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LECTURE

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"EQUITY'S CHALLENGE: Maintenance of Standards in Deployment of Enduring Powers of Attorney and Enduring Guardianship Appointments"

by

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INTRODUCTION

1 Much discussion of "elder abuse" in modern Australian society focuses upon misuse of their powers by the holders of an appointment as an "enduring attorney" or as an "enduring guardian". Upon an exercise of its equity jurisdiction, the Supreme Court of NSW plays a role in countering such abuse.

2 This paper explores the nature and role of the Court's equity jurisdiction, as it intersects with the Court's protective, probate and family provision jurisdictions, consequent upon the operation of enduring powers of attorney and enduring guardianship appointments.

3 Readers of the paper should bear in mind the observations of Paul Finn in *Fiduciary Obligations* (1st ed, 1977; reprint 2016) at paragraph [698], here reproduced with editorial adaptation:

> "[Though] the courts often enough emphasise the rigorous standards exacted by the fiduciary principal [generally applicable to an enduring attorney and an enduring guardian by virtue of their office] they less often acknowledge explicitly that it is, itself, an instrument of public policy. It has been used, and

> is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable. …"

4 Enduring attorneys and enduring guardians (for convenience, here described as "agents") perform functions, ostensibly on behalf of a person (for convenience, a "principal") who is incapable of performing those functions.

5 For convenience of discussion, an "appointor" of an enduring attorney or an enduring guardian might be described as a "principal" and an "appointee" might be described as an "agent"; but, without elaboration, these labels are inadequate to describe what are unique legal concepts.

6 The fields of operation of the two distinct types of an enduring "agent" are not coterminous with boundaries of the general law of agency.

7 Empowerment of an enduring attorney or an enduring guardian to make decisions "on behalf of" an incapacitated person can be beneficial, but the concept of (in)capacity remains problematic in a world in which incapacitated persons are encouraged, as far as possible, to live a normal life in the community; to be self reliant in matters relating to their personal, domestic and financial affairs; and to have their views taken into consideration. The concept of "(in)capacity" often inhabits a world which is neither black nor white, but an ambiguous shade of grey.

8 A common assumption that the incapacity of a principal is one of total, mental incapacity is open to challenge, raising questions about: (a) the extent to which the relationship between "principal" and "agent" requires consultation; and (b) the protections available to the estate and person of an incapacitated principal vis-à-vis his or her agent in the absence of consultation.

9 Answers to these questions require consideration of the nature and role of the equity jurisdiction of the Court, recognising that the concept of an "enduring agent" is of relatively recent origins and its application may not, in all respects,

sit comfortably with a perspective of the equity jurisdiction which sees “equity” simply as a contrast with the “common law”.

10 A common feature of the protective, probate and family provision jurisdictions is that they involve the making of *decisions about management* of the affairs of a person who, by reason of incapacity or death, is unable to manage his or her own affairs. There is a sense in which, upon an exercise of each type of jurisdiction, the central personality (whose perspective of the world has to be taken into account) is not present and able to be an advocate or be interrogated.

11 That commonly means that there is a public interest element in protective, probate and family provision proceedings that distinguishes them from common law proceedings that characteristically require *adjudication of competing claims of right* between parties present, willing and able to advocate their own interests.

12 The protective jurisdiction differs from the other jurisdictions in that it may involve difficult questions in the assessment of the “(in)capacity” of a living person and in the management of “the person” as well as “the estate” of an incapacitated person. This goes beyond what may be necessary to determine, in any class of proceedings, whether an incapable person may need a tutor to manage particular proceedings.

13 A central task upon an exercise of all of the protective, probate or family provision jurisdictions is the identification, and taking control, of the incapacitated person’s property.

14 The equity jurisdiction provides the glue that holds the protective, probate and family provision jurisdictions together because it provides a mechanism for holding “managers” (however described) to account for their management of the property of an incapacitated person, providing a means by which standards of behaviour can be required of managers.

15 In order for the equity jurisdiction to be exercised effectively, it is necessary for the Court, parties and the profession to have a common understanding about:

(a) the purpose of an exercise of equity jurisdiction;

(b) principles generally applied upon an exercise of equity jurisdiction, to deal with patterns of behaviour that justify, if not require, the granting of a remedy; and

(c) the nature and range of remedies available to address behaviour which may fall short of standards expected by the Court.

16 Specific challenges that present themselves upon an exercise of equity jurisdiction, in dealing with enduring powers of attorney and enduring guardianship appointments, include the following:

(a) identification of the field of operation of the equity jurisdiction, expressed in terms of its purpose and its intersection with other heads of jurisdiction of the Supreme Court, rather than by reference only or primarily to:

(i) English legal history predating the English *Judicature Acts* of 1873 and 1875; or

(ii) a binary comparison between the equity and common law jurisdictions of that historical period.

(b) identification of means to hold an enduring agent to account in real time during the lifetime of an incapacitated principal.

(c) identification of means to respond to an enduring agent's deployment of an enduring power of attorney in his or her own interests under cover of an act purportedly performed by an incapacitated principal rather than the agent.

(d) consideration of whether an enduring agent has an obligation to consult with his or her incapacitated principal and, if so, what might be the content of that obligation and the consequences of any breach of it.

(e) consideration of whether disputes as to the present (in)capacity of a principal can be better dealt with in case managed proceedings (in which a receiver and manager is appointed and given directions for the conduct of an independent medical examination and provision to the Court of a report by an independent visitor) than by adversarial litigation.

17 A thesis of this paper is that: (a) each type of jurisdiction exercised by the Court is governed by the purpose for which it exists; (b) its purposive character defines the functions it performs; (c) functionality is an important concern of the Court in the application of rules or principles applied to particular facts as found by the Court; (d) "rules" or "principles" generally reflect analytical structures for dealing with common patterns of behaviour encountered by the Court; (e) any extension of, or departure from, established rules or principles is likely to be called into being, and governed, by the purposive character of the jurisdiction to be exercised; and (f) an appreciation of the purpose served by an exercise of jurisdiction provides protection against a misapplication of rules and principles that guide decision-making

18 The purposive character of the Court's various types of jurisdiction is not always to the forefront of a lawyer's consciousness, but it can sometimes be implicitly, more readily recognised in an allegation that proceedings are an abuse of the Court's processes because instituted, or maintained, for a predominant purpose of using proceedings for other than the purpose for which the proceedings are designed: *Williams v Spautz* (1992) 171 CLR 509 at 529.

PRIVATISATION OF PROTECTIVE MANAGEMENT

19 Enduring powers of attorney and enduring guardianship appointments provide a means by which a person possessed of the mental capacity to do so can

nominate a person, or persons, to manage his or her affairs (respectively, his or her "estate" and his or her "person") if and when he or she loses the mental capacity to manage his or her own affairs.

20 These appointments provide a means by which arrangements for the management of the affairs of a person incapable of self-management can be "privatised", in anticipation of mental incapacity, obviating a need for the appointment by the Court (or the Guardianship Division of the NSW Civil and Administrative Tribunal, "NCAT") of a "financial manager" (pursuant to the *NSW Trustee and Guardian Act* 2009 NSW or the *Guardianship Act* 1987 NSW) or a "guardian" (pursuant to the *Guardianship Act* 1987 NSW) who perform their protective functions under the supervision of public officials (notably the NSW Trustee and the Public Guardian) themselves subject to the supervision of NCAT and the Court.

