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IN THE SERVICE OF OTHERS: The Context, Nature and Purpose of Work of the NSW Trustee and the Public Guardian in the Protection of a Vulnerable Person

by

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Introduction

1 The object of this paper is to explore the context in which the NSW Trustee and Guardian ("the NSW Trustee") and the Public Guardian are called upon to exercise powers, and to perform functions, associated with protection of a person who is, or may be, incapable of managing his or her own affairs.

2 The NSW Trustee is a statutory corporation constituted by section 5 of the *NSW Trustee and Guardian Act* 2009 NSW with, by virtue of section 6 of the Act, the status of an NSW Government Agency.

3 By virtue of section 77 of the *Guardianship Act* 1987 NSW, the Public Guardian is a person employed, in that office, in the Public Service, with the NSW Trustee.

4 Decisions made by the NSW Trustee and the Public Guardian must be made within the framework of the legislation that governs their activities. Each is, in that sense, "a creature of statute". Their powers must be found, expressly or by implication, in the text of legislation. Unlike the Supreme Court of New South Wales, they have no "inherent" jurisdiction.

5 Because they are governed by legislation, any performance of their functions requires an application of rules of one description or another. And yet, the

decisions they have to make in performance of their functions are not only about "rules". The content of legislative texts or administrative rules governing their work, and the nature of powers exercised by them, require an approach to decision-making which is empathetic to affected persons.

6 The work of the NSW Trustee and the Public Guardian is informed by an understanding of the nature of the protective functions of the Crown (the State, by another name); the nature of the protective jurisdiction of the Supreme Court exercised, historically, upon a delegation of the Crown, a template for analogous jurisdiction conferred on administrative tribunals constituted by statute; the institutional framework within which the Supreme Court and, as statutory tribunals, the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") and the Mental Health Review Tribunal operate in conjunction with the NSW Trustee and the Public Guardian; and, of critical importance, the purposive character of all decision-making affecting management of the estate and person (that is, the affairs) of a person who is, or may be, incapable of managing his or her own affairs.

7 NCAT is a statutory tribunal established by the *Civil and Administrative Tribunal Act* 2013 NSW. The Guardianship Division of the Tribunal traces its heritage back to the establishment of a Guardianship Board (later the Guardianship Tribunal) by the *Guardianship Act* 1987 NSW. Its prime concern is the protection of persons unable to manage their own affairs.

8 The Mental Health Review Tribunal is constituted by the *Mental Health Act* 2007 NSW. Its prime concern is dealing with forensic patients and others who, by reason of a mental illness, are a danger to themselves and others.

9 There is a symbiotic relationship between (on the one hand) the Supreme Court, NCAT and the Mental Health Review Tribunal and (on the other hand) the NSW Trustee and the Public Guardian. Although each decision-maker is independent of each other decision-maker, and each should cherish that independence, all decision-makers should be aware of how they can, as they

generally do, co-operate in exercise of the State's judicial and executive functions in the protection of those who are unable to care for themselves.

10 In a practical sense, although independent, the NSW Trustee and the Public Guardian are in many ways an executive arm of government upon which the Supreme Court, NCAT and Mental Health Review Tribunal rely for assistance in decision-making upon an exercise of protective jurisdiction and in implementation of decisions once made.

11 The Department of Communities and Justice and the Office of the Crown Solicitor perform much the same role for the Supreme Court and the Children's Court of NSW in the exercise of protective jurisdiction over minors as is played by the NSW Trustee and the Public Guardian in relation to incapacitated persons generally. We all have functional roles to play.

12 At the highest level of abstraction, the Supreme Court, NCAT and the Mental Health Review Tribunal, working in conjunction with the NSW Trustee and the Public Guardian, represent a means by which the State of NSW endeavours to perform the protective function of the Crown in taking care of individuals who cannot take care of themselves.

13 In contemporary Australia we speak of "the State"; but there remains utility - in historical exposition at least - in personification of the protective function of the State by reference to functions of the Crown, functions delegated to agencies of "government" in the broadest sense. Each branch of government (legislative, executive and judicial) plays a role in performance of the protective function of government.

A Diversion into History

14 By virtue of its establishment as a superior court of record (with jurisdiction originally defined by reference to 19th century English Courts and judicial office-holders), the Supreme Court of NSW has an "inherent" jurisdiction that includes a protective jurisdiction. That jurisdiction has been preserved by section 22 of

the *Supreme Court Act* 1970 NSW which currently embodies the Court's constitution.

15 Upon establishment of the Court in the 1820s jurisdiction was conferred upon it, *inter alia*, by reference to the jurisdiction then exercised by the Lord Chancellor of England upon delegations from the Crown.

16 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. Protective jurisdiction was conferred on the Court by clause 18 of the *Third Charter of Justice* in the following terms:

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

17 This power has to be read with section 9 of the *New South Wales Act* 1823 (Imp) and section 11 of the *Australian Courts Act* 1828 (Imp) which, between them, conferred on the Court both the "equitable jurisdiction" and the "common law jurisdiction" of the Lord Chancellor and, thus, confirmed the Court's protective jurisdiction (in all its manifestations) whatever may have been the contested origins of the infancy and lunacy jurisdictions in English legal history: *Estate Polykarpou; Re a Charity* [2016] NSWSC 409 at [138]-[142], [153]-[158] and [161]-[181].

