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EQUITY'S CHALLENGE: Maintaining Standards in Management of the Affairs of a Vulnerable Person

by

Justice Geoff Lindsay AM

Probate and Protective List Judge

Equity Division

Supreme Court of NSW

INTRODUCTION

The "Welfare Jurisdiction(s)" Identified

1 A common perception amongst legal practitioners, accountants and other professionals who routinely practise in what, for want of a better term, may be called the "welfare jurisdiction(s)" of the Supreme Court of NSW (or its interstate equivalents) is that Australians, from every walk of life (rich or poor), are experiencing an epidemic of "elder abuse" (or, more broadly, "financial abuse") involving exploitation of vulnerable people; often older people but essentially people of any age who lack capacity to manage their own affairs.

2 The term "welfare jurisdiction(s)" is here used as a general descriptor for the protective, probate and family provision jurisdictions of the Supreme Court, and the equity jurisdiction of the Court which underwrites those branches of the Court's jurisdiction, in relation to a person who (by reason of incapacity or death) is unable to manage his or her own affairs.

3 The expression “welfare jurisdiction” was adopted by the High Court of Australia in *Marion’s Case (Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 258) in describing the *parens patriae* (protective) jurisdiction of a superior court of record, such as a Supreme Court of the Australian States and Territories.

The Nature and Scope of this Paper

4 A thesis of this paper is that, if elder abuse is to be combated effectively within the court system attention needs to be given by estate practitioners to a constructive engagement between claims for relief upon an exercise of equity jurisdiction and the other branches of the Court’s welfare jurisdiction *viewed as a whole*.

5 Recognition also needs to be given generally to the likelihood that the prevalence of elder abuse in contemporary society is, at least in part, a function of a public policy (reinforced by the administrative requirements of institutions such as retirement villages and nursing homes who condition admission to their residency arrangements on the provision of an enduring power of attorney or an enduring guardianship appointment) that encourages individuals, in contemplation of incapacity before death, to execute a suite of documents (an enduring power of attorney, an enduring guardian appointment and a will) which lend themselves to misuse when the person who executes them (the principal) descends into (or further into) a mental fog.

6 The paper aims to achieve two objectives, both involving an exploration of the law and practice of the welfare jurisdiction(s) of a Supreme Court.

7 The first is to survey the conceptual framework of the law governing management of the affairs of a person who (by reason of incapacity or death) is, or may be, incapable of managing his or her own affairs; a person who is vulnerable to exploitation and, to that extent, at least, may be a person in need of protection.

8 The second is to provide, at a practical level, an illustration of the welfare jurisdiction(s) in operation.

9 Both objectives are more readily achieved if informed by an understanding of Anglo-Australian legal history.

10 Some degree of repetition of particular points is necessary in order to view those points from different analytical perspectives.

11 Seminal cases recommended for reading are the following:

(a) In relation to the protective jurisdiction:

(i) *Marion's Case* (1992) 175 CLR 218 at 237-239 (as to the capacity of child) and 258-259 (as to the nature of protective jurisdiction).

(ii) *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430 (as to the liability of a "guardian" to account).

(b) In relation to the concept of "(in)capacity" to transact business: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438.

(c) In relation to the probate jurisdiction:

(i) *Osborne v Smith* (1960) 105 CLR 153 at 158-159 (on the significance of service of notice of proceedings on a non-party).

(ii) *Re Estate of Griffith, Deceased*; *Easter v Griffith* (1995) 217 ALR 284 (Gleeson CJ and Kirby P on testamentary incapacity, including reference to *Banks v Goodfellow* (1870) LR 5 QB 549 at 565).

(d) In relation to the equity jurisdiction:

(i) *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 68, 96 and 141 (on the nature of fiduciary relationships).

(ii) *Johnson v Buttress* (1936) 56 CLR 113 at 134-136 (on "equity undue influence").

(iii) *Kramer v Stone* [2024] HCA 48; 99 ALJR 126 at [32] and [36]-[41] (on the elements of a proprietary estoppel by encouragement).

(e) On the family provision jurisdiction: *Pontifical Society for the Propagation of the Faith v Scales* (*Scales' Case*) (1962) 107 CLR 9 at 19-20.

12 A perceived need for a survey of a "conceptual framework" arises from the fact that, historically, the several branches of the welfare jurisdiction have been treated in isolation, without close attention to their interconnection in the real world. A manifestation of this is the confinement of standard textbooks to what are at danger of being presented as categories "closed" to outside influence: "Equity: Doctrines and Remedies"; "The Law of Trusts", "Wills, Probate and Administration Law: Practice and Procedure"; "Family Provision"; "Mental Health and the Law"; the "Law of Agency". These subject areas largely reflect the law, legal practice, and society before truly radical changes (particularly statutory reforms enabling powers of attorney to confirm plenary authority and to "endure" after the onset of mental incapacity) that date generally from the 1980s.

13 Those changes reflect a long-term shift towards transactional relationships within a domestic setting, an embrace of informality in attending to succession to property and (sometimes moving in an opposite direction, but still requiring a recalibration of the concept of "family" as a fundamental unit of social

organisation) the development of an administrative state with a shifting balance between institutional and private management of the affairs of people who (with more wealth than that possessed by an earlier generation) lack capacity to manage their own affairs without assistance.

14 Within the purview of the welfare jurisdiction(s) the equity jurisdiction has a sharp focus on the management of people, property and relationships.

15 The paper has been prepared upon an assumption that a useful way of cutting through regional differences in terminology, institutional forms and legal practice and procedure in providing a framework for understanding the law in the area of (in)capacity for self-management is to focus on one thing that each Australian State and Territory has in common.

16 That is a Supreme Court with plenary authority for the administration of justice derived, directly or indirectly, from a grant of jurisdiction similar to that exercised by courts or judicial officers in England at or about the time Britain's Australian colonies were established. For convenience of the author the Supreme Court of NSW is taken as the template for discussion of concepts.

17 Although the administrative context in which each State or Territory Supreme Court may be called upon to exercise its protective, probate or family provision jurisdiction may be different, the nature of the Court's equity jurisdiction is a constant, adaptable to the circumstances of each case and subject to the authority of the High Court of Australia in a national system of law.

Working Across Jurisdictional Boundaries on an Exercise of Welfare Jurisdiction

18 A caveat in articulation of the "welfare jurisdiction(s)" by reference to the protective, probate, family provision and equity jurisdictions of a court is that some concepts encountered upon an exercise of welfare jurisdiction stand outside, or cross, jurisdictional boundaries in a way that may bear directly on "the estate" or "person" of a vulnerable person, or steps taken to address the possibility, or actuality, of "elder abuse".

19 In particular, regard may need to be had to:

(a) the statutory concepts of an "enduring" agent (an enduring attorney or an enduring guardian, by whatever name known) and a "court authorised (statutory) will" able to be made for a person lacking testamentary capacity.

(b) the principles governing management of a dispute about disposal of a dead body, now located in the Court's inherent jurisdiction, informed by its probate and protective jurisdictions: *State of NSW v Gill* [2024] NSWSC 1263; 115 NSWLR 536, applying *Brown v Weidig* [2023] NSWSC 281 and *Dayman v Dayman* [2024] NSWSC 838.

20 The concept of an enduring attorney engages the common law and equity jurisdictions (in common with the general law of agency) and the protective jurisdiction (engaged when a principal loses mental capacity). The concept of a statutory will engages both the probate and protective jurisdictions in so far as a "will" is made, notionally by an incapacitated person, for his or her benefit.

Enduring Powers of Attorney: A Blessing and a Curse

21 Execution of an *enduring* power of attorney with a *plenary* grant of authority by the principal in favour of an attorney (an agent) to act on his or her behalf may operate in favour of a third party, who may be entitled to rely upon it without further inquiry. But, unless there is some other (private) limitation placed on the attorney by the principal at a time when the principal has mental capacity, the only protection the principal may have against an attorney who acts against his or her interests may be the law governing fiduciaries and access to the courts (which may be costly) to enforce the fiduciary obligations of the attorney.

22 In NSW, within the contemplation of the *Powers of Attorney Act* 2003 NSW, an enduring power of attorney generally confers on the attorney "the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do". That formula may assist a third party who deals with the

attorney to bind the principal because of the ostensible authority of the attorney (*Taheri v Vitek* (2014) 87 NSWLR 403), at least where the third party has no notice of a breach of duty on the part of the attorney; but, as between the attorney and his or her principal, it cannot be taken at face value without consideration of whether the attorney has acted in breach of fiduciary obligations owed to the principal (*Estate Tornya, Deceased* [2020] NSWSC 1230).

23 Enforcement of fiduciary obligations owed by an attorney to a mentally incapacitated principal generally requires an appointment by a court or tribunal of a person to represent the incapacitated person (or, after his or her death, the deceased estate). Upon an exercise of protective jurisdiction, such a person is a manager of a protected estate or a receiver and manager. On an exercise of probate jurisdiction, such a person may be an executor (of a will admitted to probate) or an administrator.

24 Institutions such as retirement villages and nursing homes which condition institutional residency or care upon provision of an enduring power of attorney or an enduring guardianship order cannot turn a blind eye to the possibility that an enduring instrument is being abused if the fact of that possibility comes to their attention.

25 A common practice of institutions concerned about the welfare of a resident towards whom they may be thought to have a duty of care is to apply (in NSW, usually to the Guardianship Division of the NSW Civil and Administrative Tribunal, "NCAT") for an appointment of a financial manager and for an appointment of a guardian (in NSW, usually the NSW Trustee and the Public Guardian respectively), thereby engaging a protective regime in which a responsible authority has power to take action in the name, and on behalf, of a person incapable of self-management.

26 Although a primary focus must be on an enduring power of attorney (in relation to management of the estate of a person incapable of self-management), notice should also be taken of the possibility that an attorney who misuses his or her

appointment as an enduring attorney may well have taken the opportunity of procuring not only an appointment as an enduring attorney and an enduring guardian but also nomination as a beneficiary of a will.

27 Although, under Australian law, a will is ambulatory (in the sense that it speaks at the time of death, not at the time of its execution) execution of a will may arm an enduring attorney with an additional instrument which might be used by the attorney as justification for self-dealing, and for presentation to third parties to deflect critical inquiries about whether the attorney is acting for the benefit, and in the interests, of the principal.

28 In practice, whatever the law relating to fiduciaries might say, some attorneys regard a grant of an enduring power of attorney as providing an opportunity, and justification, for self-dealing in anticipation of a presumptive testamentary entitlement.

"Vulnerability" is a Descriptive Label, Not a Term of Art

29 Exploitation of a vulnerable person may take the form of physical abuse (affecting "the person" of the person) or financial abuse (affecting the property or income, that is "the estate" of the person); often both.

30 A person may be vulnerable to exploitation for a wide range of reasons including, but not limited to, age (young or old) or mental incapacity. It may be that a person in complete command of his or her senses is vulnerable to exploitation simply because he or she lacks the functional (as distinct from mental) ability to manage his or her own affairs.

31 A measure of whether the person is incapable of self-management is whether he or she is vulnerable to exploitation. In some contexts a person in need of protection might be described as a "vulnerable person" but that is not a term of art in Australian jurisprudence. A person may be functionally incapable of managing his or her own affairs but, mentally competent and surrounded by the support of family in a safe and secure environment, not "vulnerable" to

exploitation or at risk of misadventure. The focus of the Court (at least in NSW) is upon functional capacity for self-management.

THE CONCEPT OF "INCAPACITY"

A Finding of (In)capacity is Task Specific and Purpose Driven

32 If a single judgment informs the legal meaning of the word "incapacity" and equivalent expressions, it is *Gibbons v Wright* (1954) 91 CLR 423 at 737-739. That judgment counsels that capacity to transact business is generally to be assessed by reference to what, in the particular case, is the business to be done. It ties the concept of capacity to particular facts and the purpose for which an assessment of capacity is made. It is fact sensitive and purpose driven.