21 The "privatisation" of the management of the affairs of an "incapable person" can assist in keeping people living in their communities and in management of their affairs if and when they need institutional care.

22 In common practice an enduring power of attorney and an enduring guardianship appointment are executed at the same time as the appointor executes a will, so there is often an element of "estate planning" that anticipates not only incapacity for self-management but also death. Some people also sign at this time (or when they enter institutional care) an "advance care directive" of the type described in *Hunter and New England Area Health Service v A by his Tutor T* [2009] NSWSC 761; 74 NSWLR 88.

23 A "price" paid by Australian society for the "privatisation" of protective management of the affairs of an incapable person appears to be the exposure of vulnerable persons to misconduct, or neglect, on the part of their chosen attorney or guardian, commonly, but not necessarily, the same person.

24 An enduring attorney and an enduring guardian each hold an office which, in most cases, is fiduciary in character with the consequence that they owe to their

principal a duty of loyalty which has the consequence, *prima facie*, that they cannot receive or retain an unauthorised benefit from performance of their functions and they must avoid conflicts between their interests and those of their principal. More particularly, they must avoid any conflict between their interests and their duty to perform the functions of their office.

25 Quintessentially, enforcement of the obligations of a fiduciary falls to an exercise by the Court of its equity jurisdiction.

26 Although the imposition or enforcement of general "standards" of conduct may not be an explicit first-order concern upon an exercise of equitable jurisdiction, it may necessarily follow from the jurisdiction's concern with unconscionability, good faith and fair dealing.

"(IN)CAPACITY" AND ENDURING AGENTS

27 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 437-438. A finding that a person had the mental capacity to effect a particular transaction (at a particular past time) requires a finding that he or she had the capacity to understand the nature of the transaction when explained to him or her.

28 The level of capacity required for self-management (going forward), upon an exercise of protective jurisdiction, is likewise governed by the 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 and his or her personal circumstances: *CJ v AKJ* [2015] NSWSC 498 at [27]-[43].

29 The legislation governing the appointment of a "financial manager" for a person in need of the protection for which the administrative regime for which the *NSW Trustee and Guardian Act* 2009 NSW provides requires that the Court (pursuant to section 41 of that Act) or NCAT (pursuant to the *Guardianship Act* 1987 NSW,

section 25G) be satisfied that the person is not capable of managing his or her own affairs.

30 To make a guardianship order in respect of a person, NCAT must be satisfied that the person is "a person in need of a guardian" (*Guardianship Act* 1987 NSW, section 14(1)), an expression which requires a finding that the person, because of a disability, is totally or partially incapable of managing his or her person (section 3(1)). The reference to "a person who has a disability" is a reference to a person who, critically for present purposes, is, by virtue of a disability, "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation".

31 Each of the definitions relating to financial management and guardianship orders is directed to functionality rather than mental capacity as such.

32 This is important in the context of the operation of an enduring power of attorney or an enduring guardianship appointment because those instruments may have effect only, in substance, when needed:

(a) section 21 of the *Powers of Attorney Act* 2003 NSW provides that, subject to the Act and the particular instrument, "an act done by an attorney that is within the scope of the power conferred by an enduring power of attorney *and that is of such a nature that it is beyond the understanding of the principal through mental incapacity at the time of the Act* is as effective as it would have been had the principal understood the nature of the act at that time". Section 21 is an empowering provision. It is not inconsistent with power to bind the principal residing in both the principal and the agent if the principal has the requisite mental capacity.

(b) section 6A of the *Guardianship Act* 1987 NSW provides that an enduring guardianship appointment "has effect only during such period of time as the [principal] is a person in need of a guardian.

> …" Section 6F provides that an enduring guardian may, on behalf of the principal, sign and do all such things as are necessary to give effect to any function of the enduring guardian. Section 6G provides that a decision made, and action taken and a consent given by an enduring guardian in the exercise of a function of the enduring guardian have effect as if the decision was that of the principal and the principal had the legal capacity to make the decision.

33 A financial management order generally has the effect of suspending the operation of an enduring power of attorney (*Powers of Attorney Act* 2003 NSW, section 50) and the power of the managed person to deal with his or her estate (*NSW Trustee and Guardian Act* 2009 NSW, section 71). A guardianship order operates to suspend all authority of an enduring guardian to exercise his or her functions: *Guardianship Act* 1987 NSW, section 6I.

34 Whereas a financial manager and a guardian are appointed by a public entity (the Court or NCAT), and are the subject of systemic supervision, an enduring attorney and an enduring guardian are private appointees whose authority is essentially transactional.

35 Although an exercise of equity jurisdiction may be accompanied by the appointment of a financial manager or a guardian (in the case of the Court, a committee of the person rather than a guardian) which effectively displaces an enduring attorney or an enduring guardian, and confers authority on another person to represent an incapacitated person, equity's engagement with an enduring attorney or an enduring guardian is also generally transactional in the sense that an enduring agent who has acted in breach of his or her obligations may be held to account upon an exercise of equity jurisdiction.

INTERACTION BETWEEN LEGISLATION AND THE GENERAL LAW

36 An enduring power of attorney is a written instrument for the appointment by a natural person (as principal) of an agent who, by force of statute, may have power to bind the principal in the conduct of his or her affairs (including dealings

with property) despite the fact that, after execution of the instrument, the principal has lost mental capacity. An enduring power of attorney is presently governed by the *Powers of Attorney Act* 2003 NSW and the *Powers of Attorney Regulation* 2016 NSW. An earlier prototype of a similar instrument was provided for in Part 16 of the *Conveyancing Act* 1919 NSW from 1985 until repealed by the 2003 Act.

37 An enduring guardianship appointment is a written instrument by which an adult person (as principal) appoints another adult as an agent who, by operation of statute, has power to make decisions for him or her about his or her personal welfare if and when he or she loses mental capacity. An enduring guardianship appointment is governed by the *Guardianship Act* 1987 NSW and the *Guardianship Regulation 2016* NSW. Amendments to the Act to make provision for such appointments came into effect in 1998.

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

39 Enduring powers of attorney and enduring guardianship appointments are not quite “creatures of statute” in the sense that the legislation that authorises their creation, and governs their operation, constitutes a code. They do, however, represent a legislative innovation that requires an appreciation of points of intersection between their governing legislation and the general law.

40 Depending on its terms, an enduring power of attorney is capable of operation in the same manner as a general power of attorney (under the *Powers of Attorney Act* 2003 NSW and the *Powers of Attorney Regulation* 2016 NSW) before the person who appoints an attorney becomes mentally incapable, but its special field of operation comes into play if and when the appointor becomes

mentally incapable of transacting business on his or her own account: *Powers of Attorney Act* 2003 NSW, sections 20-21.

41 By virtue of section 6A(1) of the *Guardianship Act* 1987 NSW, the appointment of an enduring guardian "has effect only during such period of time as the appointor is a person in need of a guardian and unless revoked or suspended under [the Act), has effect during all such periods". By virtue of section 3(1) of the Act, a "person in need of a guardian" means "a person who, because of a disability, is totally or partially incapable of managing his or her person". And, by virtue of section 3(2), "a person who has a disability" is a person "who is intellectually, physically, psychologically or sensorily disabled, who is of advanced age, who is a mentally ill person within the meaning of the *Mental Health Act* 2007 NSW, or who is otherwise disabled, and who, by virtue of that fact, is restricted to one or more major life activities to such an extent that he or she requires supervision or social habilitation".