18 That jurisdiction is supplemented by section 23 of the *Supreme Court Act* 1970 NSW, which provides that "[the] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales". Section 23 is sometimes described as a source of "inherent jurisdiction" but that expression is generally reserved for the original jurisdiction of the Court preserved by section 22.

19 What has been known since 1958 as "the protective jurisdiction" of the Court was, before that time, known as the "infancy", "wardship" or "parens patriae" jurisdiction (in relation to minors) and the "lunacy" jurisdiction (in relation to "idiots" or "natural fools" and "lunatics", historical names for the mentally ill). Based upon historical usage, each branch of the protective jurisdiction (as well as the Court's jurisdiction over charities) could be described as an exercise of *parens patriae* jurisdiction, an expression currently used in New South Wales principally to describe what was once also known as the infancy or wardship jurisdiction. In current usage, references to the Court's "protective jurisdiction" are generally taken to be references to what was formerly described as the Court's lunacy jurisdiction.

20 Upon exercise of its historical "inherent" jurisdiction the Court may appoint a "committee of the estate" or a "committee of the person" of a person who is incapable of managing his or her own affairs. A committee of the estate is functionally similar to a "financial manager" appointed by NCAT under the Guardianship Act 1987 or a "protected estate manager" appointed by the Court under the NSW Trustee and Guardian Act 2009. A committee of the person is functionally similar to a guardian appointed by NCAT under the Guardianship Act 1987. The expression "committee" (pronounced with a French affectation) does not necessarily mean, as it does in common usage, a group of people. Each committee can comprise a single person. The expression "committee", in this context, really means "manager".

21 In some jurisdictions "the protective jurisdiction" as we know it is known as "the guardianship jurisdiction". As in most areas of the law, the context in which descriptive labels are used can be important to an understanding of the law's

operation. Although NSW has a "Guardianship Act" and a "Guardianship Division" of NCAT, which deal with both management of the estate and management of the person of an incapable person, the word "guardianship" is commonly associated in NSW with management of the person only, coloured by the concepts of an enduring guardianship appointment made by an individual and a guardianship order made by NCAT. In practice, the expression "the protective jurisdiction" is one which may be used to describe management of the estate and management of the person together.

22 At about the time Australia was first colonised by the British, profound changes took place in the way mental illness was perceived. The madness of King George III, and his apparent recovery from time to time, helped to persuade people that mental illness might be curable and that the status of a person as an "idiot" (or "natural fool") or as a "lunatic" might not be permanent. In ancient usage, an idiot or natural fool was a person insane from birth. A lunatic was a person whose insanity was temporary or intermittent.

23 The distinction between the two classes of mentally ill person had fiscal consequences in a feudal society because, in taking charge of the affairs of an idiot or natural fool the Crown appropriated his or her property to itself whereas, in taking charge of the affairs of a lunatic, the Crown had to make provision for the possibility of the lunatic's recovery.

24 In the days when juries were used to determine the status of a person thought to be insane, the tendency of juries was to bring in a verdict of lunacy rather than idiocy for that reason.

25 In feudal times, the Crown had a similar property interest in the affairs of an infant made a ward. The Crown controlled the ward's property – and its permission was required for the marriage of a ward. The wardship jurisdiction of the Supreme Court is far removed from that history.

26 Under current Australian law, an exercise of protective jurisdiction does not of itself result in any form of transfer of title in the property of an incapable person

away from the incapable person: *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 at [174]-[175]. Property of an incapable person under "management" (by whatever name known) remains in the ownership of the person under management. The office of such a "manager" is (because of the law governing fiduciaries) a gratuitous one. Remuneration is generally not allowed to a manager of an incapable person unless authorised by statute or an order of the Court. An incapable person whose incapacity involves a want of mental capacity is not in a position to provide any form of consent to remuneration being received or retained by a manager out of his or her estate.

27 Things began to change in attitudes to mental illness around 1800, when the focus of an exercise of *parens patriae* jurisdiction (whether in relation to a minor or to a mentally ill adult) shifted to protection of the welfare and interest of an incapable person as the paramount consideration. It is, perhaps, for that reason that some of the seminal judgments governing a modern exercise of the Court's inherent protective jurisdiction are judgments of Lord Eldon from the first decades of the 19th century: see, eg, *PB v BB* [2013] NSWSC 1223.

28 Much of the 19th and 20th century was taken up with the development of institutions designed to accommodate the mentally ill, and with learning how best to treat them: Philip Powell, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales* (Forbes Society, Sydney, 2004). Nevertheless, the inherent jurisdiction of the Court conferred by the *Third Charter of Justice* (underpinned by the 1823 and the 1828 Imperial Acts) survived: *In re WN (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552.

29 Profound shifts in thinking about the Court's protective jurisdiction happened in 1958 and in the 1980s. Upon enactment of the *Mental Health Act* 1958 NSW, the Court's "Master of Lunacy" was renamed as the "Protective Commissioner" and the lunacy jurisdiction of the Court was henceforth known as the protective jurisdiction. The office of the Protective Commissioner became part of the NSW

Trustee when the NSW Trustee and Guardian Act 2009 commenced operation in July that year.

30 In 1983, the *Protected Estates Act* 1983 NSW conferred on the Court jurisdiction to make management orders by reference to a person's incapacity for self-management rather than his or her status as a mentally ill person. Since that time, the focus for attention has been upon a person's functional capacity for management of his or her affairs rather than upon his or her mental capacity.