33 Thus it is, for example, that the concept of "*testamentary capacity*" employed for the purpose of an assessment of the validity of a will is recognised as task specific. The simpler a will, the easier it may be to establish that a deceased person had capacity to make a valid will; the more complex the will, the higher may be the task of establishing capacity. The law does not require that a testator be free from cognitive impairment; rather, the question is whether cognitive impairment is such as to affect the ability of the testator to understand the nature and effect of making a will; to understand the extent of his or her property (at least in broad terms), and to be able to comprehend and appreciate the claims on his or her testamentary bounty: *Peacock v Knox* [2025] NSWCA 160 at [193]-[195].

34 An exposition of the concept of incapacity for self-management, in the context of *protected estate management* orders, can be found in *CJ v AKJ* [2015] NSWSC 498 at [14]-[43], paragraphs [27]-[34] and [40]-[43] of which are here extracted:

> "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].

28. 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".
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> …
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> 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.
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> 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.
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> 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.
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> 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)."

35 Minds may differ about the utility of medical evidence in aid of a determination of whether a person is, or is not, capable of self-management. Occasionally, some doctors seem willing, like the general population, to accommodate their opinions to the prevailing wind and a desired outcome. (In)capacity for self-management, as determined by a court or tribunal, is ultimately a legal concept, not a medical one. Occasionally, a medical opinion seems contrary to the facts when the subject person appears in the flesh.

36 I repeat the following observations from *H v H* [2015] NSWSC 837 at [37]:

> "Experience of the protective jurisdiction makes a judge wary of medical opinions, *unaccompanied by an articulation of primary facts based on empirical observation*, but forensically convenient to the application of the moment. It is for that reason, for example, that medical opinions expressed in support of an application for revocation of management orders (under section 86 of the NSW Trustee and Guardian Act) are routinely measured against earlier opinions expressed in support of an application for section 41 orders. The Court may take comfort from an *opinion*, but it must look primarily to facts, especially in close-run cases in which opinions may fairly differ. If in doubt, there is no substitute for a direct, personal engagement with the person whose capacity

for self-management is under consideration, and those closely associated with him or her in daily living."

Tell-tale Signs of Incapacity Calling for an Exercise of Welfare Jurisdiction

37 In common practice, whether consciously engaged in the process of "estate planning" or simply contemplating incapacity on a path towards death, a reflective person may execute a suite of documents comprising an enduring power of attorney, an enduring guardianship appointment, a will and (perhaps less frequently) an advanced care directive (described in *Hunter and New England Area Health Service v A by his Tutor T* [2009] NSWSC 761; 74 NSWLR 88), usually with professional assistance or (in the case of an enduring instrument) with the benefit of a certificate by a practising lawyer.

38 To be valid, those instruments must be executed by a person with the mental capacity to do so.

39 An advance care directive is, perhaps, in a category of its own because it is usually, and ideally, part of a conversation between a person and his or her medical professionals and family, hopefully in an environment not tainted by self interest of others.

40 An advance care directive is sold to the community as a means of having a voice to be heard about medical treatment when death or misadventure may beckon through a prism of incapacity for self-management. That is certainly one function it may serve, provided the directive is executed at a time when the nature and risks of medical treatment are foreseeably present and fairly explained. Another function, no doubt more visible to a lawyer than most people, is to protect a medical practitioner or an institution against complaints about decisions made in a grey area of medical practice.

41 Enduring powers of attorney, enduring guardianship appointments and wills are, by their nature, more readily identified with management of a person's "estate" (property) and "person" in anticipation of incapacity and death.

42 When a person is perceived by those around him or her to be failing in mental capacity, the person involved (or perhaps more often a person within his or her family or community) may call to mind a perceived need for an enduring power of attorney, an enduring guardianship appointment and a will. That is a recognised pattern whether there is skulduggery or not.

43 In health terms, tell-tale signs of the onset of incapacity noticed by those who deal with a failing mind may be chronic forgetfulness, suggestibility, rejection of close friends or caring relatives or oppositional behaviour indicative of a change of personality.

44 A person with a failing mental capacity may turn against "family" under the influence of a stranger to the family, commonly a "carer" who offers flattery to a person in need of protection and a negative attitude towards family members.

45 A common flashpoint for this phenomenon is when questions arise about a transition from "living at home" to living in, or on a pathway to, "institutional care". This may be a difficult time, not only socially, but because a necessary topic for discussion may be a need to re-organise property arrangements (perhaps including testamentary arrangements) in order to fund accommodation in a nursing home or a retirement village, or personal care at home.

46 Tell-tale signs for a lawyer occur when a person within a short space of time executes multiple enduring powers of attorney, guardianship appointments and wills, particularly if they manifest a "battle of forms" as competing claims on the bounty of the person by a variety of supplicants are called in to play.

47 Another tell-tale sign is when a person with a real or imagined claim on the bounty of a person with failing health "captures the body" and "captures the estate" of a person vulnerable to influence, and isolates the person from others, controlling if not preventing free access of others who are members of the family or significant others of the vulnerable person.

48 People who capture the body and the estate of a vulnerable person are commonly deeply shocked and offended by characterisation of their conduct in those terms. They are often persuaded that they, and they alone, know best, and that everything they have done, or they propose to do, is solely for the benefit, and in the interests, of the vulnerable person.

49 Those who capture the body and the estate of a vulnerable person commonly use their control or influence over the vulnerable person to steer the vulnerable person towards the execution of an enduring power of attorney, an enduring guardian appointment and a will, often prepared by a lawyer chosen by the person who has the body and the estate under close supervision and who, directly or indirectly, stands to benefit from financial arrangements made for the vulnerable person's ordinary living or testamentary affairs.

50 This pattern is commonly found across the full spectrum of wealth. Each in their own way, rich and poor people play the same game. A large estate might attract contentious transfers of land, usurped control of bank accounts or disputes about management control of a corporation or trust. A small estate might attract usurped control of a bank account, misappropriation of a pension or squatting in a vulnerable person's residence "rent-free".

Practical Steps in Dealing with Incapacity

51 All these situations potentially involve a fertile field of operation for the welfare jurisdiction(s) of a Supreme Court or, within their statutory jurisdictional limits, an administrative tribunal exercising protective jurisdiction.

52 Practical considerations about the timing, costs and utility of a formal invocation of a welfare jurisdiction must be weighed in the balance in each case. But, in many cases, a practical solution may be any effective step that might be taken to ensure that:

(a) a vulnerable person is safe, properly cared for and, freed from isolation, accessible to responsible family and friends; and

(b) the property of the vulnerable person is preserved pending further inquiries and, if need be, recovered or otherwise accounted for.

AN ESTATE PRACTITIONER'S CHALLENGE

53 A full understanding of the nature and scope of a Supreme Court's equity jurisdiction may have escaped the attention of those who have traditionally defined the jurisdiction by reference to a binary distinction between "the common law" and "equity" without recognition of:

(a) the interplay between the probate and equity jurisdictions;

(b) the close association between the, still relevant, historical role of the English Lord Chancellor when sitting "in Chancery" upon an exercise of equity jurisdiction and when exercising "protective" ("infancy" or "lunacy") jurisdiction on separate delegations from the Crown; or

(c) the managerial focus on the administration of an estate common to an exercise of protective, probate or equity jurisdiction, which differs from the focus upon an adjudication of competing claims of right (between competent parties) that favours rule-bound reasoning typical of a common law action or a commercial case.

54 Each branch of the Court's welfare jurisdiction is governed by the purpose for which it exists and the common fact that, upon an exercise of such jurisdiction, the Court has a focus upon a central personality: a person who, by reason of incapacity or death, is unable to manage his or her own affairs, and so is not wholly present before the Court even if duly "represented" in a formal sense, and whose welfare and interests (past, present and future) are a core concern.

55 Proceedings which involve an exercise of "welfare jurisdiction" are conducted using procedures (sometimes characterised as "inquisitorial") critically different from those deployed in an action (generally regarded as "adversarial") between

competent adversaries fighting about competing claims of right and associated obligations.

56 Upon an exercise of welfare jurisdiction, the Court is generally required, in the public interest, to test the parameters of each case and to search for, and determine, issues that may affect parties, property or interests not at the outset identified. Adversarial parties cannot dictate proceedings. Upon an exercise of jurisdiction in an adversarial action between competent adversaries the parties generally identify themselves and the subject matter of a dispute affecting only them directly. Not so upon an exercise of welfare jurisdiction.

57 An estate practitioner needs to be familiar with each branch of the Court's "welfare jurisdiction". *It is not enough to be conversant with only one or two of these "specialty" areas of legal practice. Knowledge of all of them, and how they interact, is important to their effective operation*.

58 Estate practitioners *must be equipped to view a client's affairs prospectively and retrospectively*, recognising competing interests of the "the individual" and the individual's "community" and management risks associated with an individual living and dying in community .

59 In advising about estate planning and the desirability or otherwise of an enduring power of attorney, an enduring guardianship appointment or a will, an estate practitioner must be able to identify and minimise risks attending management of the affairs of the particular client looking forward.

60 In dealing with a deceased estate (in the context of probate or family provision proceedings, if not protective proceedings abated by death) an estate practitioner must be conscious of the possibility that an estate is "more" or "less" than the actual estate appears to be because of claims that might be made on behalf of, or against, an estate based upon *inter vivos* dealings of the deceased, attracting either an equitable entitlement or (in NSW) the possibility of designation of "notional estate" in a family provision suit.

CONCEPTUAL CONTEXT

The Paradigm Assumption

61 The paradigm assumption made by Australian law in dealing with a person who is, or may be, incapable of self-management by reason of incapacity or death is that *each person is to be viewed as an autonomous individual living, and dying, in community* (with due allowances to be made for a lack of autonomy in each case).

62 *The starting point for most decision-making within this paradigm is the perspective of the individual, not the community*, recognising nevertheless that the identity of an individual may be most visible in the context of his or her community, if not dependent upon community.

63 An individual's conception of "self" may be a function of his or her "community". Nevertheless, *the freedom enjoyed by each person governed by Australian law is best secured by recognising the dignity of the individual and reasoning from the individual to the community rather than in the opposite direction*. Otherwise, freedom of the individual may be unrecognised and, if recognised, too easily overborne by community pressures.

"Death" as a Process in a "Managed Society"

64 In the eyes of modern law death is now, more than formerly, less an "event" and more a "process" that may commence before, and extend beyond, "physical death".

65 It may commence with the law's engagement with IVF, surrogacy, abortion or a claim for compensation for medical negligence at the time of birth.

66 It may conclude only upon distribution of a deceased estate or expiry of the time (with or without an extension of time) within which an application can be made for a family provision order.

67 *We all live in a "managed society" in which every life is managed (regulated) by administrative bodies (public or private) from cradle to grave and beyond*.

68 Throughout the course of an ordinary life a person may be subject to an exercise of any one or more or all of the Court's several branches of jurisdiction concerned with management of the affairs of a person who, by reason of incapacity or death, is unable to manage his or her own affairs. At different times of a person's life a different balance may be necessary between the perspectives of "the individual" and the "community" within which an individual lives and dies.

WHEN THINGS GO WRONG: NEED FOR AN INTERMEDIARY

69 **Need for an Intermediary.** When a vulnerable person has been exploited or is at risk of exploitation, or is not fully available to represent him or herself, there may be no practical remedy other than the interposition of a capable person (an enduring attorney, a guardian, a financial manager, an administrator or the like) empowered to act on his or her behalf in dealing with third parties and to consult with and serve the interests of the vulnerable person. This is a classic field of operation for equitable principles governing fiduciaries, qualified by a protective purpose and a need to accommodate the interests of third parties.

70 A prospective intermediary requires a grant of authority if anything formal is to be done on behalf of an incapable person. Such a grant bears the character of an instrument of title which provides the intermediary with standing which he, she or it might not otherwise have.

71 **An Enduring Attorney as Intermediary.** A capable person may appoint an enduring attorney or an enduring guardian in anticipation of mental incapacity on the road to death. Absent legislation, the appointment of an attorney (agent) lapses on a principal's loss of mental capacity. An enduring power of attorney "endures" (continues) beyond a loss of mental capacity.