42 Subject to the terms of the particular instrument, an enduring power of attorney confers upon an attorney "the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do: *Powers of Attorney Act* 2003 NSW, sections 8-13 and 19".

43 Subject to the terms of the particular instrument, an enduring guardianship appointment confers on an enduring guardian, while his or her appointment as an enduring guardian has effect, authority (for which section 6E of the *Guardianship Act* 1987 NSW provides) to exercise the following functions:

(a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live.

(b) deciding the healthcare that the appointor is to receive.

(c) deciding the other kinds of personal services that the appointor is to receive.

(d) giving consent under the *Guardianship Act* 1987 NSW to the carrying out of medical or dental treatment on the appointor.

(e) any other function relating to the appointor's person that is specified in the instrument.

44 The legislation governing enduring "agents" intersects with the protective jurisdiction of the Court because, just as an enduring agent is required to make decisions (ostensibly on behalf of an incapacitated person) affecting the estate or person of an incapacitated person, so to must the Court when its jurisdiction is invoked.

45 The legislation intersects with the Court's probate and family provision jurisdictions because decisions taken by an enduring agent during the lifetime of an incapacitated person can materially affect the nature and value of the person's deceased estate when it is the subject of administration "in probate" or a claim for a family provision order.

46 Section 7(1) of the *Powers of Attorney Act* 2003 NSW provides that the Act "does not affect the operation of any principal or rule of the common law or equity in relation to powers of attorney except to the extent that [the] Act provides otherwise, whether expressly or by necessary intention." The *Guardianship Act* 1987 NSW does not contain a similar provision in relation to the provisions governing the appointment of an enduring guardian, but section 6L confers on the Court express power to "review the appointment (or purported appointment) of an enduring guardian" with power to "make such orders as it thinks appropriate in respect of the appointment". Section 8 of the Act records that nothing in the provisions relating to guardianship orders of NCAT "limits the jurisdiction of the Supreme Court with respect to the guardianship of persons", noting that section 22 of the Act provides that "[on] the making of a guardianship order in respect of a person the subject of an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons, the order made by the Supreme Court shall cease to have effect".

47 On the whole, the legislation may be characterised as working with, not against, the general law in the provision of novel forms of "attorney" and "guardian" for the purpose of empowering persons to make their own arrangements for management of their estate or person in anticipation of mental incapacity.

FILLING "GAPS" IN LEGISLATION: A ROLE FOR EQUITY?

48 The equity jurisdiction of the Court underwrites the practical operation of the legislation and itself intersects with each of the protective, probate and family provision jurisdictions of the Court as they are encountered.

49 On one view, the role of equity is to give practical expression to the legislation, both generally and in those cases in which the legislation falls short of a practical mechanism to achieve its purpose. This is a view reminiscent of the view of Aristotle, in *The Nicomachean Ethics*, that "the nature of the equitable [is] a correction of law where [law] is defective owing to its universality".

50 This is not a fashionable view of "equity". But, from time to time, it comes to mind on an exercise by the Court of its protective jurisdiction, in cases closely associated with an exercise of equity jurisdiction, because, as the High Court of Australia confirmed in *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 258, upon an exercise of its inherent jurisdiction, the Court has jurisdiction "to do what is for the benefit of the incompetent" and the "limits (or scope) [of that jurisdiction] have not, and cannot, be defined" although (as explained in *Re Eve* [1986] 2 SCR 388 at 407 et seq; 31 DLR (4^{th}) 1 at 13 et seq, to which the High Court refers) the jurisdiction must be exercised in accordance with its "informing principle" (to do what is necessary for the benefit, and in the interests, of the person in need of protection).

51 The categories of case in which the Court's inherent protective jurisdiction can be exercised are not closed. The jurisdiction is of a very broad nature. It can be invoked in such matters as custody (parental responsibility), protection of property, health problems, religious upbringing and protection against harmful associations. The jurisdiction extends to orders affecting either the person or

estate of a person in need of protection or both. It is generally reserved for dealing with uncontemplated, or exceptional, situations where it appears necessary for the jurisdiction to be invoked for the protection of those who fall within its ambit: *Re Eve.*

52 An example of how the Court's inherent protective jurisdiction can be deployed in order to fill a "gap" in a legislative regime is *Re WM (a person alleged to be of unsound mind)* (1903) 3 SR (NSW) 552, where the Court confirmed its inherent jurisdiction to appoint a medical expert to examine an allegedly incapable person and to provide to the Court a report despite the absence of a legislative power.

53 Another example is *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217; (2009) 41 Fam LR 220, where the Court made a "secured accommodation order", depriving a minor of his liberty in a case in which it was necessary for his or her protection from harm. Secured accommodation orders are now often made in aid of troubled young people admitted to a programme of care and development.

54 A more recent example is *C v W* (No 2) [2016] NSWSC 945, where the Court made an order relieving persons managing an incapable person's affairs (under enduring appointments of a guardian and attorneys) of any personal liability for breaches of fiduciary duties in the course of taking control of the incapable person's assets.

55 These cases provide a parallel for the observation of English equity that, whereas common lawyers maintained a fiction that the common law arose in time immemorial, the development of equity doctrine could be traced to judgments of recent origin.

56 Modern lawyers tend to resist the idea that an exercise of equity jurisdiction can "fill a gap". That attitude of mind may, in part, be a function of their thinking of an exercise of equity jurisdiction in the context of a common law case in which

competing rights are to be determined rather than a case in which there is a need to manage an estate or a person.

MULTIPLE PERSPECTIVES OF "ENDURING AGENTS"

57 Instruments for the appointment of an enduring attorney or an enduring guardian wear different guises depending upon the perspective of the person who has them in view.

58 The *Powers of Attorney Act* 2003 NSW provides that an appointment as an enduring attorney cannot take effect unless the appointment is accepted by the attorney. Similarly, the *Guardianship Act* 1987 NSW provides that an enduring guardian appointment cannot take effect unless it is accepted by the guardian.

59 The requirement for acceptance of an appointment does not, in the absence of something more, bind the agent to act on behalf of the principal as might a contract. However, acceptance of an appointment does involve an element of agreement and, implicitly, acquiescence on the part of the agent of the obligations of an enduring attorney or an enduring guardian, as the case may be.

60 An enduring agent's acceptance of those obligations is foundational to the imposition on the agent of the obligations of a fiduciary.

61 Nevertheless, there may be some extrinsic arrangement between principal and agent (such as a letter of instruction) which might affect the existence, scope or operation of fiduciary obligations as between principal and agent.

62 Viewed from the perspective of a third party dealing with an enduring attorney or enduring guardian, an instrument of appointment may present itself, not in the guise of some form of agreement between principal and agent, but as a grant of authority by the principal in favour of the agent. Such a "grant" of authority might attract analysis as analogous to a form of property with the attributes of an instrument of title or, perhaps more accurately, as a form of representation to third parties of the agent's authority to bind the principal, if not

by means of a grant of actual authority then by a holding out of ostensible authority.