31 At about the same time as the focus for attention turned to functionality, the Guardianship Board (the predecessor of the Guardianship Division of NCAT) was established by the *Guardianship Act* 1987 NSW and legislation was introduced to permit individuals to plan for their own decline in functionality by the execution of an "enduring power of attorney" and an "enduring guardianship appointment".

32 There is a sense in which an enduring attorney and an enduring guardian are best viewed simply as agents appointed by a person in anticipation of incapacity with the intention that their powers might continue (or, depending on the terms of the instrument, be enlivened) when incapacity becomes a reality. A person with the mental capacity to do so can make, and revoke, an enduring power of attorney or an enduring guardianship appointment at will. It is otherwise if the Court or NCAT appoints a financial manager or a guardian.

33 This development was, in a sense, a form of privatisation of decision-making in management of an incapacitated person's affairs, ostensibly conferring on each person a power to appoint an agent or agents of his or her own choice (in anticipation of mental incapacity) to manage his or her affairs.

34 What was profound about enactment of legislative authority for these "enduring" appointments was that, unlike the appointment of an agent under the general law (the common law), a principal's descent into mental incapacity does not terminate the appointment of an "enduring attorney" or an "enduring guardian" by the principal.

In a Managed Society, "Death" has become a Process Rather than an Event

35 These developments have had a distinctive impact on the way Australians prepare for the possibility of incapacity or death. They have been accompanied by equally significant changes in what was formerly described as the "testator's family maintenance" jurisdiction of the Court (originally conferred by the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 NSW, later by the *Family Provision Act* 1982 NSW), now described as the "family provision" jurisdiction and governed by Chapter 3 of the Succession Act 2006.

36 That jurisdiction empowers the Court to make an order that provision (such as a legacy) be made out of the 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 partially dependent upon the deceased and a member of his or her household.

37 In a 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. The protective function of the State 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 law calls attention to a need for everybody to contemplate "the other".

38 From the perspective of a lawyer, "death" has become more of a *process* than an *event* as arrangements are routinely made for 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.

39 The process 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.

40 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. The protective jurisdiction privileges, and protects, an individual in need of protection; problems are viewed through the prism of that individual. The probate jurisdiction gives effect to a perspective which transitions from that of a person at the end of his or her life to that of members of his or her community (family) recognised as entitled to enjoy his or her inheritance. The family provision jurisdiction acknowledges an individual's "testamentary freedom" but qualifies it by empowering the Court to make an order for provision out of a deceased estate for those for whom he or she "ought" to have made provision. The purposive character of one head of jurisdiction merges with that of the next in management of people, property and relationships.

41 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 misappropriated property be returned, or that compensation for 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.

42 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.

43 Commonly, a person intent upon placing his or her affairs in order in anticipation of incapacity or death will execute three instruments: a will, an enduring power of attorney and an enduring guardianship appointment. Each instrument is executed as an independent transaction.

44 A will is an instrument governed by the *Succession Act* 2006. Disputes about the validity of a will are determined upon an exercise of probate jurisdiction by the Supreme Court. That generally involves an exercise of the Court's inherent probate jurisdiction and jurisdiction governed by the Succession Act and the *Probate and Administration Act* 1898 NSW. Until 1890 in NSW the "probate" jurisdiction was known as the "ecclesiastical" jurisdiction because, in England, for centuries before 1855, disputes about the administration of deceased estates were determined by church courts rather than secular courts.

45 An "enduring power of attorney" is presently governed by the *Powers of Attorney Act* 2005 NSW.

46 An "enduring guardian appointment" is governed by the *Guardianship Act* 1987.

47 The interlocking character of different jurisdictions that might be encountered, directly or indirectly, in relation to the work of the NSW Trustee and the Public Guardian in dealing with a vulnerable person can perhaps best be illustrated if one imagines the course of an ordinary life.

48 Imagine that a person executes a will, an enduring power of attorney and an enduring guardian appointment at one and the same time while completely in charge of his or her mental faculties. The object of doing so is to anticipate the person's descent into mental incapacity or, at least, a functional incapacity for self-management.

49 In the fullness of time, the person concerned (our central personality) descends into a fog of dementia and lacks the mental capacity to manage his or her own person or his or her affairs generally. At or about that point, it is not uncommon that friction about how to manage the person's affairs manifests itself in disputation between family members and the person's designated attorney and guardian.

50 A sign post of a person's descent into dementia may be his or her execution, in rapid succession, of multiple, inconsistent instruments 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. Whatever lawyers might say, some people regard an enduring power of attorney (in particular) as a license to steal. In a similar vein, some people, seeking to anticipate or pre-empt the operation of a will, use an enduring power of attorney as a means of diverting property away from the prospective deceased estate of a vulnerable person.

51 Sometimes friction arises from what is, or appears to be, a misuse of powers conferred on the attorney or guardian, whose powers are regarded by the Court as "fiduciary" powers because (subject perhaps to the terms of a particular instrument) they exist for the purpose of enabling an appointee to act on behalf, and in the interests only, of the appointor. This is often not fully appreciated by enduring attorneys or enduring guardians who imagine that they can exercise their powers for their own benefit. [To some extent, confusion about this arises from the form of an enduring power of attorney which, for the benefit of third parties dealing with an attorney, generally declares that an attorney is able to do anything which his or her principal could do, if capable. As between principal and agent, an equity judge may hold otherwise.]