72 In the "standard" case of a person who executes an enduring power of attorney, an enduring guardianship appointment and a will, there is a nuanced change in

the operation of fiduciary principles as the person progresses from full capacity to none at all.

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

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

75 **A Protective Manager as Intermediary.** A Supreme Court or an administrative tribunal exercising protective jurisdiction in respect of a person unable to manage his or her affairs may appoint a financial manager or guardian, which is often done if there is a dispute about the validity or proper use of an enduring power of attorney. In NSW, the Court often appoints the NSW Trustee as a receiver and manager of the estate of a person pending a determination of whether he or she needs protected estate management.

76 In recent days an appointment of the NSW Trustee as a receiver and manager of an identified fund (existing or created and limited in quantum for the purpose of facilitating arrangements for an independent medical examination and/or the appointment of a visitor) has facilitated an independent expert assessment of a vulnerable person's (in)capacity, allowing interested persons an opportunity to make representations to the NSW Trustee and the NSW Trustee (with the benefit of directions from the Court, if required) to speak with one voice in instructions given to a medical expert or visitor.

77 With the benefit of the advice of experts the NSW Trustee routinely provides a "Report to Court" which the Court may order be served on, or withheld from, interested persons, with or without redaction.

78 That procedure cuts through problems experienced when competing parties are unable to agree upon the identity of a joint expert or instructions to be given to an expert.

79 Left to their own devices, parties do not confine their focus to an assessment of a vulnerable person's present and future (in)capacity (the primary concern of the Court at the time), but commonly try to divert an inquiry about present (in)capacity by a focus on past (in)capacity relating to a time when a disputed enduring power of attorney was executed or a disputed transaction was entered into. Left to their own devices interested parties readily become obsessed with the existence of a potential claim in equity for the recovery of property or compensation in advance of any person (such as the vulnerable person or a manager) being confirmed as having the standing to make a claim.

80 Those questions are best left for consideration by the vulnerable person (if he or she is found to have capacity) or a protected estate manager (if the Court makes a finding of incapacity).

81 **An Interim Administrator as an Intermediary.** Upon an exercise of probate jurisdiction, a Court may, in anticipation of a grant of probate or general administration, appoint an interim administrator (by way of a "special" or "limited" grant) that operates in much the same way as the appointment of a receiver and manager upon an exercise of equity jurisdiction.

82 A problem with an interim grant (which is essentially a Court order by another name) is that lawyers commonly persist in seeking, or submitting to, orders expressed in terms simply of obscure Latin tags without express enumeration of powers as would be the case in the appointment of a receiver and manager or the like upon an exercise of any jurisdiction other than probate jurisdiction. This is not helpful. It does not speak to the wide variety of people to whom a

grant may be presented by an interim administrator with the expectation that they will understand the nature, scope and limits of his or her authority. Tradition has its place, but not here.

A PERENNIAL PROBLEM

83 A perennial problem in combating elder abuse is the need for timely recognition of an incapacity for self-management and the appointment of a protective intermediary (to use a generic expression), minimising the risk of prejudice to an incapable person arising from delay.

84 If timely steps cannot be taken during the lifetime of an incapable person litigation falls to be conducted in the administration of a deceased estate, necessarily involving a different range of interested parties than the focus of protective proceedings on the central personality of a living incapable person.

85 A tension between the different perspectives of an incapable person, a protective intermediary (whether an enduring attorney or guardian, a financial manager or guardian of an incapable person) and third parties dealing with the intermediary lies at the heart concerns about elder abuse. A third party dealing with an intermediary (an "agent" for an incapacitated "principal") benefits from being able to rely upon an instrument (eg an enduring power of attorney) expressed in terms that confer actual, plenary authority on the agent. It is good for business to be able to deal with a person competent to do business.

86 An intermediary granted plenary authority may interpret the grant literally (in essence, colloquially, as a "licence to steal") in disregard of fiduciary obligations owed by him or her to his or her incapacitated principal.

87 A price paid for "privatisation" of management of a vulnerable person's estate by another is a risk of that "other" mismanaging the vulnerable person's affairs. The choice of an enduring attorney or an enduring guardian (able to exercise powers without administrative supervision) is an inherently risky decision whatever trust might be reposed in a person thought to be honest and reliable.

PROBLEMS WITH TERMINOLOGY AND ADMINISTRATIVE DIFFERENCE IN A FEDERAL SYSTEM OF GOVERNMENT

88 Over time and between different places, the law and legal practice concerning an exercise of welfare jurisdiction (commonly under the rubric of "the law of succession", "wills and estates" or the like) been beset by the use of different terms to describe much the same concepts.

89 There are, no doubt, many reasons for this phenomenon. A detailed examination of them is beyond the scope of this paper. Nevertheless, easily noticed are cultural changes in the way mental health concerns have been perceived, spoken of and dealt with over time. Sometimes those changes have accompanied a need to use different terminology to address social stigma arising from a particular community's appropriation of established terms in derogatory remarks about the mentally ill or other vulnerable people. Sometimes reformers embrace a new terminology to distinguish a new administrative regime from an earlier one or a competing administrative model.

90 Illustrations of this can be readily found in NSW experience. In 1958 the "Lunacy jurisdiction" of the Supreme Court of New South Wales was rebadged as the "Protective jurisdiction"; the Master in Lunacy became the Protective Commissioner; and very few people now appreciate the technical meaning of the historical labels of "idiot" (natural fool) and "lunatic". In 1983 the Court's statutory jurisdiction to appoint a manager of an incapable person's estate shifted from a focus on mental capacity to a focus on a person's functional capacity for self-management.

91 As a Federation of States, Australia is not free from the use of different terms to describe similar concepts.

92 Although States and Territories have primary responsibility for the law governing management of the affairs of a person who (by reason of incapacity or death) is, or may be, incapable of self-management, and for the delivery of services affecting vulnerable people, the national government has increasingly asserted its influence over State and Territorial regimes through its imposition

of regulatory regimes on institutions such as hospitals, retirement villages and nursing homes; superannuation; and the terms upon which social security funding (notably, carer's pensions and National Disability Insurance Scheme funding) is available.

93 There is in Australia no "uniform law" governing management of the affairs of a person who (by reason of incapacity or death) is, or may be, incapable of self-management. That is, perhaps, to be expected in a federal system which, by nature, endeavours to accommodate within a broader structure local perspectives on what constitutes "good government" and the administrative demands of service delivery.

94 Two specific examples of divergent approaches to the administration of a welfare jurisdiction are notable. First, NSW's concept of a designation of "notional estate" for the purposes of a family provision application, reaching back up to three years before a person's death for property that may be amenable to a family provision order is unique to NSW. Secondly, the recent enactment of legislation in Victoria and Tasmania to embrace an "*assisted (or supported) decision-making* model" stands in contrast to the protected estate *management* model (sometimes erroneously described as a "*substituted decision*" model) operating in NSW, subject to commentary in *Re KT and JC, Protected Persons* [2025] NSWSC 306 at [224]-[233].

95 An estate practitioner must be mindful of the possibility of these differences in making sure that particular problems are identified, and hopefully solved, by reference to the particular legislative regime applicable to the case at hand. Nevertheless, there is utility in locating legislation within a broader, conceptual framework because legislation is often predicated upon familiarity with the functionality of a Supreme Court's jurisdiction.

THE FUNCTIONALITY OF SUPREME COURT JURISDICTION

96 The jurisdiction of the English antecedents of the Australian Supreme Courts is sometimes obscured by a focus on procedural norms long since lost to history. Nevertheless, a focus on the historical jurisdiction by reference to which the

Supreme Courts of Australia acquired what is sometimes described as their "inherent jurisdiction" can be instructive. The purpose of conferring jurisdiction on Australian courts by reference to an English precedent was essentially to confer upon Australian courts the full range of *functions* performed by responsible authorities in an established common law system of government.

97 What was "inherited" or "received" by the Colonial courts, ultimately sourced in Imperial legislation was not an immutable set of rules of procedure but a conferral of functional jurisdiction, defined by reference to English models, serving particular purposes. The fact that, well into the 20th century (at least) Australian lawyers practised their profession through English cultural norms should not obscure that fact. An exercise of welfare jurisdiction is not rule-bound, but purpose-driven.

98 Recognition of that fact invites consideration of the *purpose* served by each head of jurisdiction conferred on an Australian Supreme Court in the service of a function perceived necessary for a superior court of record with plenary authority for the administration of justice.

COMMON FEATURES OF A WELFARE JURISDICTION

99 As has been noticed, in dealing with any case that engages, or may engage, any of the "welfare jurisdictions" of the Supreme Court it is important to have an "overview" understanding of how, and why, they all fit together.

100 With nuances reflecting its particular purpose, each branch of jurisdiction focuses upon management of the affairs of a central personality (a vulnerable or dead person) not able to manage his or her own affairs and the Court's engagement with the community of that personality (often "family" by whatever name known) rather than competing claims of right by competent adversaries.

101 Managerial decision-making is perhaps most evident in proceedings which involve an exercise of the "welfare jurisdiction(s)" of the Court.

102 What the welfare jurisdictions have in common is that:

(a) they each may involve management of “the person” or “estate” of a central personality who (by reason of incapacity, legal or factual, or death) is not able to represent himself or herself as in an adversarial contest about competing claims of right and whose “welfare” may be a paramount consideration or, at least, has to be taken into account by a judge independently of partisan contentions;

(b) there is a strong public interest element in the administration of justice because not all affected parties are “wholly present “before the Court and decisions made by the Court may affect property entitlements vis-a vis “the whole world”;

(c) the Court cannot, without due inquiry, confine its role to the determination of a question (or evidence) tendered by parties who happen to be present before the Court.

(d) the Court cannot necessarily proceed to the hearing or determination of a case presented by parties who present themselves to the Court without the service of notice of the proceedings on persons who may have a material interest in the outcome of the proceedings and should be afforded an opportunity to choose whether they intervene in the proceedings;

(e) questions of management may require evaluative judgements about risk management looking forward to an uncertain future;

(f) a managerial decision is generally given effect by an order which is discretionary in nature even if the Court’s discretion is customarily exercised in a particular way;

(g) a managerial decision is patently governed by the purpose for which the jurisdiction exercised by the Court exists; and

(h) an adversarial form of advocacy must be tempered by the need of a judge to consider the interests of a person who is vulnerable or "not fully present" before the Court, with the consequence that proceedings may have a tendency to be inquisitorial (rather than adversarial) in nature.

THE PURPOSIVE NATURE OF THE COURT'S "WELFARE" JURISDICTION(S)

103 The purpose for which any jurisdiction of the Court exists generally governs its exercise.

104 The purposive character of the Court's various types of jurisdiction is not always to the forefront of anyone's consciousness, but it can sometimes be 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.

105 In practice, identification of the "purpose" of a jurisdiction may be closely associated with some basic questions asked of an advocate. What orders are sought (what do the parties want the Court to do)? Why are those orders sought (what do the parties want to achieve)? How can the Court do anything to achieve that outcome? Why should the Court exercise a power to make orders sought?

106 The answers to questions like that point to the functional (purposive) nature of the Court's different branches of jurisdiction.

107 **The protective jurisdiction** of the Court exists for the purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. The Court focuses, almost single-mindedly, upon the welfare and interests of a person incapable of managing his or her own affairs, testing everything against whether what is to be done or not done 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. *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 QdR 1 at [48].

108 In a society which is, to this extent, managed *on behalf of* a person who is incapacitated, or on the periphery of incapacitation, there is often tension between what the person in need of protection can (and ought to be allowed to) do personally and what must, for want of a practical alternative, be done for the person by somebody else. There is also, in all such cases, a concern about the *accountability* of those who (as holders of a fiduciary office or as persons who stand in a fiduciary relationship with an incapable person) deal with an incapable person's estate. These are presently hot topics for debate.