THE PURPOSIVE CHARACTER OF AN APPOINTMENT OF AN ENDURING "AGENT"

63 Section 4 of the *Guardianship Act* 1987 NSW provides as follows:

> "**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."

64 Section 4 is similar in terms to section 39 of the *NSW Trustee and Guardian Act* 2009 NSW, which (in Chapter 4 of the Act, entitled "Management functions relating to persons incapable of Managing their affairs") is in the following terms:

> **"39 General principles applicable to Chapter**
>
> It is the duty of everyone exercising functions under this Chapter 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."

65 There is no comparable provision in the *Powers of Attorney Act* 2003 NSW.

66 There is, however, an interconnectedness in the way the *Powers of Attorney Act* 2003, the *Guardianship Act* 1987 NSW and the *NSW Trustee and Guardian Act* 2009 NSW operate in the context of enduring instruments. That is because, if and when disputes arise as to the validity or operation of an enduring power of attorney or an enduring guardianship appointment, both the Court and NCAT are empowered (and routinely exercise a power) to make an order for the appointment of a financial manager or a guardian, the effect of which is to suspend the operation of an enduring power of attorney or an enduring guardianship appointment, as the case may be.

67 A manager appointed by the Court under the *NSW Trustee and Guardian Act* 2009 NSW is bound by section 39 of the Act. A financial manager or a guardian appointed by NCAT is bound by section 4 of the *Guardianship Act* 1987 NSW.

68 In any event, the prescribed form of an enduring power of attorney makes clear, in a formal "information note", that an attorney must always act in the best interest of the principal, and the prescribed form of an enduring power of appointment (in an "information note") contains a recommendation that a principal "inform" his or her enduring guardian of his or her "wishes about

lifestyle decisions" and involve them in discussions about his or her "views or goals".

69 There is here, perhaps, unnoticed, a question whether, notwithstanding that a principal may lack mental capacity to some degree or another, there is an obligation on the "agent" to consult with the principal and to ascertain his or her views and preferences, so far as they can be reasonably ascertained, before exercising a power that binds the principal.

70 This may be an area in which equity may be called upon to "fill a gap", and be justified in "filling it", in a formulation of the fiduciary obligations of an enduring attorney or an enduring guardian based on a fiduciary's fundamental duty of loyalty to his or her principal.

71 A breach of a fiduciary obligation on the part of an enduring agent to consult his or her incapacitated principal (perhaps in a way consistent with the principles set out in section 4 of the *Guardianship Act* 1987 NSW and section 39 of the *NSW Trustee and Guardian Act* 2009 NSW) need not, of itself, expose an agent to a liability for compensation or the like. It would be more likely to ground an application to the Court or NCAT on an application for review of an enduring instrument, or for the appointment of a financial manager or guardian to displace an agent who has defaulted in his or her obligation or simply suffered a break down in his or her relationship with his or her principal.

72 What constitutes the "best interests" of incapacitated principal is often the subject of controversy because persons who suffer disability sometimes feel disrespected by an absence of consultation with them about how they can or should live their lives.

73 Some guidance might be found in the observations of Lord Eldon in *Ex parte Whitbread; Re Hind* (1816) 2 Mer 99; 35 ER 878, upon a consideration of whether an allowance should be made out of the estate of an incapable person, he stated that the Court should do for the benefit of the incapable person that

which it is probable that the incapable person himself or herself would have done if capable.

74 The issue might also be encountered in the context of a "risk management" assessment of what is required in the management of a protected estate. Not uncommonly, in that context, it may be appropriate for the Court, NCAT or a manager to allow a protected person to make decisions for himself or herself despite a risk of failure. Uninstructed by a need for empathetic decision-making, a lawyer might think that a manager who approaches decision-making in this way would be guilty of a breach of duty owed to the protected person.

75 Upon an exercise of protective jurisdiction (and, perhaps, in making an analogous decisions after the death of an incapable person) there is room for a grant to a manager of relief from liability for a breach of duty (*C v W* (No 2) [2016] NSWSC 945) or, to put the point in a slightly different way, relief from a liability to account (in accordance with the principles enunciated in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423). *Smith v Smith* [2017] NSWSC 407 is an example of a case in which these issues were canvassed.

THE EQUITY JURISDICTION IN OVERVIEW

76 There is a sense in which the Court's equity jurisdiction takes its colour from other heads of the Court's jurisdiction with which it intersects.

77 An enduring power of attorney provides a concrete example of this because the character it bears depends on whether what is examined is:

(a) the relationship between an incapacitated principal and a third party dealing with the principal's enduring attorney, in which case the perspective of the law is that of a commercial lawyer sensitive to rights of the third party in the formation of a contract or the conduct of other business within the purview of the Common Law (*Taheri v Vitek* (2014) 87 NSWLR 403); or

(b) the relationship between the incapacitated principal and his or her enduring attorney, in which case the perspective is that of an equity lawyer sensitive to holding the attorney to account as a fiduciary (*Estate Tornya, Deceased* [2020] NSWSC 1230).

78 By its nature, the equity jurisdiction of a superior court of record such as the Supreme Court of NSW commonly requires for its exercise an empathetic, but unsentimental and pragmatic, concern for the rights, interests and welfare of a vulnerable person who comes before the Court.

79 The central touchstone of an exercise of equitable jurisdiction is a preparedness, in a manner consistent with practical wisdom (reminiscent of a view of a "equity" advanced by Aristotle as a form of prudential reasoning), in a particular case:

(a) to restrain conduct that is against good conscience or to enforce duties by orders which, upon an exercise of discretion, can be moulded to meet the justice of the particular case according to established principles;

(b) to hold to account a person who receives or retains property to which, on established principles, he or she is not entitled;

(c) to aid the preservation and orderly management of property under threat of dissipation or competing claims; and

(d) to aid the peaceful resolution of disputes so as to minimise public disruption and a multiplicity of proceedings.

80 The reference here to "practical wisdom" should be taken to include the conventional wisdom that equitable relief is moulded by the Court to do "practical justice" between contending parties: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 111-115; *Bridgewater v Leahy* (1998) 194 CLR 457 at 494 [126]-[128].

81 Historically, an exercise of equity jurisdiction was used to allow facts and documents to be "discovered" (by procedures for the discovery of documents and the administration of interrogatories). That jurisdiction remains available, but it has been largely displaced by rules of court.

82 The expression "established principles" embodies the idea that, upon an exercise of equitable jurisdiction, decisions are not made on a whim but with due regard to precedent and customary practice. When we speak of "established principles" we commonly speak, for example, of principles governing fiduciary obligations, undue influence, unconscionable conduct (in the form of a catching bargain), misrepresentation or estoppel. In practice, these principles are often applied to deal with common patterns of behaviour which, if established (by admission, proof of facts or a failure to rebut a presumption), attract common forms of discretionary remedy.

83 Implicit in the expression "established principles" is also the optimistic idea that for every claimed "right" there must be an available remedy. Although a claim is generally presented these days as moving from principle to remedy, in many cases, one suspects, a need for a remedy calls forth an established principle and a factual matrix to fit.