Intersections between the Protective and Equity Jurisdictions

52 If a dispute arises as to the efficacy or operation of an enduring instrument, that dispute may become the subject of proceedings in the Guardianship Division of NCAT or in the Equity Division of the Supreme Court. The Court's protective

list is administered as part of the Equity Division and all judges of that Division commonly decide cases involving the rights of vulnerable persons upon an exercise of equity jurisdiction.

53 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 that property for the estate or compensation upon an exercise of the Court's equity jurisdiction. The "causes of action" commonly relied upon in such proceedings are known by the labels "undue influence", "unconscionable conduct" and "breach of fiduciary obligations".

54 Another digression into legal history might bring life to these bare labels.

55 In strict theory, use here of the expression "cause of action" in connection with principles or remedies associated with an exercise of equity jurisdiction is a misnomer. Historically, it is associated with the basis upon which an *action* could be brought in a court of common law in England (the Court of King's Bench, the Court of Common Pleas or the Court of Exchequer) for damages or some other common law remedy designed to enforce a legal right or provide a remedy for wrongful conduct. A common law action was generally tried by a jury in a trial over which a judge presided. Typical common law actions are claims for damages for a breach of contract or tortious conduct such as trespass or negligence.

56 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.

57 The Supreme Court of New South Wales exercises both common law and equitable jurisdiction (in addition to other heads of jurisdiction, such as protective, probate and family provision jurisdiction) in the one court structure, but a jurisprudential distinction between "common law rules" and "equitable principles" still informs the law in operation. An exercise of common law jurisdiction generally involves competing claims of "right" giving rise to an entitlement to a specific remedy, often damages. Its rules and remedies were, historically, adapted to determination by a jury, characteristically entrusted with a binary choice (verdict for the plaintiff or verdict for the defendant; guilty or not guilty). An exercise of equitable jurisdiction gives rise generally to a remedy which lies within the discretion of the Court to grant or withhold, on conditions if appropriate, designed to meet the justice of the particular case. Upon an exercise of equitable jurisdiction the Court may notionally intervene in the enforcement of a legal right, or compel performance of a duty, when a plaintiff has established "an equity" to relief (an "equitable cause of action"): that is, a basis upon which the defendant can be said to have acted, or to have threatened to act, against good conscience.

58 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.

59 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.
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> 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. …"

60 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.

61 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.

62 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.

63 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.

64 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.

65 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.

66 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.

67 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 Tribunal, as well is the NSW Trustee, to bring home to a prospective financial manager the burdens of a fiduciary office .

68 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".

69 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.

70 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.

71 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.

72 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 conscientious 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*.*

73 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.

74 The work of the NSW Trustee and the Public Guardian has a strong focus on protection of a living person in real and future time. The NSW Trustee is also routinely involved (as a "manager" of an estate or as a supervisor of "managers" of an estate) in steps taken to recover property or compensation on behalf of the estate of an incapable person (or his or her deceased estate) where, in breach of a fiduciary obligation, by an exercise of undue influence or through unconscionable conduct, a person has wrongfully misappropriated property of an incapable person or diverted property away from an incapable person.

75 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 third party, commonly a member of family or a family company.

76 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.

The Province of Financial Management and Guardianship Orders

77 At the risk of oversimplification, disputes about the efficacy or operation of an enduring instrument often end up:

(a) in the appointment of a "financial manager" by NCAT (under the Guardianship Act 1987) or an equivalent "protected estate manager" by the Court (under the *NSW Trustee and Guardian Act* 2009 NSW) in relation to a dispute about a power of attorney; and

(b) in the appointment of a "guardian" by NCAT (under the Guardianship Act 1987).

78 It is the function of NCAT to make "guardianship orders", not the Court. The Court can appoint a "committee of the person" (upon an exercise of its inherent jurisdiction), an office analogous to that of a guardian appointed by NCAT; but most disputes about "guardianship" in this sense are determined by NCAT rather than the Court.

79 A practical difference between management of the affairs of an incapacitated person under the authority of an enduring instrument and management of the

affairs of a person pursuant to a management order or a guardianship order is that appointments of the former kind involve little, if any, administrative oversight in the absence of disputation whereas appointments of the latter kind have the benefit of systemic administrative oversight by the NSW Trustee and the Public Guardian, depending on the nature of particular appointments.

80 In cases in which there has been an abuse of power by an enduring attorney, an enduring guardian, a financial manager (or the Supreme Court equivalent) or a guardian (or the Supreme Court equivalent), resulting in a diversion of property from the estate of an incapable person, proceedings may be instituted in the Supreme Court to restore property to the estate of the person, or to recover compensation on behalf of the person, upon an exercise of jurisdiction which may involve one or more of the Court's protective, probate, family provision or general equity jurisdictions.

The Distinction Between Management of "the Estate" and Management of "the person" of an Incapable Person

81 By whatever name known, and subject to the terms of his or her appointment, a person appointed to manage "the estate" of an incapable person and a person appointed to manage "the person" of an incapable person are appointed to take control of the estate or person of the incapable person, as the case may be.

