obligation to Account: Is there a time of reckoning?

23 Because of the nature and timing of an exercise of family provision jurisdiction, *some* of the impediments to a “just and equitable” administration of an estate evident upon an exercise of protective or probate jurisdiction can be addressed upon an exercise of that jurisdiction, if not earlier. This is particularly so in an environment in which proceedings are closely case managed by the Family Provision List judge (Hallen J) and routinely made the subject of mediations.

24 However, equity and justice might, in practice, be beyond reach where family members, friends or associates of a deceased person have helped themselves to an estate in anticipation of death and dissipated assets, pre-empting formal laws of succession.

25 Anecdotal evidence suggests that pre-emptive conduct of this kind represents a major, growing challenge to how the law operates in practice.

ENFORCEMENT OF A FIDUCIARY’S OBLIGATION TO ACCOUNT IN ESTATE ADMINISTRATION CASES

Fiduciary Offices

26 The focus for attention in this paper turns, then, to fiduciary obligations, the liability to account and vulnerable people. In a world in which vulnerable people abound (by reason of age, physical infirmity or mental health), and their affairs are increasingly “managed” by private persons on their behalf, how does “fiduciary law” operate, and by what means can a fiduciary’s obligation to account to the principal be enforced in practice?

- 27 A fiduciary's liability to account is central to recent developments in the "privatisation" and "commercialisation" of estate administration procedures, and it is likely to continue to be a pivotal focus.
- 28 Fiduciary officers, fiduciary relationships and fiduciary obligations are found across the spectrum of the protective, probate and family provision jurisdictions of the supreme court (as well as the general equity jurisdiction), territory familiar to all engaged in estate administration.
- 29 In the protective jurisdiction, fiduciary offices are routinely occupied by:
- (a) an enduring attorney, or an enduring guardian, privately appointed by a principal;
 - (b) a protected estate (financial) manager appointed by the Supreme Court or the Mental Health Review Tribunal (under the *NSW Trustee and Guardian Act 2009 NSW*) or the Civil and Administrative Tribunal, NCAT (under the *Guardianship Act*) or the general law equivalent, a committee of the estate, appointed by the Court upon an exercise of inherent jurisdiction; and
 - (c) a committee of the person appointed by the Court upon an exercise of inherent jurisdiction or, more regularly, a guardian appointed by NCAT pursuant to the *Guardianship Act*.
- 30 In the probate and family provision jurisdictions, fiduciary offices are routinely occupied by an executor or administrator or other parties appointed by the Court to represent a deceased estate.
- 31 In each type of jurisdiction, the Court not uncommonly appoints a "receiver and manager", on an interim basis, for a particular purpose. Such an appointee is no less a fiduciary.

“Entitlements” to Remuneration

- 32 Axiomatic to each of these fiduciary offices is that the office of a fiduciary is *prima facie* a gratuitous one. This is an important starting point even if, by means of regulated procedures, remuneration is commonly allowed. Unless that starting point is maintained, the conduct of office holders, unchecked by a principal fully competent and present, could be impossible to supervise effectively.
- 33 Equally axiomatic are the propositions that a fiduciary must not: (a) place himself, herself or itself in a position of conflict of interest and duty; or (b) obtain a benefit from the fiduciary office, without first obtaining the principal’s fully informed consent.
- 34 Those propositions lie at the heart of the observation that the office of a fiduciary charged with management of the estate of an incapable or deceased person is *prima facie* a gratuitous one. Absent a legislative warrant or a court order, such a fiduciary can only be allowed remuneration if the principal whose estate is under management has authorised it.
- 35 Such an authorisation is not uncommonly found in a will, but it is rarely found in an instrument appointing an enduring attorney (or guardian) even if a limited authority to obtain benefits from the estate is expressly conferred.
- 36 The question of remuneration of fiduciary officers of the type under consideration has been addressed in detail:
- (a) in the context of a protected estate (financial) manager, by *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383.