84 That was the thinking behind the old "Forms of Action" at Common Law. Although we now employ equity's "narrative fact" style of pleadings in most modern litigation (as opposed to the old common law style of "issue pleading"), the idea that lawyers reason backwards from remedy to right remains embedded. This is particularly so in cases involving an exercise of probate or family provision jurisdiction where the focus is on the nature of orders sought from the Court, and not so much on an articulated complaint of unconscionability coupled with a prayer for relief designed to remedy the specific complaint. It is nevertheless true about an equity case which associates a common remedy with a common pattern of behaviour.

85 Equitable remedies commonly take the form of an injunction, specific performance, equitable compensation (or damages under section 68 of the

Supreme Court Act 1970 NSW, the local equivalent of *Lord Cairns' Act*) or an order for accounts. An order for the appointment of a receiver and manager can also serve as a means of preserving a *status quo* or carrying a determination of the Court into effect.

86 Most equity cases focus attention on particular transactions and, generally, past events. This is so even though, by its very nature, a remedy generally speaks to the present and future as well as to the past.

THE OFFICE OF A RECEIVER AND MANAGER (OR THE LIKE)

87 The appointment of a receiver and manager upon an exercise of equitable jurisdiction (or under section 67 of the *Supreme Court Act* 1970 NSW) generally focuses attention upon a need for, and the availability of, systemic protection, for a particular purpose, for the present and future. Interference with a receiver and manager's performance of his or her functions can constitute a contempt of Court no less than breach of an injunction. An appointment of a receiver and manager allows the Court to achieve, or pursue, an object through purposive management rather than a piecemeal attempt, by a suite of injunctions, to attempt to achieve the same object.

88 The office of a receiver and manager in equity is, in concept, similar to the office of a financial manager (charged with management of an estate) or the office of a "guardian" (charged with management of the person) of an incapable person upon an exercise of protective jurisdiction.

89 Upon an exercise of the Court's inherent protective jurisdiction, a committee of the estate is the equivalent of a financial manager and a committee of the person is the equivalent of a guardian. In strict terms, in New South Wales a "guardian" is appointed by NCAT, not the Court, whose "guardians" are more accurately characterised as committees of the person.

90 These managers (by whatever name known) commonly bring order out of chaos in management of the affairs of an incapable person, bringing to an end disputes about the operation of competing enduring powers of attorney and

enduring guardianship appointments. In substance, much the same can be said of the appointment of an administrator of a deceased estate upon an exercise of probate jurisdiction.

91 An exercise of equity jurisdiction may assist a community's pursuit of peace, order and good government in a managed society in which the liberties of individuals, living and dying in community, can be accommodated. Equitable principles are generally expressed to operate at the micro-level, in dealing with the affairs of one or more individuals, in contrast to analogous administrative law principles at play in public law where public policy issues may be more explicit.

A DIVERSION: WHAT IS "EQUITY"?

92 Although an exercise of equity jurisdiction may involve adversarial litigation, it commonly bears an administrative character in the management of people, property and relationships, especially where the Court is called upon to exercise powers conferred by statute. The distinction between "adversarial" and "administrative" litigation may be elusive but, in practice, it can inform the manner in which cases are argued and judicial decisions are made.

93 Not all agents are fiduciaries but the nature of the office of an enduring attorney or an enduring guardian is such that he or she is bound to be subject to the obligations of a fiduciary when acting for a mentally incapable principal.

94 The legislation that provides for the appointment of an enduring attorney or an enduring guardian does not spell out in detail the rights and obligations of "principal" and "agent" or their rights and obligations *vis-à-vis* third parties with whom they may deal. That is left to the general law as administered by the Court and, under the supervision of the Court, NCAT, the NSW Trustee and the Public Guardian.

95 At least when enduring instruments engage with the mental incapacity of a principal, they may, sooner or later in the life cycle of the principal, attract an exercise of the protective, probate or family provision jurisdictions of the Court,

each one different from the common law jurisdiction of the Court - which is usually used (imperfectly) as a comparator in the definition of “equity”.

96 It is, perhaps, because the concept of an enduring “agent” does not fit neatly into the law of agency under the general law, and the conduct of an enduring “agent” may attract an exercise of protective, probate or family provision jurisdiction, that the concept of “equity” requires clarification. An exercise of equitable jurisdiction often serves to facilitate the operation of other jurisdictions.

97 **An Orthodox Approach.** Attempts to define the concept and field of operation of “equity” in Anglo-Australian law sometimes make a passing reference to Aristotle’s *Nicomachean Ethics* (which associates “equity” with justice, a need to address “gaps” in the law and prudential reasoning), but they generally sidestep definitional problems by addressing “the nature of equity” and doing so by reference to English legal history.

98 A good example of that can be found in the opening section of Chapter 1 of Sir Frederick Jordan’s *Chapters on The Equity in New South Wales*” (6th edition, 1947) here reproduced without footnotes:

> “**The Nature of Equity**
>
> Equity is a body of law which supplements, and, in its application, in some measure corrects and controls the rules of the common law. By the common law, provision is made for the punishment of crime, for the enforcement of proprietary rights, and enabling persons who have suffered loss by a civil wrong or a breach of contract to recover compensation for the damage so sustained. With crime, as such, modern equity has no concern but into the other fields of the common law equity has entered to a varying extent. It is not, however, a complete or self contained system of rules, but presupposes the existence of the common law, to which it is in the nature of an addendum. In the statement of the principles of equity contained in [*Chapters in Equity*], an acquaintance with the rules of common law relating to real and personal property, contracts, and torts, is assumed.
>
> The rules of equity were formulated and developed by the Court of Chancery; and in order properly to understand them it is necessary to have some acquaintance with the history of that Court and the principles upon which it exercised jurisdiction in the past, since these still in a considerable measure influence the scope and doctrines of modern equity and the attitude of the Courts which administer equity.”

99 This passage can usefully be read together with the following observations (later in Chapter 1 of *Chapters in Equity*):

> "A plaintiff at common law sues to establish a legal right, and, if he can establish his case, is entitled to relief as of right. A petitioner to the Chancellor prayed for relief which, if allowed, was granted, as of grace. As the rules of equity have become settled, the discretion of an equity Judge has become restricted, and must be exercised in accordance with the settled principles of the Court. But the scope of the judicial discretion is still important, and enables the Court exactly to adjust the relief to the merits of the case ...".

100 Sir Frederick Jordan's treatment of the topic "What is Equity?" accords with those of FW Maitland, whose classic work, *Equity: A Course of Lectures* (Cambridge University Press, 1936) Jordan cites.

101 Maitland's view of "equity" is encapsulated in the following observations:

> "We ought not to think of common law and equity as two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature has passed a short act saying 'Equity is hereby abolished', we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand, had the legislature said 'Common Law is hereby abolished', this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law. Take the case of the trust. It's of no use for equity to say that A is a trustee of Blackacre for B, unless there be some Court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.
>
> For this reason I do not think that anyone has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendices between which there is no very close connection. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses. …"

102 I do not intend in this paper to attempt, let alone to achieve, anything like what Maitland and Jordan have authoritatively declared to be impossible.

103 I do, however, intend to ask whether we have sold ourselves short by imagining the equity jurisdiction to be so many obscure bits and pieces preserved from the carcass of a system of court administration long ago abandoned in favour,

first, of a Judicature Act system of court administration and, more recently, a case management system of administration.