82 There is no absolute, black line demarcation of authority in all cases between the two different types of office: "manager" of the estate and "manager" of the person. In practice, there is often a need for co-operation between the different types of officeholder. A classic case of that is an incapable person who needs care in an aged care facility that requires payment of a bond.

83 In the case of conflict between a "manager" of the estate and a "manager" of the person, orders might be made by the Court or NCAT to change arrangements for management of the incapable person's affairs. In theory, the Court can give directions for the conduct of the person's affairs generally but, in practice, the more likely outcome of conflict is that new managers (or the NSW Trustee and the Public Guardian) might be appointed.

84 My impression is that some crises can be negotiated by warring parties being invited to discuss their problems with a responsible person in the office of the NSW Trustee or the office of the Public Guardian. Certainly, my experience of family conflict in a court setting involving an exercise of protective jurisdiction is that the mere presence of the NSW Trustee or the Public Guardian, with an invitation extended to persons affected by the proceedings to consult with the NSW Trustee or the Public Guardian, can have a moderating influence on adversarial conflict.

85 People affected by protective proceedings in the Court often have no real appreciation that such proceedings are generally not intended to be conducted in an adversarial manner. They often have no appreciation of applicable legal principles or how administrative procedures involving the NSW Trustee, the Public Guardian and NCAT work. There is only so much a judge presiding over proceedings can do to bring everybody to a full appreciation of how the system works. For that reason too the involvement of the NSW Trustee and the Public Guardian can be critical. They can often settle tensions, and be accessible for advice, in a way that a judge acting judicially cannot.

86 Whether viewed through the prism of "management of the person" or "management of the estate", protective management is governed by the purpose for which the jurisdiction to subject a person to protective management exists. That must be so in the nature of a jurisdiction which suspends a person's right to manage his or her own affairs.

The Nature and Purpose of "Protective" Decision-Making

87 In Australia, the classic formulation of the protective function is found in the judgment of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259, elaborated by reference to the judgment of the Supreme Court of Canada in *Re Eve* [1986] SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14-21 and the judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.

88 Historically, as those cases demonstrate, Anglo-Australian law is founded on the proposition that the Crown, as *parens patriae* (father, or parent, of the nation), has an obligation, with commensurate power, to take care of those who are not able to take care of themselves.

89 An underlying assumption of the law, not to be overlooked, is that each individual has a right (and duty) to take care of himself or herself, so far as able to do so. Respect is accorded to the dignity of each person as an individual. The gold standard underlying an exercise of protective jurisdiction is the concept of an autonomous individual living, with dignity, in his or her community of choice.

90 The purposive character of "protective jurisdiction" exercised by the Supreme Court looks to protection of an individual unable to take care of himself or herself: unable to manage his or her own affairs, be those affairs described in terms of "person" or "estate". 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 238DF and 241G -242A; *GAU v GAV* [2016] 1 QdR 1 at 25[48].

91 The purposive character of the "protective" functions performed by the NSW Trustee and the Public Guardian is most explicitly described in section 4 of the Guardianship Act 1987 and section 39 of the NSW Trustee and Guardian Act 2009, which are in substantially similar terms.

92 Section 4 of the Guardianship Act is in the following terms:

> **"4 General principles**
>
> It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles—
>
> (a) the welfare and interests of such persons should be given paramount consideration,
>
> (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles."

93 Section 39 of the NSW Trustee and Guardian Act is in the following terms:

"39 General principles applicable to Chapter

It is the duty of everyone exercising functions under [Chapter 4 of the Act] with respect to protected persons or patients to observe the following principles—

(a) the welfare and interests of such persons should be given paramount consideration,

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation."

94 Chapter 4 of the NSW Trustee and Guardian Act is entitled "Management functions relating to persons incapable of managing their affairs".

95 Upon an exercise of a protective power, the person in need of protection is the central personality. Care needs to be taken against an ever-present risk that the interests of a person in need of protection are subordinated to the interests, or convenience, of another person, or an institution, with whom his or her life intersects.

96 There is nothing new in these observations. In *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 at 101; 35 ER 878 at 879 Lord Eldon noticed the problem and set a standard of how to deal with it: With emphasis added, the headnote to the report of his judgment reads as follows:

> "*Practice of making an allowance* to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and *founded not on any supposed interest in the property, which cannot exist during the Lunatic's life-time, but upon the principle that the Court will act with reference to the Lunatic and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court*."

97 Lord Eldon's judgment (at 2 Mer 101-103; 35 ER 879) elaborates the specified principle, encased in a precautionary tale about the intersection between human frailty and what is necessary for the due administration of a protected estate (with emphasis here added):

> "The *Lord Chancellor* [Eldon]. For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund [102] which, it is probable, may one day devolve upon themselves. Nevertheless, *the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons*. So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; *upon the principle that it*

> *would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, - but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic*.
>
> *The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes [103] care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.*
>
> The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children - to brothers and other collateral kindred; and *if we get to the principle, we find that it is not because the parties are next of kin to the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done*.
>
> [No Order was made upon the Petition.]"

98 The "general principles" identified in section 4 of the Guardianship Act and section 39 of the NSW Trustee and Guardian Act are functionally similar to statements made by judges about the purposive character of an exercise of the Court's inherent protective jurisdiction.

99 They are not to be read simply as "check lists" of topics to be addressed in decision-making. They are, as they proclaim themselves to be, statements of general principles intended to guide an exercise of judgement in quality decision-making.