109 One way of viewing the State's protective regime is to see it as an administrative system for *managing risk* associated with the management of property (assets and income) by or on behalf of a person unable, personally, without assistance, to manage his or her own affairs without undue exposure to exploitation. The general law may offer *particular* remedies to address *particular* wrongdoing (invoking equitable jurisdiction or legislation like the *Australian Consumer Law* or the *Contracts Review Act* 1980 NSW), mostly *retrospectively*, but the protective jurisdiction allows for *systemic* protection with a *prospective* outlook.

110 The purposive nature of the protective jurisdiction is on display in the principles governing the accountability of a "guardian" in the application of funds under the guardian's management: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430.

111 **The probate jurisdiction** of the Court looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get

what is due to them: *In the Goods of William Loveday* [1900] P154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

112 The probate jurisdiction gives effect to a perspective which transitions from that of a person at the end of his or her life to that of members of his or her community (family) recognised as entitled to enjoy his or her inheritance. The interest of a beneficiary before completion of executorial duties in administration of a deceased estate is an entitlement to due administration of the estate, rather than an interest in particular assets of the estate: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 717C-F, upholding *Livingston v Commissioner of Stamp Duties* (Qld) (1960) 107 CLR 411 at 435, 451 and 459. Once the character of a legal personal representative passes from that of an executor to that of a trustee, his or her obligations shift in focus from the deceased to his or her beneficiaries: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229 at [20].

113 **The family provision jurisdiction** of the Court, 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 (for relief out of a deceased estate or notional estate) in whose favour an order for provision "ought" to be made.

114 The concept of "testamentary freedom" foundational to probate law and practice (viewing “capacity” through the prism of an *individual* testator’s testamentary capacity) is qualified, upon an exercise of family provision jurisdiction, by a judicial assessment (accommodating a *communal* perspective) of whether considerations of wisdom, justice and community standards require that provision be made for an eligible applicant.

115 In the exercise of its statutory powers in the determination of an application for a family provision order the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she *ought* to have done in all the circumstances of the case, in light of facts now known, treating the deceased as wise and just rather than fond and foolish (*In re Allen* [1922]

NZLR 218 at 220-221*, Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 107 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502*; Andrew v Andrew* (2012) 81 NSWLR 656) and, generally, consulting specific statutory criteria so far as they may be material: *Bassett v Bassett* [2021] NSWCA 320 at [170-[171].

116 **The equity jurisdiction** of the Court, generally, serves the purpose of maintaining standards of conduct (including protection of the vulnerable) by restraining conduct that is against good conscience and enforcing duties where non-performance of a duty would be unconscionable. The jurisdiction defies simple definition because it may be called in aid to fill a gap in the general law and because, as illustrated by adoption legislation (and, more recently, legislation such as the *Surrogacy Act* 2010 NSW and the *Voluntary Assisted Dying Act* 2022 NSW), equity judges often have assigned to them statutory jurisdiction in particular areas of the law involving management decisions, reflecting their historical connection with proceedings involving questions of administration.

117 Managerial decision-making is generally associated in NSW with categories of jurisdiction routinely exercised by judges of the Equity Division of the Supreme Court ("equity judges") who, as with their predecessors, are accustomed to hear and determine proceedings without a jury. That said, whatever their specialties, all judges of the Court can exercise the Court's jurisdiction.

118 An illustration of managerial thinking upon an exercise of equitable jurisdiction is the Court's supervisory jurisdiction over trust administration, which is purposive (in its dedication to the fulfilment of the ascertainable purpose that constitutes a trust as a matter of law); administrative in character, both procedurally and substantively; protective of the interests of settlors, trustees and beneficiaries, if not also third parties relying upon the due administration of a trust; and, from a beneficiary's perspective, governed by the principle that the Court acts "in the best interests of the beneficiaries" of a trust: Daniel Clarry,

The Supervisory Jurisdiction Over Trust Administration (Oxford University Press, Oxford, 2018), paragraphs [1.16]-[1.22] and [10.42]-[10.51].

119 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.

120 The observations of Paul Finn in *Fiduciary Obligations* (1st ed, 1977; reprint 2016) at paragraph [698], here reproduced with editorial adaptation, are of profound importance:

> "[Though] the courts often enough emphasise the rigorous standards exacted by the fiduciary principle [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. …"

Locus Standii Upon An Exercise of Welfare Jurisdiction

121 The purposive character of each branch of the Court's welfare jurisdiction is manifested in different approaches to the standing required to institute and maintain proceedings before the Court.

122 Upon an exercise of *protective* jurisdiction there is no formal requirement for *locus standii* independent of a proper case for orders serving the interests, and for the benefit, of a person in need of protection. The question of standing ultimately focuses upon the rationale of the protective jurisdiction itself: the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [93]-[94]; *Re An Incapacitated Principal* [2025] NSWSC 89 at [5]-[12].

123 This is consistent with the approach to standing taken in other areas of the law in which the public interest requires a flexible approach to the question of standing: *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at [2], [94], [162] and [211] (*habeas corpus*); *State of New South Wales v Gill* [2024] NSWSC 1263; 115 NSWLR 536 (disposal of a body).

124 The purposive character of an exercise of *probate* jurisdiction (with its focus on the due administration of an estate and the distribution of property in accordance with the law of succession) is manifest in characterisation of probate litigation as "interest litigation". A party to proceedings must have an interest in the proceedings in the sense that its rights will, or may, be affected by the outcome of the proceedings: *Nobarani v Mariconte* (2018) 265 CLR 236 at [49].

125 The purposive character of an application for a *family provision* order is manifest in the terms of the legislation governing such an order and identification of an applicant's status as a person entitled under the legislation to apply for family provision relief.

126 An exercise of *equity* jurisdiction requires identification of an "equity" (analogous to, but distinct from, a common law "cause of action"), often associated with particular patterns of conduct, justifying equitable intervention in the affairs of persons who are, or might reasonably be supposed to be, affected by the relief sought.

WHAT IS THE EQUITY JURISDICTION?

127 **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.

128 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].

129 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.

130 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.

131 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.

132 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.

133 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.

134 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.

135 **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.

136 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."

137 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 ...".

138 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.

139 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. …"

140 This paper does not attempt, let alone achieve, anything like what Maitland and Jordan have authoritatively declared to be impossible. A conceptual difficulty with any attempt to formulate a definition of "equity" is that, because it operates as a remedial or corrective jurisdiction or it may be called upon to "fill a gap" in the administration of the law, it cannot be confined to a closed category of cases.

141 This paper does, however, 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.

142 One of the best and most pithy attempts at definition of "Equity" is to be found in the Glossary of R.E. Megarry QC's *Miscellany-at-Law*: *A Diversion for Lawyers and Others* (Stevens & Sons, London, 1955) which illustrates the problem for lawyers (particularly those practising outside England) in the modern era:

> "Equity: A supplementary system of justice which grew up under the Chancellors towards the end of the Middle Ages to deal with gaps left in a system of law that had become over rigid and would not, eg, enforce trusts. Later it became rigid itself, but initially it was wide and flexible, being based on what seemed fair, equitable and in good conscience.

143 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 "*rules*" in 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.

144 To adapt Megarry's definition of "Equity" to a modern Australian setting, the equity jurisdiction operates best, at least in its interplay with the welfare jurisdiction(s), when available to be exercised in a manner that is "wide and flexible", based on what seems "fair, equitable and in good conscience" within established guidelines, purpose driven not rule bound.

145 **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.

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

147 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.

148 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.

149 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.

150 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.

151 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.

152 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."

153 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.

154 **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).

155 The systematisation of English 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.

156 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.

157 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.

158 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.

159 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.

160 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.

161 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”.

162 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.

163 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.

164 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.

165 Experience teaches that practitioners with a commercial or common law background (trained for adversarial contests about competing claims of right) may not have an experience of the equity jurisdiction that readily lends itself to a case involving an exercise of welfare jurisdiction even though abstract principles of equity may be stated in universal terms.

166 By its nature, the equity jurisdiction 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.

EQUITY AND ESTATE ADMINISTRATION

167 In addition to allowing opportunities for the operation of the law of trusts (equity’s most prominent contribution to Anglo-Australian law), the equity jurisdiction engages with the welfare jurisdictions (each branch of which is governed by the purpose for which it exists) in four particular ways affecting the administration of an estate.

168 First and foremost, equity characterises as “fiduciary” the office of a financial manager and a guardian (appointed upon an exercise of protective jurisdiction) and the legal personal representative of a deceased person (whether an executor or an administrator) upon an exercise of probate jurisdiction, with a role to play representing an estate in family provision proceedings, allowing all such office bearers to be held to account in the performance of their representative functions.

169 Secondly, the equity jurisdiction engages with the welfare jurisdictions in the operation of principles commonly relied upon in dealing with a pattern of conduct giving rise to “an equity” justifying an exercise of equity jurisdiction (colloquially, misnamed as an “equitable cause of action”):

(a) *in augmentation of an estate* by a claim made on behalf of the estate based upon an allegation of:

(i) *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, looking to the quality of the consent or assent of a weaker party to a transaction such that an impugned transaction is not the free, voluntary and independent act of the weaker party.

(ii) *unconscionable conduct* (commonly described by reference to *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 15 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; or *Bridgewater v Leahy* (1998) 194 CLR 457), looking to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person under a special disadvantage, taking an unfair or unconscientious advantage of the opportunity created by the special disadvantage.

(iii) *a breach of fiduciary obligations* (commonly explained by reference to *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 68, 96 and 141; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 or *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467), being a breach of a duty of loyalty owed by a fiduciary 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.

(b) *in diminution of an estate* by recognition of a pattern of conduct giving rise to an entitlement in a party to a declaration that an estate asset is held on trust for that party, commonly known as a "trust claim" based, inter alia, upon principles governing:

(i) *a contract to make a will (and not revoke it): Delaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at [31]-[34].

(ii) *a common intention trust,* based upon an actual intention that property be held on trust: *Clayton v Clayton* [2023] NSWSC 399 at [529]-[543].

(iii) *a proprietary estoppel by encouragement*, most recently reviewed by the High Court of Australia in *Kramer v Stone* [2024] HCA 48; 99 ALJR 126 at [32] and [36]-[41].

(iv) *a joint endeavour trust* based upon a division of property the subject of a joint endeavour which has failed without attribution of fault: *Baumgartner v Baumgartner* (1988) 164 CLR 137.

170 A “trust claim” is a fashionable forensic device for challenging the scheme (and operation) of a will by locating property rights outside the will binding on a deceased person’s legal personal representative.

171 A claim of an entitlement based on upon a proprietary estoppel by encouragement might naturally be brought against a deceased estate when, upon publication of a will, the expectations of the person alleging an estoppel have been disappointed. However, an estoppel claim may have greater scope for operation.

172 *Slade v Brose* [2024] NSWCA 192 (following *Q v E Co* [2020] NSWCA 220) demonstrates that a proprietary estoppel claim arising from a family’s succession plans may be relied upon in anticipation of a death, not only post-mortem; it might have scope for application if a promisor descends into mental incapacity with a will that does not reflect promises earlier made.

173 *Soulos v Pagones* [2023] NSWCA 243 demonstrates that a proprietary estoppel claim may (by reference to testamentary expectations) be crafted in combination with a claim for family provision relief.

174 A claim based upon an allegation of a proprietary estoppel by encouragement may be difficult to prove, or perhaps more difficult to defend, when (as is often the case) the claim is based on oral representations informally made long ago. Particular caution is required in the assessment of evidence relating to acts alleged to have been done and statements alleged to have been made by a person or persons not available to give evidence and not corroborated by other evidence: *Plunkett v Bull* (1915) 19 CLR 544 at 548-549.

175 A claim based on evidence of an oral representation might be challenged by an inquiry as to why, if a representation was made and relied upon, the representee did not insist upon or obtain something in writing. However, a claim based on a proprietary estoppel by encouragement is generally dependent upon findings of fact in the particular case.