104 Part of the problem with the orthodoxy here associated with the names of Maitland and Jordan is that "equity" is not described by reference to the purpose for which the Court's jurisdiction exists but is described exclusively in terms of a binary relationship with "common law", without regard to the variety of different types of jurisdiction brought together in a Judicature Act system or the nuanced differences in the functions they once performed, and still perform in a modern Court setting.

105 **Historical Reasons for a "Binary" Description of "Equity".** Attempts to define the nature of "equity" and to describe its field of operation by a binary contrast with "common law" go back a long way.

106 Several reasons suggest themselves as candidates for an explanation of this.

107 Firstly, in English legal history, after the Reformation (and, perhaps, more especially, after the Restoration, following Cromwell's republican experiment) the Lord Chancellor and the Court of Chancery gradually encroached on the probate jurisdiction of the ecclesiastical courts and the Crown delegated to the Lord Chancellor its jurisdiction over mentally ill persons, supplementing a separate delegation of the Crown's infancy jurisdiction. Separate heads of jurisdiction outside the common law gravitated towards the equity jurisdiction which was, to that extent, enhanced.

108 Secondly, the procedures generally adopted upon an exercise of equity jurisdiction (with a judge making decisions without a jury and often on affidavit or other documentary evidence) were profoundly different from those applied upon an exercise of common law jurisdiction, characteristically centred upon a trial by jury on oral evidence.

109 Thirdly, the remedies available at common law and in equity were profoundly different. As befits a system of decision-making involving a jury, common law

remedies reflected a determination of competing claims of right, with a binary choice of verdicts: verdict for the plaintiff or verdict for the defendant, guilty or not guilty. A jury may have been required, in its evaluation of evidence, to exercise a discretionary judgement, but the jury's discretionary reasoning was generally hidden in a binary verdict. Equitable relief was notoriously, openly "discretionary" and able to be moulded to the facts of a particular case, as in large measure it remains today.

110 Fourthly, before the adoption of a Judicature Act system Chancery could "interfere" with enforcement of common law judgments by means of a "common injunction" designed to assert the supremacy of equitable principles in a "conflict" with common law rules, so it was necessary to distinguish common law rules and equitable principles.

111 Fifthly, in the common understanding of lawyers, the competition between "law" and "equity" had long been imagined to have been resolved in favour of equity in the *Earl of Oxford's Case*, 1616 - enshrined in Judicature Act style legislation such as the *Law Reform (Law and Equity) Act* 1972 NSW –but it was a festering sore of resentment amongst common lawyers, who prized justice as delivered by a jury trial.

112 Section 5 of that Act reads as follows:

> "In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail."

113 Fundamental as this simple formula has been to our understanding of how a Judicature Act system of court administration operates, it is overly simplistic in at least two respects. First, it ignores the fact that the Judicature Act system brought together within the administrative framework of one court not only the equity and common law jurisdictions but also a range of other jurisdictions, for present purposes noting particularly the protective and probate jurisdictions. Secondly, it does not sit comfortably with the fact that the existence and scope of a fiduciary obligation may be affected by the terms of a contract.

114 **Searching for a New Perspective**. A common perception emerged in England in the late 18th century and the early 19th century (during the tenures of Lord Chancellors, Nottingham, Hardwicke and Eldon) that equitable principles had become "systematised", constraining earlier perceptions that equity's discretionary decisions were subjective and arbitrary. Not everyone shared that perception at the time, or admired "systematic" equity, because the equity "system" was perceived to be cumbersome, costly and slow (as readers of Charles Dickens' *Bleak House* may recall).

115 The systematisation of equity was, in the 19th century, accompanied by the introduction of avenues of appeal from a Chancery judgment and followed by the development (across jurisdictional boundaries) of an increasingly firm insistence upon precedential reasoning on the part of judges. The heyday of the "doctrine of precedent" appears to have been between about 1865 and 1966, G.C. Lindsay, "Building a Nation: The Doctrine of Precedent in Australian Legal History", being Chapter 11 in J.T. Gleeson, J.A. Watson and R.C.A. Higgins (ed), *Historical Foundations of Australian Law* (Federation Press, Sydney, 2013), Volume 1, page 288.

116 The regular publication of "authorised" law reports in and from 1865 in England (with ancillary developments belatedly following in NSW) aided the process of requiring cases to be argued, and decided, by reference to judicial precedents.

117 The decline of trial by jury in civil cases (which occurred in England long before it did in NSW) also contributed to a need for reasoned judgments to be delivered where, once, a more informal, oral direction to a jury was the norm in the determination of a common law action. The work of a common law judge, required to provide reasons for judgment when sitting alone, to that extent came closer to that of an equity judge.

118 Whatever the jurisdiction they have exercised, judges have been increasingly required to engage in formal processes of reasoning backed by reference to judicial precedents. This has magnified a need for articulation of "principles" or "rules" as points of reference on the way to granting, or withholding, a remedy.

119 The context in which Maitland and Jordan described "the nature of equity" no longer exists. The old Courts of Common Law and Chancery have not existed in England since 1875. Nor have their NSW counterparts existed within the Supreme Court since 1972. Civil jury trials have been displaced in favour of hearings by judges sitting alone. The concept of a trial (grounded upon the availability of a jury on a particular day) has itself been abandoned in a case management system of court administration, with directions hearings designed to identify "real issues in dispute" and adaptation of procedures designed to address those issues. The Court's powers to order a compulsory mediation or to refer questions out to a referee profoundly affect the type of advocacy necessary to achieve a litigious outcome. Legislation (such as the *Contracts Review Act* 1980 NSW, sections 20-21 of the *Australian Consumer Law* and sections 12CA and 12CB of the *Australian Securities and Investments Commission Act* 2001 Cth) that confers broad discretionary powers, analogous to those found upon an exercise of equity jurisdiction, are conferred on all judges, not merely those accustomed to sitting routinely in equity cases.

120 Debates about whether the effect of introduction of a Judicature Act system of court administration was to "fuse" common law rules and equitable principles (or merely administrative structures, as is the orthodox Australian view) have been important in their day, as readers of earlier editions of Meagher, Gummow and Lehane's *Equity: Doctrines & Remedies* will recall.

121 In Australia at least, "fusionists" have not managed to displace "equity" as a separate field of study. The Equity Division of the Supreme Court stands as a repository of equity jurisprudence. However, heat may have been taken out of the debate about "fusion" by the discretionary powers conferred upon a range of courts by legislation rising above disputes between "law" and "equity".

122 It remains the case, that the several types of jurisdiction routinely exercised by the Supreme Court involve nuanced differences, which may affect judicial decision-making.

123 In this context a key to understanding the role of the equity jurisdiction is appreciation of the different types of jurisdiction routinely exercised by the Court, their purposive character and their functional differences.

THE PURPOSE AND FUNCTIONALITY OF SUPREME COURT JURISDICTION

124 **Introduction**. If there is anything to be learned by a practising lawyer from the course of Anglo-Australian legal history it is that law develops in the Common Law Tradition (which is to say, via judge-made law, based on precedential reasoning, case by case) in ways that defy prescriptive abstractions. Small streams from diverse sources feed into a river prone to break its banks.