100 The protective jurisdiction of the Court is, almost single mindedly, focused upon the welfare and interest of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or left undone, is or is not for the interests, and benefit, of the person in need of protection, taking

a broad view of what may benefit that person, but generally subordinating all other interests.

101 Upon an exercise of inherent jurisdiction the Court will commonly identify as the governing principle the paramountcy of the welfare and interests of the person in need of protection. This reflects section 4(a) of the Guardianship Act and section 39(a) of the NSW Trustee and Guardian Act.

102 Upon an exercise of the Court's inherent jurisdiction, the other principles identified in section 4 of the Guardianship Act and section 39 of the NSW Trustee and Guardian Act are commonly assumed to flow incidentally from the paramountcy principle, as I believe they do.

103 Implicit in statements of principle about how protective jurisdiction should be exercised is a tension found in the rationale for the jurisdiction: the State's perceived duty to take care of those persons *who cannot take care of themselves*.

104 An appointment of a person empowered to take control of the affairs of a person unable to manage his or her own affairs is *not* a grant of authority unqualified by a need for the appointee to consult with the person whose affairs are under management and to endeavour to give effect to that person's preferences if they can reasonably be ascertained.

105 That said, the protective jurisdiction is not a "consent jurisdiction" in the sense that the Court or NCAT (or a person appointed as a financial manager or guardian) is bound to act at the direction of an incapable person or anybody else. Regard must be had to the "will and preferences" of an incapable person if and to the extent they can reasonably be ascertained, but a "management" decision that does no more than adopt an incapable person's statements of mind without independent assessment offers no protection to the incapable person and should be eschewed. The hard edge of an exercise of protective jurisdiction is that in some circumstances a person exercising the jurisdiction must be able to say "no" to a course of action proposed by or on behalf of the

incapable person. The difficulty is often to know when to say “no”. It requires wisdom in the prudential management of risk.

106 The concept of “prudential management of risk” is not code for a simple elimination of risk in all cases. Protective estate management of the affairs of an incapable person needs to allow for the possibility that, in an appropriate case, the incapable person should be allowed an opportunity to take risks on his or her own account: that is, in an appropriate case, he or she should be allowed a “freedom to fail”, a close associate of any “freedom to succeed”.

107 In difficult cases, avenues may exist for responsibility for decision-making to be shared. Thus, for example, a financial manager in doubt about how best to proceed can invite the NSW Trustee to give directions for the management of the estate under management or apply to the Court for directions. The NSW Trustee itself can apply to the Court for “judicial advice” or a procedural equivalent.

108 Difficulties in the prudential management of risk often manifest themselves in the context of a proposal that managed property be applied for the benefit of a member of the family of an incapable person, a friend or a carer - even a new found friend. Often such a proposal is advanced (and advanced passionately) by the incapable person rather than the intended beneficiary of the proposal.

109 In such cases, care needs to be taken not to allow the welfare and interests of the incapable person to be subordinated to the interests of any other person. A proposal for application of property under management should be accompanied by evidence of a material benefit to the incapable person whose property it is. Care needs to be taken to ensure that, if property is applied as proposed, sufficient property will remain for the enjoyment of the incapable person. So far as is practicable, objective evidence should be sought as to the necessity for, and utility of, an application of property as proposed. If property of an incapable person is to be paid to another person, consideration should be given to whether the property might be recovered and, if so, on what terms so as to protect the interests of the incapable person.

110 An example of an unacceptable dealing with property under management is a proposal that property of an incapable person be "invested" in a superannuation policy that renders property inaccessible to the incapable person or permits superannuation monies to be diverted away from the estate of the incapable person: see *G v G* (No2) [2020] NSWSC 818. Some families seek to secure for themselves the wealth of an incapable person by an "investment" in a superannuation policy that permits a death benefit payment to be made otherwise than to the incapable person's deceased estate. Through a statutory will procedure (governed by sections 18-26 of the *Succession Act* 2006 NSW) the law provides a mechanism by which, in an orderly way, testamentary arrangements can be put in place for an incapable person. The safeguards built into the statutory will procedure should not be permitted to be circumvented by manipulation of superannuation procedures.

111 In the words of Scripture, protective estate management requires a decisionmaker to be as wise as a serpent and as gentle as a dove (Matthew 10:16). Before one can be generous to everybody affected by a management decision, one has to be critically aware of the mixed motives that might affect participants in the process. That might involve a consideration of the question, "What's in it for them?", followed by a cost benefit analysis conducted from the perspective of the person whose affairs are under management.

112 Any decision-maker exercising a power that affects the person or interests of an incapacitated person must, so far as possible, consult the affected person *and* those with a genuine interest in the affected person's welfare.

113 It is almost inevitable that, in the management of the estate or person of some persons incapable of self-management, the incapable person or a family member, friend or carer will complain (and, often enough, have cause to complain) about things done; things done badly; things done without proper consultation or empathy; or fees charged by the NSW Trustee, a licensed trustee company or, with the approval of the Court, a private manager for reward. Nobody is immune from complaints of this nature: not the NSW Trustee, not the Public Guardian, not licensed trustee companies, not private

managers, not NCAT, not the Court. Criticism, correctly channelled, is a safety valve for dealing with the frustrations associated with management of the affairs of a person incapable of self-management.