176 Thirdly, equity is the historical source for procedural norms routinely applied upon an exercise of welfare jurisdiction, including statutory provisions for orders to be made (without the making of a general administration order of the type described in *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623) for a "partial administration order" or "judicial advice".

177 Fourthly, equity has pioneered remedies (unknown to the common law) allowing relief to be made, upon an exercise of discretion, moulded to deal with the circumstances of a particular case.

178 Each of the welfare jurisdictions has a focus on administration of an estate, although that focus depends upon the purpose served by the particular jurisdiction.

179 Although an exercise of probate jurisdiction may involve consideration of a clause in a will for the appointment of a testamentary guardian of a child, and questions of personal welfare implicitly arise in family provision proceedings, the jurisdiction primarily concerned with the welfare of "the person" is the protective jurisdiction.

180 Of the Court's welfare jurisdictions, the protective jurisdiction is the closest, historically and functionally, to the equity jurisdiction. Although nuances between each type of jurisdiction cannot be ignored (eg, as the incapacity of an infant routinely fades with maturity and age, whereas the incapacity of a mentally ill person may not), it is worthy of notice that each of the infancy and lunacy jurisdictions (which together constitute the courts' modern "protective jurisdiction") and the equity jurisdiction have origins in the office of the Lord Chancellor of England as a personal delegate of the Monarch, historically regarded as the source of justice.

181 The protective jurisdiction is also unique in that a person appointed to manage an estate (such as a committee of the estate or a financial manager) takes *control* of an estate without, by reason only of that appointment, occupying the office of a trustee. The legal title to property under protective estate

management generally remains in the name of the person under management: *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [166]-[175]..

182 Another, related, idiosyncrasy of the protective jurisdiction is that the "liability to account" of a "guardian" (by whatever name known, including the manager of an estate) is not that of a trustee. It depends upon whether property under management has been properly applied by the guardian for the benefit of the person under management: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423, read with *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433.

183 An exercise of equitable jurisdiction in aid of an exercise of other welfare jurisdictions to recover estate property or equitable compensation implicitly identifies and enforces *standards of conduct* in dealing with a person who, by reason of incapacity or death, is unable to manage his or her affairs: a field of operation not limited to a formal regime of estate administration.

EQUITY AND PROTECTIVE JURISDICTION

The Challenge

184 Equity's challenge at its intersection with the protective jurisdiction is a perennial one of:

(a) bringing home to the community (not limited to those involved in administration of the law) the nature of fiduciary relationships attaching to dealings with vulnerable people and the obligations of a fiduciary; and

(b) devising and maintaining procedures that facilitate the availability in real time of effective remedies for breaches of fiduciary obligations.

Concepts *vis-a-vis* Terminology

185 A newcomer to study of the protective jurisdiction is confronted by a bewildering array of synonyms for basic concepts, in part a reflection of different historical foundations for a jurisdiction melded from composite parts.

The Protective Jurisdiction

186 The jurisdiction itself goes by different names. The adjective appended to the noun varies between "protective", "*parens patriae*", "inherent", "lunacy" and, in relation to minors, "infancy" or "wardship". Use of the expression "Lunacy Jurisdiction" has been discouraged in NSW since about 1958, when the expression "Protective Jurisdiction" was adopted as a substitute: *Mental Health Act* 1958 NSW, sections 5-6.

187 In NSW we tend to reserve the expression *parens patriae* jurisdiction for cases involving minors. However, chapter 9 of Joseph Chitty's *Treatise on the Law of the Prerogatives of the Crown* (London, 1820) confirms that the expression has long applied to cases involving "infants", "idiots" and "lunatics" (a collection of cases we sometimes place under the rubric *parens patriae*) and, in addition, to "charities", a topic we do not generally associate with the expression *parens patriae* (*Estate Polykarpou; re a Charity* [2016] NSWSC 409). One common denominator is that, historically, the Crown claimed jurisdiction as "the father (or parent) of the nation" (*parens patriae*). Another is that each head of jurisdiction involves a public interest aspect that transcends the interests of private parties.

Protected Estate Managers (Committees of the Estate)

188 The office we presently describe as that of a "(protected estate) manager" or "financial manager" is substantially the same as that which, in historical terms, was described as a "committee of the estate", an expression still used (to avoid misunderstandings) when the Court exercises its inherent jurisdiction to appoint a "manager": *IR v AR* [2015] NSWSC 1187 at [113].

189 The office of a "manager" (however described) is fiduciary in character, sometimes likened to that of a bailiff or agent, and distinguished from that of a trustee in the strict sense: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [166]-[175]; *Clay v Clay* (2001) 202 CLR 410 at 428-431. The office is a gratuitous one unless a special arrangement to the contrary is authorised by legislation (as it is in relation to the NSW Trustee and licensed trustee companies) or an order of the Court.

190 The Court's jurisdiction to appoint a committee of the person is generally invoked to deal with exceptional cases: eg, *IR v AR* [2015] NSWSC 1187 (extra territorial operation of orders); *G v G* [2016] NSWSC 511 (urgent orders to guard against exploitation by a suitor).

191 On an exercise of protective jurisdiction, the Court sometimes appoints a "receiver and manager", rather than a manager, in order to underscore the interlocutory character of the appointment. If, in such a case, the NSW Trustee is the receiver, the Court's practice is to define the receiver's powers as those exercisable by the NSW Trustee if management of the estate were to be committed to the NSW Trustee: *JMK v RDC and PTO v WDO* [2013] NSWSC 1362: *L v L* [2014] NSWSC 1686 at [60]-[69].

192 The Court's jurisdiction to appoint a receiver and manager is both statutory and inherent. Receivers have long been appointed in exercise, or in aid of an exercise, of the Court's protective jurisdiction: *GNM v ER* [1983] 1 NSWLR 144 at 148C-149D; Theobald, *The Law Relating to Lunacy* (1924), pages 54, 401-403 and 511-513. In *Ex parte Warren* (1805) 10 Ves Jun 622; 32 ER 985 at 986 Lord Eldon regarded as immaterial whether a person appointed to manage the estate of a lunatic was called "committee" or "receiver". As any form of protected estate management order is liable, with a change in circumstances, to be revoked or varied there is a sense in which *all* such orders are "interlocutory", not "final".

Guardianship Orders (Committees of the Person)

193 In the *Guardianship Act* 1987 NSW the expression "guardianship order" accords with that which historically, and upon an exercise of the Court's inherent jurisdiction, is known as an order for the appointment of a "committee of the person": *NSW Trustee and Guardian v Ralph Stern* [2015] NSWSC 2087 at [7]-[9], citing *RH v CAH* (1984) 1 NSWLR 694 and *MN v AN* (1989) 16 NSWLR 525.

194 On closer examination, the expression "guardian" depends very much on the context in which it is used: *IR v AR* [2015] NSWSC 1187 at [105]-[114].

195 In modern usage, it is commonly associated with the guardianship of minors and protection of the person as distinct from the protection of property. However, in earlier times the Court's "guardianship jurisdiction" was regarded as synonymous with its *parens patriae* jurisdiction, including jurisdiction over the appointment and removal of committees of the estate as well as committees of the person: *Tomlins' Law Dictionary* (London, 1810), "Guardian", paragraph [7].

196 In broad terms, according to the practice of the English Lord Chancellor at the time NSW inherited English law and procedure in the 1820s, a committee of the person was perceived to be the equivalent of a "tutor", and a committee of the estate was acquainted with that of "curator", under Roman law: Blackstone, *Commentaries on the Laws of England* (1st edition, 1765-1769; 9th edition, 1783), volume 1, pages 305 and 460.

197 An appointment by the Court of a "committee of the person" is comparatively rare, given the ease with which people can themselves appoint an "enduring guardian" and the ready access that can be had to the Guardianship Division of NCAT for the review of such instruments and/or the appointment of a guardian. The Court's jurisdiction to appoint a committee of the person has generally been invoked to deal with exceptional cases: eg, *IR v AR* [2015] NSWSC 1187 (orders required for extra-territorial operation); *G v G* [2016] NSWSC 511 (urgent orders required to prevent exploitation by overseas

suitors). However, in recent times appointments of the Public Guardian as a committee of the person, acting in concert with the NSW Trustee as a manager of an estate, have become more common.

Tutors

198 Today, in NSW Court proceedings we confine use of the word "tutor" narrowly. Section 3 (1) of the *Civil Procedure Act* 2005 NSW defines the word as follows:

> "**Tutor**, in relation to a person under legal incapacity, means a tutor appointed to represent the person (whether by the Court or otherwise) in accordance with the *Uniform Rules*".

199 Equivalent expressions, sometimes sanctified by legislation and sometimes simply used colloquially, are "next friend" and "guardian *ad litem*".

200 The word "*tutor*" is Latin in origin, associated with the idea of a person protecting, defending, making safe another person. In modern legal language, this essential idea remains central.

Management of "The Person", Management of "The Estate" of a Person Incapable of Self-Management

201 It is customary to speak of the Court making orders affecting "the person" or "the estate" (that is, the property) of a person in need of protection. An order for the appointment of a "committee of the person" (a guardian) and orders authorising the performance of a medical or dental procedure are in the former category. An order for the appointment of a "committee of the estate" (a protected estate manager/financial manager) is in the latter category.

202 The same person may be appointed to manage *the estate* and to care for *the person* of a person in need of protection. However, not uncommonly different people are appointed, on the one hand, to the office of a manager and, on the other hand, to the office of a guardian, using the modern expressions for a committee of the estate and a committee of the person respectively. This might be done to ensure that too much power is not unnecessarily reposed in one person, or as a means of conferring particular functions on particular people

and encouraging cooperation within the community of the person under protection. Thus it may be that a professional manager (such as a licensed trustee company) is appointed to manage an estate, including the protected person's residence, and a member of family is appointed guardian for limited purposes that include decisions about where the protected person may live and what medical or dental treatment the protected person is to receive.

Selection of a Protected Estate Manager or Guardian

203 If there is need of a manager or guardian, and no other person is available for appointment to those offices, the NSW Trustee (constituted by the *NSW Trustee and Guardian Act* 2009 NSW) and the Public Guardian (governed by the *Guardianship Act* 1987 NSW) are available as appointees "of the last resort". Whereas other appointees cannot, according to convention, be appointed without their consent, the NSW Trustee and the Public Guardian (as public officers) can, in practice, be appointed without their consent.

204 In a contemporary setting, an endeavour is made to facilitate the appointment of private managers and guardians where that is the preference of an incapable person's family: *M v M* [2013] NSWSC 1495 at [24]-[29] and [39]-[48]; *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [30]-[32]. Those endeavours mirror encouragement given to everybody to prepare for the future by execution of an enduring power of attorney (governed by the *Powers of Attorney Act* 2003 NSW) and an instrument for the appointment of an enduring guardian (governed by the *Guardianship Act* 1987).

205 It is not the practice of the Court to appoint a private corporation as a protected estate manager unless the corporation is a licensed trustee company (governed by the *Trustee Companies Act* 1964 NSW and Chapter 5D of the *Corporations Act* 2001 Cth) or, as happens less frequently, the Court has the benefit of a report from the NSW Trustee of the type contemplated by *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [290](m) bearing upon the corporation's suitability for appointment.

206 Where a corporation has been appointed to manage a protected estate and there has been a substantial change in the ownership, management structure or mode of operation of the corporation, bearing upon the capacity of the corporation to manage the estate or the means by which the estate might be managed, a protected person and his or her family and carers can reasonably expect to be allowed an opportunity to consider for themselves whether the change is in the best interests, and for the benefit, of the protected person; a corporate manager cannot, by a restructure, force a protected person, without redress, to submit to the restructure: *Re LSC and GC* [2016] NSWSC 1896 at [41]; *SLJ v RTJ* [2017] NSWSC 137 at [26]; *Re KT and JC, Protected Persons* [2025] NSWSC 306.