(b) in the context of “executor’s commission” (a concept more familiar to practitioners) in the administration of a deceased estate (referable to an equivalent of the *Probate and Administration Act* 1898 NSW, section 86(1) and the Court’s inherent jurisdiction), by *Nissen v Grunden* (1912) 14 CLR 297 and, more recently, *Re Estate Gowing; Application for executor’s commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32, 763 and *Re Estate Ford; Application for executor’s commission* [2016] NSWSC 6.

- 37 In each of these contexts, there are regulatory controls (involving supervision by the Court and/or the NSW Trustee and, in the case of licensed trustee companies, the Australian Securities and Investments Commission) which should not lightly be abandoned.
- 38 Those regulatory controls are aided by a recognition that the occupier of a fiduciary office charged with management of an estate cannot be regarded as having a vested interest in continuing in occupation of the office: *M v M* [2013] NSWSC 1495 at [50]; *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 [36].
- 39 The due administration of an estate requires an appreciation that an estate does not exist for the benefit of the fiduciary (remunerated or not), but that the office is occupied for the purpose of effecting a due administration of the estate. Trite although this proposition may sound, parties who look to an estate for remuneration tend to overlook it.
- 40 A spate of recent cases suggests that members of a protected person’s family increasingly see an application for a change of manager as a means of response to dissatisfaction with a protected estate manager’s level of fees or service.

- 41 Some of those cases appear to have arisen as a direct consequence of changes in the ownership, management structure or method of operation of a corporate manager: eg, *SLT v RTJ* [2017] NSWSC 137.
- 42 Under the State's current regime of protected estate management, it is easier to obtain a change of manager than was formerly the case. It is not necessary, as it was once thought to be, for there to be proof of misconduct on the part of a manager sought to be displaced. However, the fact remains that the Court's protective jurisdiction is not a "consent" jurisdiction; an order for the appointment, removal or replacement of a particular manager is not made merely because a party seeks it, consents to it or acquiesces in it. Whatever is done, or not done, upon an exercise of protective jurisdiction, in the making of a decision affecting the welfare or interests of a person in need of protection, must be done in a manner, and for a purpose, calculated to be in the best interests, and for the benefit, of that person: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 Qd R 1; [2014] QCA 308 at [48].
- 43 In the context of this paper, it should be noted, any "entitlement" to remuneration is, in concept, more correctly a *discretionary allowance out of an estate*, in favour of the fiduciary, on a taking of accounts. In this sense, an "entitlement" to remuneration is an incident of the fiduciary's obligation to account to the principal for the estate.
- 44 Provided they are maintained, regulatory controls *are* in place to supervise appointees of the Court (or NCAT) who overstep the mark in taking, or retaining, remuneration from a protected or deceased estate.

Unauthorised Self-dealing by the Holder of an Enduring Powers of Attorney

- 45 A more urgent, contemporary problem is how to supervise people who, often without any authority in fact but in purported exercise of authority under an enduring power of attorney, help themselves to their incapable principal's

property. Appointed by a private individual, with practical effect *after* that individual becomes incapable of self-management, such persons are not always able to be supervised as closely as is an appointee of the Court, or a statutory tribunal, monitored by the NSW Trustee.

- 46 The leading cases are *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 416 at 420-423 and *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433. See also *Jodrell v Jodrell* (1851) 14 Beav 397; 51 ER 339 and *Brown v Smith* (1878) 10 Ch D 377. A “guardian” of the property of an incapable person is a fiduciary (not a trustee in the strict sense) whose liability to account may depend on whether or not the “guardian” has fulfilled the purpose for which appointed to office: namely (as *Marion’s case* (1992) 175 CLR 218 at 258-259 confirms) to care for the incapable person unable to take care of him or herself.
- 47 Recent examples of this type of case include *Crossingham v Crossingham* [2012] NSWSC 95, *Woodward v Woodward* [2015] NSWSC 1793, *Downie v Langham* [2017] NSWSC 113 and *Smith v Smith* [2017] NSWSC 408 .
- 48 Problems which may need to be confronted in this area include the following:
- (a) Whether any benefit received by the fiduciary from the incapable person’s estate goes beyond that which is incidental to performance of the fiduciary’s proper functions.
 - (b) Whether, on a taking of accounts or in anticipation of them, a “presumption” or the like might be called in aid against a fiduciary who fails to keep proper accounts (*Houghton v Immer (No. 155) Pty Limited* (1997) 44 NSWLR 46 at 59D), who mixes personal funds with those of the principal so as to render identification impossible (*Brady v Stapleton* (1952) 88 CLR 322 at 336-337) or who claims it would be inequitable for the Court

to enforce an unqualified obligation to account (*Warman International Limited v Dwyer* (1995) 182 CLR 544 at 556-562).