114 With this in mind, it is extremely important for everybody involved in management of the affairs of a person in need of protective management to remain diligent, patient and focused on the best interests and welfare of the person in need of protection and, incidentally, his or her significant others and support persons.

115 This counsel of perfection may be particularly difficult for staff of the NSW Trustee and the Public Guardian who, perhaps without the resources necessary to do everything that a particular case optimally requires, must deal with "difficult" people or difficult cases.

116 Much public dissatisfaction with institutional managers arises from a public perception (justified or not) that an incapable person or those involved in his or her day-to-day care cannot establish or maintain a personal rapport with a member of the staff of the institution who is willing and able to engage personally about personal problems. Applications for a change of institutional manager are often grounded upon a complaint about bureaucratic indifference or a change of personnel resulting in loss of a trusted and popular member of staff. For that reason, I have endeavoured to make it easier than it once was for there to be a change of manager; it is not necessary, or generally productive, to require proof of misconduct on the part of the manager sought to be removed from office; a change of manager cannot be made "as of right" but, as in all things relating to protective management, decisions must be made by reference to what is perceived to be in the best interests, and for the benefit, of the person in need of protection.

117 In dealing with a person in need of protection and those with a genuine interest in his or her welfare, it is important that decision-makers know the personal circumstances of the person in need of protection: the nature of the person's incapacity, his or her whereabouts, the nature of his or her personal

relationships, the identity of his or her principal carers, his or her needs, and the financial resources available to meet those needs.

118 Those involved in management of the estate or the person of an incapable person need, jointly or severally, to cater for the whole person. A label such as "financial manager" or "manager of a protected estate" does not justify an assumption that the only concern of a manager (or the NSW Trustee or the Public Guardian) is that part of the business of life embraced by the word "financial" or "estate". If an incapable person and his or her significant others are left without assistance because of what is perceived to be a demarcation dispute or an invisible administrative boundary, they may have no practical means of living a normal life in the community, and every reason to complain about their treatment.

What, then, is "Incapacity" for Self Management?

119 The expression "(in)capable of managing his or her affairs" is not the subject of express definition in either the Guardianship Act or the NSW Trustee and Guardian Act.

120 My approach to the meaning of that expression was most comprehensively set out in *CJ v AKJ* [2015] NSWSC 498 at [27]-[43], here reproduced:

> "[27] In the absence of an express legislative definition, the expression "(in)capable of managing his or her affairs" should be accorded its ordinary meaning, able to be understood by the broad community (lay and professional) it serves, remembering that:
>
> (a) the concept of incapacity for self-management is an integral part of the protective jurisdiction which, historically, arose from an obligation of the Crown (now more readily described as the State) to protect each person unable to take care of him or her self: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.
>
> (b) of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (i) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (ii) particular reasons for an incapacity for self-management: *PB v BB* [2013] NSWSC 1223 at [5]-[9] and [50].

(c) the focus for attention, upon an exercise by the Court of its protective jurisdiction (whether inherent or statutory), is upon protection of a particular person, not the benefit, detriment or convenience of the State or others: *Re Eve* [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; (1986) 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34; *JPT v DST* [2014] NSWSC 1735 at [49]; *Re RB*, *a protected estate family settlement* [2015] NSWSC 70 at [54].

(d) the "affairs" the subject of an enquiry about "management" are the affairs of the person whose need for protection is under scrutiny, not some hypothetical construct: *Re R* [2014] NSWSC 1810 at [94]; *PB v BB* [2013] NSWSC 1223 at [6].

(e) an inquiry into whether a person is or is not capable of managing his or her affairs focuses not merely upon the day of decision, but also the reasonably foreseeable future: *McD v McD* [1983] 3 NSWLR 81 at 86C-D; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [136].

(f) the operative effect given to the concept of capacity for self-management, upon an exercise of protective jurisdiction by the Court (whether inherent or statutory), is informed, *inter alia*, by a hierarchy of principles, proceeding from a high to a lower level of abstraction; namely:

(i) an exercise of protective jurisdiction is governed by the purpose served by the jurisdiction (protection of those not able to take care of themselves): *Marion's Case* (1992) 175 CLR 218 at 258.

(ii) upon an exercise of protective jurisdiction, the welfare and interests of the person in need of protection are the (or, at least, a) paramount consideration (the "welfare principle"): *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238B-C and 241A-B and F-G; *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [146]-[147].

(iii) the jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do: H.S. Theobald, *The Law Relating to Lunacy* (London, 1924), pages 362-363, 380 and 462: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 522 [55] and 540 [150].

(iv) whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what 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* [2014] QCA 308 at [48].

(v) The Court's inherent jurisdiction has never been limited by definition. Its limits (and scope) have not, and cannot, be defined: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Re Eve* [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) 1 at 16; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and *Wellesley v Wellesley* (1828) 2 Bli. NS 124 at 142; 4 ER 1078 at 1085.

[29] The jurisdiction, although theoretically unlimited, must be exercised in accordance with its informing principles, governed by the purpose served by it.

[30] Although the concept of "a person… incapable of managing his or her affairs" is foundational to the Court's protective jurisdiction in all its manifestations (inherent and statutory), the purposive character of the jurisdiction is liable, ultimately, to confront, and prevail over, any attempt at an exhaustive elaboration of the concept in practice decisions.