207 No protected estate manager has an *entitlement* to remain in office. There is no property or similar right to remain in that office. All managers are liable to removal and replacement whenever it may appear to be in the interests, and for the benefit, of the protected person that there be a change: *Re X* [2016] NSWSC 275 at [36]-[37]; *Re KT and JC, Protected Persons* [2025] NSWSC 306.

The State's Administrative Regime for Protective Cases

208 The Court's "inherent jurisdiction", extremely broad and incapable of exhaustive definition, is generally reserved for dealing with exceptional cases (*Re Eve* [1986] 2 SCR 388 at 411; 31 DLR (4th) 1 at 17; *Re Victoria* ['2002) NSWSC 647; 29 Fam LR 157 at [37] - [40]; *Re Frieda and Jeffrey* [2009] NSWSC 133; 40 Fam LR 608), and in aid of statutory courts and tribunals (*Re B (No 1)* [2011] NSWSC 1075 at [58]-[60]; *P v NSW Trustee & Guardian* [2015] NSWSC 579 at [116]; *IR v AR* [2015] NSWSC 1187 at [115]-[117]), especially where protective jurisdiction is conferred by statute on a specialist court or tribunal.

209 This predisposition towards restraint is generally manifested in dismissal of applications for an exercise of inherent jurisdiction calculated to circumvent a statutory appeal procedure. However, it can also be found in the Court's reluctance to appoint a protected estate manager prior to the final determination

of common law personal injury proceedings in which the case of a claimant for damages is proceeding in an orderly way, *via* a tutor acting on behalf of the claimant, under the control of the court entertaining the claim: *Re W and L (Parameters of protected estate management orders)* [2014] NSWSC 1106 at [48]; *H v H* [2015] NSWSC 837 at [6]-[18]; *MKH v JBH* [2016] NSWSC 1031 at [14]-[18].

210 Protected estate management orders, if made, have the effect, *prima facie*, of suspending the authority of a tutor to conduct compensation proceedings: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [38] *et seq*; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [40]-[49]; *MKH v JBH* [2016] NSWSC 1031 at [13]. The court hearing a compensation claim is generally better placed to supervise the conduct of a claimant's tutor, on terms fairer to both parties to the claim, in adversarial proceedings, than is the Court, exercising protective jurisdiction, at a distance, in what may effectively be *ex-parte* proceedings.

211 Much of the work formerly performed by the Supreme Court in the exercise of its protective jurisdiction is now performed by NCAT's Guardianship Division. It routinely deals with the making and revocation of financial management orders and guardianship orders, the granting of medical consents and reviews of enduring powers of attorney and enduring guardianship appointments. It does not, however, have power to authorise, or permit, a financial manager to claim remuneration (*Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245); to supervise tutors in court proceedings (*Civil Procedure Act* 2005 NSW, section 80; *Re P* [2006) NSWSC 1082; *Bobolas v Waverley Council* [2012) NSWCA 126 at [58] and [60]); or to order that money paid into court pursuant to a judgment for the recovery of personal injury compensation be paid out (*Civil Procedure Act* 2005, sections 75-79; *Dunning v NSW Trustee & Guardian* [2015] NSWSC 2095).

212 The NSW Trustee manages some protected estates, and supervises all protected estates, subject to directions of the Supreme Court: *NSW Trustee and Guardian Act* 2009 NSW, chapter 4. It is the statutory successor to the

Protective Commissioner, the successor in turn to the Court's Master in Lunacy. Unlike its predecessors, the NSW Trustee is not an officer of the Court. Nevertheless, the Court regularly looks to the NSW Trustee to provide assistance, including executive services, in its exercise of protective jurisdiction: *M v M* [2013] NSWSC 1495 at [10] *et seq.*

213 Historically, the Court's protective jurisdiction is based upon delegations by the Crown to the Lord Chancellor of jurisdiction protective of those deemed incapable of self-management: idiots or natural fools, lunatics, others of "unsound mind" and infants. These days, we think not of the *Crown's* protective functions, but the *State's*.

214 The efficacy of administration of the State's legal system for the protection of those in need of protection depends, in large part, on adoption by the Court of practice conventions in exercise of the jurisdiction it enjoys as a superior court. Reserving all its powers for cases in which they may be needed, the practice of the Court is to exercise purposeful restraint in deployment of its inherent jurisdiction, with the object of facilitating the work of statutory courts and tribunals, and channelling appeals from those courts and tribunals through the regulatory framework for which their governing legislation specifically provides.

215 The work of the Court in its administration of protective jurisdiction is, and must be, integrated with that of the statutory courts, tribunals and authorities which bear the heavy burden of the routine cases: in the finding of facts, in the making and revocation of orders, and in the day-to-day management of the "person" and "estates" of individuals in need of protection.

Supervisory Jurisdiction Over "Tutors"

216 No less important than the Supreme Court's general protective jurisdiction is the ability of each court governed by the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW to regulate, *via* tutors, proceedings before the particular court in which a party to the proceedings is under a legal incapacity: CPA section 3 (definition of "person under legal

incapacity") and Part 6 Division 4 (sections 74-80); *UCPR* Part 7 Division 4 (rules 7.13-7.18).

217 These powers are protective in character (*Rappard v Williams* [2013] NSWSC 1279), if only by analogy; but the Supreme Court's inherent jurisdiction extends, in any event, to the appointment (and removal) of a tutor for the purpose of proceedings in any court or tribunal: *Re P* [2006] NSWSC 1082 at [8]; *Bobolas v Waverley Council* [2012] NSWCA 126 at [58] and [60]. Section 80 of the *Civil Procedure Act* 2005 NSW also empowers the Supreme Court, on the application of a tutor, to give directions with respect to the tutor's conduct of proceedings, whether the proceedings be in the Supreme Court or some other court.

218 In exercise of its powers, the Supreme Court endeavours to be mindful not to interfere with the conduct of proceedings in other courts: eg, *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [37]-[53] *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [40]-[49]; *MKH v JBH* [2016] NSWSC 1031.

219 When, upon settlement of a claim for compensation on behalf of a person under legal incapacity or otherwise incapable of managing his or her affairs, the Court is called upon to approve the settlement pursuant to section 76 of the *Civil Procedure Act*, the jurisdiction exercised by the Court is protective in nature, akin to the Court's inherent protective jurisdiction: *Fairhurst (bht NSW Trustee and Guardian) v Fairhurst* [2012] NSWSC 388 at [30]-[40]; *Institoris by his next friend Maria Institoris v Falcolner* [2012] NSWCA 298 at [2].

Consequences of the Jurisdiction's Purposive Character

220 That the purposive character of the protective jurisdiction may require adaptation in different circumstances may be illustrated by reference to the need to accommodate public safety in the formulation of legislation governing work with forensic patients: *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [116]-[211].

221 The purposive character of the protective jurisdiction nevertheless carries procedural consequences which mark out an exercise of protective jurisdiction as different from what is routinely experienced in ordinary, adversarial proceedings on a claim of right at common law.

222 Without pretending to be exhaustive, several illustrations are noted.

223 First, the protective jurisdiction is not a "consent jurisdiction". Orders cannot be made simply "by consent" of parties. For example, an order for the appointment, removal or replacement of a particular manager is not to be made merely because a party, or some other person, seeks it, consents to it or acquiesces in it: *JJK v APK* (1986) *Australian Torts Reports* 80-042 at 67, 881 (first guideline). The Court is bound to exercise an independent judgement because of the public interest element in the decision to be made and the possibility, if not the fact, that the person in need of protection lacks the mental capacity requisite to informed decision-making.

224 Secondly, by its nature the protective jurisdiction has a strong administrative flavour. Historically, the origins of the jurisdiction are found in delegations from the Crown to the Lord Chancellor, and much of the Lord Chancellor's work was necessarily performed by his delegates or administrative staff: HS Theobald, *The Law Relating to Lunacy* (1924), page 61; Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots and Persons Of Unsound Mind* (London, 1833), pages 25-27. The work of the Supreme Court, as the local repository of jurisdiction historically exercised by the Lord Chancellor in England, cannot, functionally, be entirely separated from executive government in one form or another. In a practical sense, an exercise of protective jurisdiction often requires that the Court be afforded assistance by the NSW Trustee as well as the Court's Registry. The Court's powers under the *NSW Trustee and Guardian Act* include (in sections 61 and 64) powers to give directions to the NSW Trustee: for example, to provide to the Court a report on particular questions.

225 Thirdly, whereas standing to sue on a common law claim depends upon the claimant's possession of a cause of action, even a stranger may apply for the appointment or revocation of protected estate management orders. In protective proceedings, the question of standing ultimately returns to the rationale for the protective jurisdiction itself (the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection): *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [92].

226 Fourthly, because a protected person may lack the mental capacity requisite to informed decision-making and, in that sense, may be "absent" from any deliberations of the Court, and because of the public interest element in the process of decision-making of the Court, protective proceedings may be more inquisitorial than adversarial in character.

227 The protective jurisdiction is classically said to be "parental and protective", "for the benefit of [the person in need of protection]" and "directed to administration [of the affairs of such a person] without strife in the simplest and least expensive way" rather than "to litigation": Theobald, *The Law relating to Lunacy* (1924) pages 380 and 383.

228 The focus is on problem solving, from the perspective of the person in need of protection, rather than on adjudication of competing claims made by adversaries. This is graphically illustrated, in many cases, by a tendency on the part of the family of an incapable person to be passionate about the affairs of the incapable family member until such time as they are put on notice that they may have an exposure to personal costs orders or, contrary to their wishes, an independent manager or guardian might be appointed. Sometimes reasonable solutions emerge only when self-interest and altruism are forced to make choices.

229 Because the Court's focus is on "problem solving" governed by its purposive jurisdiction, it may be required to be more attentive to outcomes than it is required to be in ordinary civil proceedings between fully competent

adversaries. There is a purpose-driven concern about outcomes, and a special need to have regard to the utility, or otherwise, of proposed orders.

230 Fifthly, in exercising its protective jurisdiction the Court is not necessarily bound by strict rules of evidence, but has a discretion to act on material which is rationally probative, even though excluded by such rules; the Court is able to proceed upon consideration of what is rationally probative of material facts, with due regard to considerations of fairness *vis-a-vis* affected parties: Theobald, *The Law Relating to Lunacy* (1924), pages 59-60; *Roberts v Balancio* (1987) 8 NSWLR 436; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [7]. The operation of the Court's protective jurisdiction might usefully be informed by the rules of evidence as a counsel of good practice, or procedural fairness, but the paramountcy principle, fundamental to the operation of the protective jurisdiction, prevails, where it must, over technical rules of evidence.

231 Sixthly, if an unqualified application of the principles of natural justice would frustrate the purpose for which the protective jurisdiction exists, an application of those principles may be qualified to that extent: *J v Lieschke* (1987) 162 CLR 447 at 457.

232 Seventhly, upon an exercise of protective jurisdiction, the mere fact that a person is incapable of managing his or her own affairs is insufficient to compel the Court to make an order for protected estate management, or to sustain the continuation of such an order, absent a need for, or utility in, the existence of such a manager: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42]. Questions of utility loom large in the determination of protective proceedings.

EQUITY AND PROBATE JURISDICTION

Challenges

233 Equity's challenge at its intersection with the probate jurisdiction is both perennial and novel.

234 The perennial challenge of the equity jurisdiction is to maintain standards of conduct essential to the due administration of the law of succession in holding executors, administrators and trustees (fiduciaries) to account in the recovery, administration and distribution of an estate.

235 A novel challenge of the equity jurisdiction is crystallised in the question (obliquely raised by the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63]) whether equitable principles governing "undue influence" have any role to play in determining the validity, or operation, of a will.

236 The novelty of that question arises because the orthodox negative answer to the question was formulated at a time, and in a social setting, that did not have to deal with complexities associated with exploitation of vulnerable persons through the execution and deployment of enduring powers of attorney, enduring guardianship appointments and wills as a suite of documents.

237 Another challenge for the equity jurisdiction, with both a perennial and a novel flavour, is how to accommodate testamentary "promises" made *inter vivos* and the operation of a will administered in probate after death through the medium of estoppel by encouragement.