125 What follows is an attempt to understand and describe what can be seen, neither more nor less.

126 **The Supreme Court's Jurisdiction upon Establishment**. At the time the Supreme Court of New South Wales (as presently constituted) was established in the 1820s jurisdiction was conferred upon it by a combination of the *New South Wales Act* 1823 (Imp), as it was colloquially known; the *Third Charter of Justice* 1823 (Imp) published under the authority of that Act; and the *Australian Courts Act* 1828 (Imp), which fixed 25 July 1828 as the date upon which the Colony of NSW "received" English law so far as applicable to local conditions.

127 Jurisdiction was conferred on the Court by reference to English institutions and officeholders.

128 Common law jurisdiction was conferred by reference to the English Courts of Common Law: the Court of Kings Bench, the Court of Common Pleas and the Court of Exchequer.

129 Equity jurisdiction and what we today know as protective jurisdiction (then more particularly known by separate names such as infancy jurisdiction and lunacy jurisdiction) were separately conferred by reference to the office of the Lord Chancellor of England.

130 Probate jurisdiction (as it has been known in NSW only since 1890) was conferred, as “ecclesiastical jurisdiction”, by reference to a major English ecclesiastical court.

131 This, and other, jurisdiction was conferred on the Court, as a single body, at a time when justice was administered in England through a hotchpotch of authorities which the Parliament at Westminster set about reforming over the 50 years or so it took to pass the Judicature Acts of 1873 and 1875.

132 Each of the English authorities by reference to which jurisdiction was conferred on the Court performed specialised functions (governed by their own procedural rules) developed, with the benefit of experience of routine cases, over many years. Their work sometimes overlapped. Their division of work was not fully logical. With apologies to O.W. Holmes Jnr’s *The Common Law* (1881), the life of the law is experience, not logic. The Court of Exchequer, for example, exercised equity jurisdiction, and (as observed in *Estate Polykarpou; Re a Charity* [2016] NSWSC 409 at [167]-[169]) the Lord Chancellor had a common law side to his work.

133 The problem of overlapping or competing jurisdictions was not inherited by the Supreme Court of New South Wales because most of the several types of jurisdiction involved in the administration of justice in England were conferred on the Supreme Court as a single entity.

134 It is not necessary in the present paper to trace the course of court administration in the Supreme Court of New South Wales after its establishment, save to recognise that in the years following establishment of the Court and until 1972 (when the *Supreme Court Act* 1970 NSW commenced operation), NSW chose to establish separate courts (constituted by a Supreme Court judge) to administer separate types of jurisdiction. The Colony embraced England’s hotchpotch approach to judicial administration as England itself was moving away from it and only returned to a Judicature Act system 100 years later, by which time court administration, in England and Australia, was being reimagined through case management theory.

135 The jurisdiction conferred upon the NSW Supreme Court at the time it was established has been preserved by section 22 of the *Supreme Court Act* 1970 NSW.

136 It has been supplemented by section 23 of the *Supreme Court Ac*t 1970 NSW, the operation of which serves, at least, to free the Court from any procedural constraints that might otherwise attend an "inherent" jurisdiction defined by reference to 19th century English authorities. Section 23 provides that "[the] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales".

137 Section 23 has, from time to time, been relied upon as a source for the Court's protective jurisdiction: *Re AAA; Report on a Protected Person's Attainment of the Age of Majority* [2016] NSWSC 805 at [21]-[27].

138 At the time the Court was established in the 1820s English law was generally viewed through the prism of remedies. It was only through the course of the 19th century that English jurisprudence shifted from action based reasoning to what were perceived to be "scientific" principles as guides to decision-making. It was only through the course of the 19th century that a recognizable distinction emerged between "substantive" and "adjectival" (procedural) law.

139 This can be seen in the changing nature of standard legal texts, from "digests" of cases to treatises on specialised topics. Practice texts increasingly took the form of an academic work: A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 *University of Chicago Law Review* 632, reprinted as Chapter 12 in Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, London, 1987).

140 What was constant was the functional significance of established types of jurisdiction. That is true, at least, of the common law, equity, protective and probate jurisdictions of the Court.

141 **The Functional Significance of Interactive Jurisdictions**. In marking out the field of operation of an exercise of equity jurisdiction it is convenient, even at a high level of abstraction, to mark out the different fields of operation of the common law, protective, probate and family provision jurisdictions.

142 This exercise is not intended to be a substitute for the application of established rules or principles to the facts of a particular case.

143 Nor can it pretend to describe a closed system of analysis. Some legal concepts naturally occupy territory on either side of whatever boundaries are drawn. The concept of "property" is an example of this.

144 "Property" is a function of communal acceptance that transmissible rights attach to a thing of value within the community. Those rights may reflect common law rules, equitable principles or customary law routinely applied so as to give rise to expectations about the likely course of contested proceedings about the thing. The existence and nature of "property" is often influenced by factors outside the law; notably, the existence, and fluctuations, of a market for the thing.

145 Some "property" depends upon a common assumption about the relationship between "law" and "equity" and how a court will conventionally deal with that relationship. A commercial trust is, perhaps, the prime example of this. A legal estate vested in a trustee has attached to it rights of beneficiaries that might be capable of assignment, and the management of trust property is generally regulated by a written instrument (commonly a deed) the terms of which bind the trustee and all beneficiaries. Litigation between parties interested in "the trust" might commonly bear the dual character of an adversarial contest and a concern for the management of trust property.

146 An analysis of the operation of enduring powers of attorney and enduring guardianship appointments nevertheless requires an appreciation of the nuances that arise in different jurisdictional contexts.

147 Different processes of reasoning may be associated with different types of jurisdiction encountered in dealing with an enduring instrument.

148 The purpose of an exercise of common law jurisdiction in civil proceedings is generally to adjudicate competing claims of right (often resulting in an award of damages or another form of money judgement) based upon established causes of action in contract, tort or restitution, including the resolution of commercial disputes focusing upon documentary evidence and the construction of written material.

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

150 The probate jurisdiction looks to the due and proper administration of a particular estate, having regard to any duly expressed testamentary intentions of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Lov*eday [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

151 The family provision jurisdiction, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (out of a deceased person's estate or notional estate) in whose favour, because they have been left without "adequate provision for their proper maintenance, education or advancement in life", an order for provision "ought" to be made.

152 The equity jurisdiction generally looks to grant, or withhold, discretionary relief (to restrain conduct or to compel the performance of a duty or to require an accounting) for the purpose of preventing conduct which, according to its precepts, is unconscionable.

153 Cases which attract an operation of the protective, probate or family provision jurisdictions of the Court are a fertile ground for fiduciary relationships, governed by an exercise of equity jurisdiction, because property is routinely required to be held by one person (a fiduciary) on behalf of another (a beneficiary, or principal). The core function of the equity jurisdiction is provision of remedies designed to hold a fiduciary to account for a breach of standards of conduct required of a fiduciary.

154 The family provision jurisdiction differs from the other heads of jurisdiction here identified because it is transparently recent in origin and explicitly sourced in (local) legislation whereas (although they came to the Supreme Court of NSW via Imperial legislation) they have a flavour of antiquity and (reflecting their association with "the general law") a history of reasoned development through the accumulation of precedents which expose the functional significance of the jurisdiction exercised.