[31] From time to time one reads in judgments different formulations of the, or a, "test" of what it is to be "a person (in)capable of managing his or her affairs". Convenience and utility may attach to such "tests", but only if everybody remembers that they provide no substitute for a direct engagement with the question whether the particular person under scrutiny is, or is not, "(in)capable of managing his or her affairs", informed by "the protective purpose of the jurisdiction" being exercised, and the "welfare principle" derived from that purpose.

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

[33] The same is true of "capacity" for self-management, upon an exercise of protective jurisdiction, governed by the protective purpose of the jurisdiction, viewed in the context of particular facts relating to a particular person in, or perceived to be in, need of protection.

[34] Once this is accepted, there is scope for appreciation of different insights available into the meaning, and proper application, of the concept that a person is "(in)capable of managing his or her affairs".

[35] Four different formulations of the concept may serve as an illustration of this.

[36] First: Without any gloss associated with "the ordinary affairs of man" Powell J's formulation, in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, of what it is to be "a person incapable of managing his or her affairs" might usefully be recast as follows:

"… a person is not shown to be incapable of managing his or her own affairs unless, at least, it appears:

(a) that he or she appears incapable of dealing, in a reasonably competent fashion, with [his or her affairs]; and

(b) that, by reason of that lack of competence there is shown to be a real risk that either:

(i) he or she may be disadvantaged in the conduct of such affairs; or

(ii) that such moneys or property which he or she may possess may be dissipated or lost (see *Re an alleged incapable person* (1959) 76 WN (NSW) 477); it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner: See *In the Matter of Case* (1915) 214 NY 199, at page 203, per Cardozo J… [emphasis supplied] ".

[37] Secondly: An alternative formulation, found in *EB and Ors v Guardianship Tribunal and Ors* [2011) NSWSC 767 at [134] per Hallen AsJ, is to the effect that a person can be characterised as "incapable of managing his or her affairs" if his or her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made, which action or decision the person is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

[38] Thirdly: An approach which commends itself to me, in this case, is to record that, in considering whether a person is or is not capable of managing his or her affairs:

(a) a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation; and

(b) in considering whether a person is "able" in this sense, attention may be given to: (i) past and present experience as a predictor of the future course of events; (ii) support systems available to the person; and (iii) the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

[39] Fourthly: Drawing upon the legislation that governs the Guardianship Division of NCAT in determining whether or not to make a financial management order (*Guardianship Act*, Part 3A, particularly sections

25E and 25G, read with sections 3(2) and (4)), it might be said that, in common experience, whether a person is or is not "capable of managing his or her own affairs" might be determined by reference to the following questions:

(a) whether the person is "disabled" within the meaning of sections 3(2) (a)-(d). That is, whether the person is: intellectually, physically, psychologically or sensorily disabled; of advanced age; a mentally ill person; or otherwise disabled;

(b) whether, by virtue of such a disability, the person is (within the meaning of section 3(2)) "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation"; and

(c) whether, despite any need he or she has for "supervision or social habilitation" (section 3(2)):

(i) he or she is reasonably able to determine what is in his or her best interests, and to protect his or her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager (sections 4 (a)-(c), 4(f), 25G (b) and 25G (c)).

(ii) he or she is in need of protection from neglect, abuse or exploitation (sections 4(a), 4(g), 25G(b) and 25G(c)).

[40] The utility of each of these formulations depends on whether (and, if so, to what extent) it is, in the particular case, revealing of reasoning justifying a finding that a person is or is not (as the case may be) capable of managing his or her affairs, having regard to the protective purpose of the jurisdiction being exercised and the welfare principle.

[41] In each case care needs to be taken not to allow generalised statements of the law or fact-sensitive illustrations to be substituted for the text of any legislation governing the particular decision to be made and, in its particular legislative context, the foundational concept of capacity for self-management.

[42] Whatever form of words may be used in elaboration of that concept, it needs to be understood as subordinate to, and of utility only insofar as it serves, the purpose for which the protective jurisdiction exists.

[43] Likewise, ultimately, whatever is 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 particular person in need of protection: *GAU v GAV* [2014] QCA 308 at [48]. That touchstone flows from the core concern of the Court's inherent jurisdiction with the welfare of the individual, and it finds particular expression in the *NSW Trustee and Guardian Act*, section 39(a)."

121 Because the concept of "(in)capacity" is task specific, and depends upon an assessment of the personal circumstances of the person whose capacity is to be assessed, a finding about the functional capacity of a person may depend very much upon whether he or she has any (and, if so, what) support. The classic example of this is a case in which a vulnerable person ceases to be so because he or she has established a stable domestic environment in which he or she is supported by a committed partner.

CONCLUSION

122 What has been drawn to attention in this paper is but a small treatment of a large topic.

123 The prime points to take away from the paper are:

(a) The protective jurisdiction has a rich history, and a wide range of applications, all informed by the purpose that governs the jurisdiction: taking care of those unable to take care of themselves.

(b) Although the jurisdiction is governed by rules (particularly in the case of statutory jurisdiction) it is, in operation, necessarily informed by the purpose it serves.

(c) In all things, an exercise of protective jurisdiction requires consultation with a person who may be subject to it (and his or her significant others) and empathetic decision-making directed to a constructive engagement with all affected persons.

GCL
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