- (c) Whether some allowance should be made for the defaulting fiduciary if, but for any default, the principal might reasonably be expected to have made some provision for the fiduciary (*McLaughlin v The City Bank of Sydney* (1912) 14 CLR 684 at 698-699; HS Theobald, *The Law Relating to Lunacy* (1924), chapters 52 and 65; and *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542).
- (d) Whether, upon an application of section 85 of the *Trustee Act* 1925 NSW or analogous protective jurisdiction (discussed in *C v W (No. 2)* [2016] NSWSC 945 at [45]-[47] and *Downie v Langham* [2017] NSWSC 113), the defaulting fiduciary might reasonably and fairly be excused from personal liability for a breach of fiduciary obligations.

49 In such cases, by one means or another, a defaulting fiduciary bears an onus to prove that he, she or it acted properly or should be excused from personal liability.

50 However, in practice, what appears to be happening is that, by dissipation of assets, defaulting attorneys are putting any practical remedy beyond the reach of those (such as a protected estate or financial manager appointed after the event, or the executor or trustee of a deceased estate) charged with recovery of estate property.

51 Whether legislative reforms will be forthcoming remains to be seen. Some of the reforms from time to time discussed are a more rigorous system for the registration of powers of attorney, procedures for the filing of accounts or declarations of transactions effected pursuant to a power of attorney, and a system of auditing attorneys.

- 52 Each reform of this type requires some form of “reregulation” in the context of a system which, for two decades or so now, has been encouraging families to engage in private arrangements.
- 53 Difficult although it may be for anybody to protect families against themselves when they appoint an enduring attorney or guardian without prudential safeguards, solicitors may have unique opportunities for restraining misconduct in the counsel they give to principals and attorneys who choose to travel down a pathway defined by an enduring power of attorney.
- 54 A practical starting point might be identification of all persons who have, or might have, a prospective interest in the principal’s deceased estate, coupled with arrangements for an exercise of a power of attorney to require two or more attorneys to act *jointly*. Prudence might also dictate that one of those joint attorneys be a trusted solicitor.

Security for Estate Management

- 55 In the context of a protected estate, subject to a regime of management under the *NSW Trustee and Guardian Act 2009*, the NSW Trustee has recently courted controversy by imposition of a requirement for security bonds from private managers. This has led to, or engaged decision-makers in, proceedings in NCAT (eg, *KDP* [2016] NSWCATGD 24; *TNL* [2016] NSWCATGD 25; *Re DVX* [2016] NSWCATGD 26; *Re DJC* [2016] NSWCATGD 27; *Re TKG* [2016] NSWCAT GD 28; *CTS v NSW Trustee and Guardian* [2017] NSWCATAD 119), but, so far, not in the Supreme Court. Confronted with a requirement for a security bond, some families are seeking to have management orders revoked.
- 56 Although administration bonds are often dispensed with by the Supreme Court in the administration of deceased estates, particular concerns do surround the administration of trusts on behalf of minors, whose interests the court endeavours particularly to protect (eg, by requiring an infant’s funds to be held by the NSW Trustee).

CONCLUSION

- 57 Fiduciary offices, fiduciary obligations and a need to hold fiduciaries to account are necessarily an integral part of the administration of the estate of a person who is, by reason of death or incapacity, unable to manage his or her own affairs.
- 58 Due recognition needs to be given to the distinctive, purposive character of, and interaction between, each of the protective, probate and family provision jurisdictions, overlaid as they are by the general equity jurisdiction, of the Supreme Court, aided as the Court is by executive functions performed by the NSW Trustee, and by the equally important work of NCAT and the Mental Health Review Tribunal.

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