Introduction

238 An appreciation of the challenges of equity at its intersection with the probate jurisdiction requires familiarity with the general law governing "wills and estates", more particularly, probate law and practice and the administration of a deceased estate.

239 The profound influence of the equity jurisdiction on the probate jurisdiction (reaching back to the time when the probate jurisdiction was administered in England by "Church Courts" and known as the "Ecclesiastical Jurisdiction") is largely lost to view because it has moulded the office of an "executor" or "administrator" in line with recognition of each of those offices as fiduciary in character with accountability, according to equity practice and procedure, attaching to each office.

240 Nevertheless, there are fundamental differences between the probate jurisdiction and other branches of the Court's jurisdiction which reflect the particular purpose of each jurisdiction.

241 An understanding of that requires an understanding of the probate jurisdiction's distinctive, traditional approach to "practice and procedure".

242 One of the most fundamental of ideas that distinguishes probate proceedings from other types of proceedings is that, in probate proceedings, the Court may be required to go in search of parties and may bind a non-party to a decision concerning an entitlement to property, an object of the law being to settle rights to property.

243 The common law concept of parties (namely, that only persons named as a party in proceedings are bound by a determination of the proceedings) is a product of the types of "causes of action" (competing claims of right) litigated *via* the traditional common law mode of trial by jury. Upon an exercise of equity jurisdiction (principally in the determination of rights concerning property) the Court has an inherent jurisdiction to make orders for the representation of an absent party, including a person as yet unborn.

244 The distinctive nature of an exercise of probate jurisdiction is that an absent party may be bound, without any order of the Court, if given notice of pending proceedings and a reasonable opportunity to intervene: *Osborne v Smith* (1960) 105 CLR 153 at 158-159. Supervising the regular service of a "Notice of Proceedings" (traditionally called a "citation to see proceedings") on persons

who may have an interest in the outcome of proceedings is a function of the Court in probate proceedings.

245 In standard common law and equity proceedings parties present themselves to the Court with a "cause of action" (commonly thought these days to include a common law cause of action, an "equity" justifying the Court's intervention in civil affairs or a statutory entitlement) against named persons based upon allegations of fact. Although parties might apply to the Court for interlocutory relief in the nature of discovery, interrogatories and the like, there is generally no need for the Court to go in search of parties or the subject matter of proceedings. Nor is the Court customarily concerned, beyond case management considerations, to intervene in the conduct of proceedings by adversarial parties. On the whole, all affected parties are before the Court and able, or at least required, to protect their own interests, often best known to themselves.

246 Probate proceedings (in common, more or less, with other forms of estate administration proceedings) are different. In the earliest stage of probate proceedings, and sometimes at later stages as well, the Court must actively supervise arrangements designed to go in search of an absent central player (a person deceased or presumed to be deceased), his or her property, statements of his or her testamentary intentions (if any), his or her named beneficiaries (if any) and personal relationships which may bear upon selection of a person (an executor or administrator) to manage his or her affairs, disposal of his or her body, collection and management of his or her property, identification and payment of his or her debts, realisation of his or her property and accounting for administration of his or her estate. Even though interested persons may be left to protect their own interests, the Court's procedures provide a framework within which an estate is to be administered and claims on an estate determined in an orderly way.

247 In the course of administration of a deceased estate there may be an intersection between the operation of the Court's probate and equity jurisdictions. Three common examples are: (a) confusion about the meaning

of the expression “undue influence” in probate law; (b) the possibility that the assets of an estate include a right to recover property or compensation arising from a breach of fiduciary obligations by an attorney, carer or relative of the deceased during the lifetime of the deceased; and (c) recognition that the office of an executor, administrator or trustee of a deceased estate is a fiduciary one.

248 The office of an executor, administrator or trustee of a deceased estate is inherently that of a fiduciary. Accordingly, as a general proposition, it may be said that such an officeholder may have a liability to account to the estate of the deceased for any benefit obtained or received by the officeholder in circumstances in which there existed a conflict of personal interest and fiduciary duty or the officeholder obtained or received a benefit by reason of or by use of his, her or its fiduciary position or of an opportunity or knowledge resulting from it: *Chan v Zacharia* (1984) 154 CLR 178 at 198-199.

249 As a fiduciary office, the office of an executor, administrator or trustee is a gratuitous one. Such an officer cannot, for example, receive or retain remuneration for services rendered without either:- (a) express authorisation by a testator or all interested beneficiaries; (b) statutory authority; or (c) a court order: *Re Estate Gowing; Application for Executors’ Commission* [2014] NSWSC 247.

First Steps In Preparation of a Probate Case

250 In probate proceedings an initial, key step in any decision making, problem solving process is generally to identify:

(a) the central personality (the deceased or a missing person presumed deceased) through whose lens the world must be viewed;

(b) the nature and value of the “estate” (property) to which that key personality is, may be, or has been entitled and which may have a bearing upon administration of his or her deceased estate;

(c) the existence or otherwise of any and all legal instruments that may govern, or effect, the disposition or management of property of the central personality: eg, a will, statutory intestacy provisions, an enduring power of attorney, an enduring guardianship appointment, a financial management order, a guardianship order, or a death benefit nomination pursuant to a superannuation policy;

(d) the full range of persons whose "interest" may be affected by any decisions made. (As has been noted, probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings);

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration; and

(f) whether any (and, if so, what) steps need to be taken to ensure that all "interested persons" are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

Phases in the Administration of a Deceased Estate

251 The administration of an estate upon an exercise of probate jurisdiction ordinarily involves, conceptually, at least three phases (not mutually exclusive):

(a) a first, "establishment" phase involves the identification of estate property, identification of any testamentary instrument of the deceased, and identification of all persons who may be interested in the estate, as well as ancillary steps relating to the publication, and service, of notice of proceedings;

(b) a second, “management” phase generally involves a process of bringing estate property under control of an estate representative (an executor or administrator) realising assets, paying debts and readying the estate for distribution; and

(c) a third, “accounting” phase involves the estate representative in accounting to beneficiaries (and, if need be, the Court) for administration of the estate; as an ancillary part of the accounting process, making any claim for “commission” (remuneration) that might be made; and effecting a distribution of the estate to beneficiaries.

252 Identification of these “phases” is intended only as an aid to understanding different factors that may bear upon different aspects of estate administration. It is not suggested that all estates are administered by reference to a consecutive sequence of formal stages.

253 Because, in a practical sense, a deceased estate is, or may be, administered under the control of the Court, litigation can, and often does, arise in each of the three phases of estate administration. Nevertheless, much of the litigation encountered (at least in the second and third phases) is, as is traditionally the case in equity proceedings, administrative in character. That means that it is amenable to presentation to the Court in a form which enables a judge, upon being satisfied of particular factors, to make orders “as of course”.

254 In terms of contested proceedings, the first phase is perhaps the most prominent because it requires the parameters of estate administration to be determined, often with all the paraphernalia of pleadings and adversarial debate, although the distinction between a grant of probate in common form and a grant of probate in solemn form points to the fact that much of the Court’s probate work is non-contentious.

255 The second phase might be more likely, characteristically, to involve applications to the Court for judicial advice; directions, including a Benjamin

order (named after *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723) or the like; or, perhaps, a contested construction suit. For an exposition of the law, and practice, relating to an application for judicial advice, see the paper (presented by me on 19 November 2021) entitled "An Application for Judicial Advice: Text, Context and Functional Purpose" published on the NSW Supreme Court website.

256 Proceedings of this character illustrate different perspectives of estate administration proceedings. Some proceedings are best viewed as requiring the Court to make a management decision. Other proceedings are best viewed as requiring the Court to make a determination as between competing claims of right. A Benjamin order and judicial advice (each of which may be expressed in terms that an executor or trustee would be "justified" in the administration of an estate on a particular basis or "at liberty" to do so) are forms of Court order designed to protect an executor or trustee from personal liability if an estate is administered in accordance with the Court's orders. They are not designed as a means of determining contested rights such as might be determined on a construction suit in which competing claims might be the subject of adjudication. They are a management tool.

257 The third phase is often dealt with administratively by a registrar, subject to an application for review being made to a judge.

258 The idiosyncratic nature of probate proceedings is on show in each of the three phases of estate administration, but the most idiosyncratic is the (first) establishment phase.

The Establishment Phase and Peculiarities of Probate Law and Practice

259 In the establishment phase practitioners often have to confront peculiarities of probate practice and procedure relating to:

(a) lodgement of a "caveat" and applications to the Court for an order that a caveat "cease to be in force": eg, *Probate and Administration Act* 1898 NSW, sections 144-148; *Supreme Court*

Rules 1970 NSW, Pt 78, rules 66-74; *Estate of Katalinic* [2020] NSWSC 805; *Estate of Linworth* [2021] NSWSC 334; *Re Estate Capelin* [2022] NSWSC 236; 107 NSWLR 461.

(b) the availability or otherwise of procedures for the timely disclosure of information: *Re Estates of Brooker-Pain and Soulos* [2019] NSWSC 871.

(c) the operation of principles relating to the "formal" and "essential" validity of a will, including:

(i) the statutory requirements for due execution of a valid "formal" will (eg, *Succession Ac*t 2006 NSW, Chapter 2, Part 2.1, especially sections 4-7 and 9-10).

(ii) statutory requirements for admission of an "informal" will to probate (eg, *Succession Act* 2006, section 8);

(iii) general law principles, both substantive and adjectival.

(d) the service of notice of proceedings on persons who are, or may be, interested in the outcome of proceedings on an application for a grant in order to bind them to that outcome whether joined as a party or not.

(e) a form of pleadings more akin to old style "issue" pleadings at common law than to the equity style of pleading a narrative of facts which is now used in most civil proceedings.

260 Implicit in these procedural peculiarities are a number of particular features of probate law and practice.

261 First, probate litigation is "interest litigation". A party must have an interest in proceedings in the sense that its rights (usually, but not necessarily property rights) will, or may, be affected by the outcome: *Nobarani v Mariconte* (2018)

265 CLR 236 at [49]; *Gardiner v Hughes* (2017) 54 VR 394; *Gertsch v Roberts; the Estate of Gertsch* (1993) 35 NSWLR 631.

262 Secondly, a grant of probate or administration is both an order of the court and an instrument of title to property forming part of the estate of the deceased person in respect of whom a grant is made: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233].

263 As an order of a court the object of which is to facilitate the due administration of a deceased estate a grant is liable, if the due administration of an estate so requires, to be revoked (if, for example, a new will is discovered or an executor or administrator fails to administer an estate).

264 The idiosyncratic character of the probate jurisdiction manifests itself in the terminology used to describe it. For those unfamiliar with the jurisdiction it can be demystified, to some extent at least, by recognition of parallel concepts in other areas of the law (principally the equity jurisdiction) to which different labels attach.

265 Probate lawyers speak of "administration" of an "estate", meaning simply "management" of "property". A "grant of administration" is the generic description of a "grant of probate" (of a will) or a "grant of letters of administration" (in respect of an intestate estate or in relation to a testate estate where a grant is made to a person not named as an executor in a will admitted to probate).

266 The Court can, and does, make interlocutory orders for the appointment of a "receiver and manager" (an office generally associated with an exercise of equity jurisdiction) pending the determination of a dispute; but, more often than not, upon an exercise of probate jurisdiction it appoints a "special administrator" (that is, it makes a grant of special administration; a grant expressed to be limited in time, scope or purpose) to do the same work. A practical difference between the two types of procedure is that an undertaking as to damages is

routinely required as a condition for the appointment of a receiver and manager, but rarely required as a precondition for a special grant of administration.

267 Orders for the appointment of a special administrator can be particularly opaque because they have commonly been made by reference to traditional Latin tags without express articulation of the powers of "the administrator" (the equivalent of a receiver and manager). For an exposition of the law, and practice, relating to special grants of administration, see the paper (presented by me on 31 August 2019) entitled "The Concept of 'Special' Administration of a Deceased Estate" published on the Supreme Court website.