155 An example of the interconnectedness of the Court's various heads of jurisdiction is where it is necessary to identify a pool of assets available to satisfy a family provision order. An application for provision cannot be properly considered unless the estate (or notional estate) of the deceased person who is the object of the application is first identified. Where the deceased had appointed an enduring attorney, and the attorney appears to have acted in breach of his or her fiduciary obligations as an attorney by using the power of an attorney to transfer property of the deceased to himself or herself, an entitlement residing in the deceased's legal personal representative (an executor or administrator) of the estate of the deceased to recover such property may be an asset of the estate which has to be taken into account in the family provision proceedings.

156 In analysing that possibility, the law governing deployment of an enduring power of attorney may require consideration of the Court's protective jurisdiction; the law governing representation of a deceased estate invokes the probate jurisdiction; and the equity jurisdiction is generally interwoven with both the protective and the probate jurisdictions, all of which must be considered in the context of the family provision jurisdiction.

EQUITY'S "FORMS OF ACTION"

157 In pre-*Judicature Act* days, Common Law pleadings centred upon a formulaic pleading of a cause of action described as a "form of action".

158 In combination, some equitable principles and equitable remedies have become so commonplace that they might bear some similarity to a form of action. It is not necessary, though, to go so far as this in order to recognise that common patterns of behaviour give rise to common forms of "equity" requiring common forms of response upon an exercise of equitable jurisdiction.

159 In the context of abuse of the powers of an enduring power of attorney or an enduring guardianship appointment, equity's most common "forms of action" go by the labels "a breach of fiduciary obligations", "undue influence" and "unconscionable conduct".

Common Causes of Action

160 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.

161 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.]

Standing to Sue

162 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.

163 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.

164 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.

165 Where an enduring guardian transfers property away from his or her principal during the three years prior to the principal's death, even if not amounting to a breach of fiduciary obligations or otherwise the product of unconscientious conduct, the property may be clawed back (under Chapter 3 of the *Succession Act* 2006 NSW) as notional estate for the purposes of an application for a family provision order.

Terminology

166 The "causes of action" commonly relied upon in such proceedings are known by the labels "undue influence", "unconscionable conduct" and "breach of fiduciary obligations".

167 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.

168 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.

169 A consciousness of historical labels may assist clarity of analysis in a modern day setting. Nevertheless, it must be acknowledged that in current legislation (including rules of court and the *Limitation Act* 1969 NSW) the expression “cause of action” is used to denote claims of any historical origin.

A Duty of Loyalty

170 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.

A Fiduciary’s Liability to Account

171 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* (1st ed, 1977; reprint, 2016), paragraph [698]; *Johnson v Buttress* (1936) 56 CLR 113 at 134-136. The law aims to require a fiduciary to be accountable for an abuse of his or her position.

172 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.

173 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 v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428 [37] *et seq*. 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.

174 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 .

175 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".

Undue Influence and Unconscionable Conduct

176 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.

177 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.

178 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.

179 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*.*

The Surreptitious Attorney

180 A claim to equitable relief commonly requires close attention to the facts of the particular case. Nowhere is that more true than in dealing with an enduring attorney who deploys his or her enduring power of attorney in his or her own interests under cover of an act purportedly performed by an incapacitated principal rather than himself or herself.

181 Where an enduring power of attorney has been expressly relied upon by a delinquent attorney to transfer property to himself or herself, he or she will generally bear an onus, in one form or another, to justify the transfer by reference to principles governing fiduciaries or undue influence.

182 Sometimes an enduring attorney will, for example, accompany an incapacitated principal to a bank, produce his or her power of attorney as evidence of his or her *bona fides* and proceed to have the principal execute whatever documentation is necessary to effect a transfer of funds that, directly or indirectly, benefits the attorney.

183 In such a case, foundational facts are often that: (a) the principal has executed an enduring power of attorney; (b) the attorney has accepted that appointment; and (c) the attorney has received a benefit which, from the perspective of the incapacitated principal, was so substantial, or so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act. *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675, informed particularly by the observations of Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 at 134-136, speaks of the nature of such a gift in the context of a case of undue influence.

184 In such a case, the Court needs to be vigilant in its examination of particular facts to assess whether they support an inference of unconscientious behaviour on the part of the enduring attorney, and in making an assessment as to whether the attorney (notwithstanding the principal's incapacity) might be said to have acted with the fully informed consent of the principal (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 67-69 and 96-97; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467), unlikely though that might be.

CONCLUSION

185 If (as here contended) it is correct to say that the jurisdiction of the Court in all of its manifestations is governed by the purpose it serves, the equity jurisdiction need not be tied to either English legal history or a binary comparison with the common law jurisdiction. A purposive approach focuses attention on "why" and "how" problems can be solved and rights can be vindicated.

186 If an enduring agent is to be held to account, in real time, for a failure to perform the functions of his or her office, parties who have a real concern for the welfare

of an incapacitated principal may need to consider an application to the Court for the appointment of a receiver and manager (in aid of an application for a financial manager) of the estate of the principal (so as to ensure that somebody has standing to sue on behalf of the principal and to arrange for an independent medical examination of the principal) under the direction of the Court.

187 Where an enduring attorney deploys his or her office under cover of an act purportedly performed by an incapacitated principal rather than himself or herself, the Court needs to be alive to the possibility that (independently of any onus that might be borne by a self-dealing fiduciary or any presumption that might attend a finding of undue influence) there might be evidence sufficient to support an inference that the attorney has abused his or her position vis-à-vis the principal.

188 Although an enduring attorney or an enduring guardian may have authority to make decisions against the wishes of a principal, an enduring agent's duty of loyalty to the principal generally requires him or her, so far as may be practicable, to consult the principal to ascertain his or her wishes and preferences.

189 If an enduring agent proposes to defer to the wishes or preferences of an incapacitated principal in circumstances in which it might not, objectively, be perceived to be in the principal's "best interests" to do so, consideration should be given by the agent to seeking confirmatory authorisation from the Court or, at least, documenting a decision-making process (including consultation with professional experts) designed to ground an application, if need be, to be excused from the consequences of any breach of duty.

190 Where there is disputation about the validity or operation of an enduring power of attorney or an enduring guardianship appointment, prudence commonly suggests that an application be made to the Court or NCAT for the appointment of a financial manager or a guardian so as to establish an orderly regime for management of the estate and person of the incapacitated principal.

191 Although adversarial parties often want to litigate questions about the validity of an enduring power of attorney executed by a vulnerable person sometime in the distant past (perhaps because of a disputed transaction entered into by the attorney), it is often prudent for the Court to focus on the present (in)capacity of the vulnerable person. That is because: (a) it is in all cases important to secure the safety and well being of the vulnerable person as a first priority; and (b) unless and until somebody (such as a receiver and manager or a financial manager) is appointed, beyond challenge, to represent the vulnerable person, nobody may have standing to sue a party alleged to be accountable to the vulnerable person.

192 In considering what course of action should be taken in court proceedings, consideration also needs to be given to the availability of funding (usually from the estate of the principal) and the likelihood of costs orders being made affecting one or more parties to the proceedings. There are no easy answers to questions of this character, although it is clear that, in the ordinary practice of protective proceedings, costs do not necessarily "follow the event" but are made upon an assessment of "the proper order" in all the circumstances of the case: *CCR v PS* (No 2) (1986) 6 NSWLR 621 at 640.

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