268 Orders for the appointment of a "special" or "interim" or "independent" administrator (all descriptions in use) reflect the fact that an order for administration can be made generally (for administration of an intestate estate), "with the will annexed" (for administration of an estate by somebody other than an executor named in a will) or otherwise limited in time, scope or purpose according to the business to be done by the administrator.

269 The prevalence of the word "grant" in the formulation of orders made, upon an exercise of probate jurisdiction, for the administration (management) of an estate (property) reflects the preoccupation of the jurisdiction with property.

Not All Probate Business is "Contentious", Most is Not

270 An appreciation that the Court's focus is upon "due administration of an estate" (the proper management of property) is essential to an understanding of the probate jurisdiction. Parties to "contentious" probate proceedings tend to view the proceedings as adversarial in character, as a contest between competing claims of right, even though proceedings are directed to identification of the testamentary intentions of a deceased person, absent and sometimes forgotten. The public interest involved in the Court's ascertaining, and giving effect, to the testamentary intentions of a deceased person (by definition, a person absent from the bar table) is an impediment to a simple characterisation of probate proceedings as adversarial.

271 Probate law and practice is marked by the fact that most probate proceedings are “non-contentious” and dealt with administratively, in chambers, by a registrar. “Contentious” probate business is generally dealt with by a judge (or, sometimes, a registrar) in open court after allowing competing parties an opportunity to be heard.

272 The fact that the probate jurisdiction must accommodate both contentious and non contentious business may inform debate about the role of “presumptions” in the analysis of the validity of a will.

273 A loose illustration of the distinction between “contentious” and “non contentious” business is found in the two, alternative forms of grant that can be made when a will is admitted to probate.

Grants of Probate in “Common” and “Solemn” Form

274 A grant of probate “in common form” can be made with comparatively little formality, where the Court is satisfied that it is appropriate to do so, without insisting upon notice of proceedings for a grant to be served personally on all persons who might have an interest in opposing the admission of a will to probate. A common form grant is sometimes likened to an interlocutory order, liable to be revoked (set aside) on the application of a person with a sufficient interest to do so. An application for a common form of grant is commonly dealt with by the Court as “non contentious” business.

275 A grant of probate “in solemn form” is generally made only after a contest preceded by personal service of notice of an application for a grant upon all persons who might have an interest in opposing the application, allowing them a reasonable opportunity to intervene in proceedings on the application. Because of this precondition of service of notice, a grant of probate in solemn form is not as readily liable to be revoked as a grant in common form.

276 If a judge orders that a will be admitted to probate in solemn form the grant issued by the registry will ordinarily bear an endorsement to that effect. However, the absence of the words “in solemn form” on a grant is not

necessarily indicative of a grant in common form: *Mortimer v David*; *Estate Dawn Audrey Day*, *Deceased* [2005] NSWSC 1166 at [28]. A grant made, on notice to all interested persons, after hearing evidence bearing on the validity of a will, may aptly be described as a grant "in solemn form" notwithstanding the absence of those words in the instrument of grant. The difference between common and solemn form grants is more than merely formulaic.

277 As explained in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249], a grant of probate expressly issued in "solemn form" is a judicial statement that, on the Court's then assessment:

(a) all persons interested in the making of a grant (and, particularly, those with an interest adverse to the making of a grant) have been joined in proceedings as a party, or given notice of proceedings, leading to the grant and thereby allowed a fair opportunity to be heard, with a consequence that principles about the desirability of finality in the conduct of litigation should weigh heavily on any application for revocation of the grant;

(b) on evidence then formally noticed, the Court is satisfied that the particular grant represents, consistently with the law's requirement that testamentary intentions be expressed formally, an expression of the deceased's last testamentary intentions, if any; and

(c) an order for a grant in solemn form appropriately serves the due administration of justice.

The Ultimate and Subsidiary Questions in Context

278 Statements about the elements of a valid (formal) will have traditionally been framed in terms of "rules" embodying reference to presumptions and the substantive elements. An authoritative statement of the law in those terms can be found in *Tobin v Ezeki*el (2012) 83 NSWLR 757, which also (at [44]) confirms that the ultimate question for the Court in assessment of the validity of a

testamentary instrument is whether it represents the last will of the deceased as a free and capable testator.

279 The nature of a probate presumption needs to be understood, logically, as a "presumption of fact", not a presumption of law and perhaps better understood as an inference of fact drawn from common experience.

280 The utility of probate presumptions is very much diminished as an aid to decision-making by a judge (as is common in the present day, sitting without a jury) who must decide whether a testamentary instrument represents the last will of a free and capable testator having regard to the whole of the evidence adduced at a final hearing.

281 Presumptions were historically more important when the validity of a will was determined by a jury and evidence was adduced orally rather than (as is common in modern practice) by affidavits filed and served before the commencement of a final hearing.

282 Presumptions may nevertheless continue to have practical utility in a Probate Registrar's administrative determination of an application for a common form grant of probate in non contentious business of the Court. A person is presumed to be "sane" in the absence of evidence to the contrary. If a will has been duly executed, and is rational on its face, a testator may be presumed to have had knowledge of its contents and to have approved them.

283 The question whether a document represents the last will of a free and capable testator is conventionally (and logically) analysed by reference to four main, subsidiary questions:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had "testamentary capacity": *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566; *Bailey v Bailey* (1924) 34 CLR 558; *Timbury v Coffee* (1941) 66 CLR 277; *Worth v Clasohm* (1952)

86 CLR 439; *Re Estate of Griffith*; *Easter v Griffith* (1995) 217 ALR 284.

(b) whether the will was made with the testator's "knowledge and approval" of its contents: *Nock v Austin* (1918) 25 CLR 519 at 528; *Tobin v Ezekiel* (2012) 83 NSWLR 757; *Lewis v Lewis* [2021] NSWCA 168.

(c) whether the testator's execution of the will was obtained by an exercise of "undue influence" on the part of an identified individual or individuals: *Winter v Crichton* (1991) 23 NSWLR 116; *Hall v Hall* (1868) LR 1 P&D 481; *Wingrove v Wingrove* (1885) 11 PD 81; *Petrovski v Nasev* [2011] NSWSC 1275 at [269]; *Dickman v Holly* [2013] NSWSC 18; *Estate Rofe* [2021] NSWSC 257.

(d) whether the testator's execution of the will was obtained by the "fraud" of an identified individual or individuals: *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136.

284 These questions, framed as grounds upon which a will is alleged to have been invalid, represent the standard grounds pleaded in defence of a contested application for a grant of probate of a will.

285 They are directed towards an inquiry as to the existence of an *actual* testamentary intention, not the quality or wisdom of that intention or a process by which it may have been formed.

286 This peculiarity of the probate jurisdiction invites four observations.

287 First, although the orthodox view is that equitable principles governing undue influence do not apply to testamentary gifts, the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63] left open the possibility that those principles might yet be held to apply in probate cases. What the High

Court said was *obiter* – but, if confirmed, profound as a means of addressing elder abuse in an environment in which a will is one of a suite of documents (including the "enduring" instruments) able to be leveraged by a wrongdoer in the abuse of a vulnerable person.

288 An exercise of equity jurisdiction is more amenable to upholding standards of conduct than is an exercise of probate jurisdiction.

289 The focus of an exercise of probate jurisdiction is on identification of the state of mind of a testator, not the manner in which that state of mind was formed. An essential point of difference between the probate and equity jurisdictions is that, upon an exercise of equity jurisdiction, the Court can focus on the formation of a testator's state of mind for the purpose of declining to give effect to an instrument execution of which was procured by unconscientious conduct in the particular case. This enables the Court to identify and maintain standards of conduct in a way not open on an orthodox exercise of probate jurisdiction.

290 Conceptually, a determination that a will, or part of a will, is tainted by "undue influence" as understood in equity is not far removed from "trust claims" that are commonly encountered in probate litigation in a focus on identification of estate assets.

291 That equity (taking account of facts extrinsic to a will) may impose a constructive trust upon a beneficiary who cannot in good conscience retain the benefit of a gift in a will is illustrated by the Court's enforcement of a "secret trust": *Voges v Monaghan* (1954) 94 CLR 231 at 240-241, for a discussion of which see Daniel Yazdani, "Secret Trusts: An ancient doctrine in need of reform?" (2015) 23 Australian Property Law Journal 196.

292 In *Schwanke v Alexakis* [2024] NSWCA 118 the NSW Court of Appeal emphatically rejected the proposition that the validity, or operation, of a will can be challenged on equitable principles, including "undue influence" .

293 For commentary on the case, see my paper presented at the STEP NSW Seminar of 20 November 2024 (entitled "Current Issues and Routine Patterns in Estate Litigation, Across Jurisdictional Boundaries and in Social Context") published on the Supreme Court website. For a reflective consideration of "probate undue influence", see Daniel Yazdani, "Testamentary Undue Influence – A Historical Overview" (2023) 53 Australian Bar Review 182."

294 In substance, the Court endorsed the hitherto orthodox approach of Powell J in *Winter v Crichton* (1991) 23 NSWLR 116 that, upon an exercise of probate jurisdiction, "the undue influence which must be shown to avoid [a] will must amount to force or coercion destroying free agency". The Court of Appeal's refusal to follow the High Court's *obiter* was itself *obiter*.

295 In dismissing applications for special leave to appeal, the High Court left open the possibility of a future appellate review of the role of an exercise of equity jurisdiction in relation to the validity or operation of a will if a "suitable vehicle" emerges: *Schwanke v Alexakis* [2024] HCASL 246*; Camilleri v Alexakis* [2024] HCASL 247 (5 September 2024). In doing so it recognised that the question of the role of an exercise of equity jurisdiction is one of "public importance".

296 If the point is to be taken at an appellate level it must first be taken, and distinctly taken, at first instance in order to allow it to be taken on appeal. It is unlikely to be able to be raised for the first time on appeal because a party on the receiving end of an allegation of equity undue influence could plausibly complain that the case would have been run differently at first instance if the allegation were made manifest.

297 A judge at first instance (at least in NSW) is probably obliged to follow the *obiter* of the Court of Appeal in *Schwanke v Alexakis and the orthodoxy* of Powell J rather than the *obiter* in *Bridgewater v Leahy*. In any event, if the point is to be taken on appeal, a party seeking to rely upon *Bridgewater v Leahy* should distinctly allege "equity undue influence" (with or without an allegation of "probate undue influence") and tender evidence (even if it be rejected as irrelevant) in support of a *Bridgewater v Leahy* case.

298 Adversarial prudence may dictate that a case based upon *Bridgewater v Leahy* be presented within the parameters of what was said by the High Court in that case without a scatter-gun reliance upon equitable principles of a broader (albeit similar) nature.

299 Omitting footnotes, the majority of the High Court (Gaudron, Gummow and Kirby JJ) wrote the following in *Bridgewater v Leahy* (1998) 194 CLR 457at [62]-[63]:

> "[62] The position taken by courts of probate has been that to show that a testator did not, by reason of undue influence, know and approve of the contents of the instrument propounded as a testamentary instrument, 'there must be - to sum it up in a word - coercion'. The traditional view, repeated by Sir Frederick Jordan [in *Chapters on Equity in New South Wales*], has been that a court of equity will not, on the ground of undue influence as developed by the Court of Chancery, set aside a grant made by a court of probate.
>
> [63] The approach taken in the probate jurisdiction appears to be concerned with the existence of a testamentary intention rather than the quality of that intention or the means by which it was produced. It is a concern of this latter nature which finds expression in the treatment by equity of dispositions *inter vivos*. In the present litigation, with respect to the dispositions made by the Will, no party submitted that equity might apply or extend its principles respecting undue influence and dispositions *inter vivos*, not to attack a grant of probate itself, but to subject property passing under a will to a trust in favour of the residuary beneficiaries or the next of kin."

300 In practice, many parties (and their lawyers) do not readily grasp the orthodox concept of "probate undue influence" and instinctively conflate it with "equity undue influence". For that reason alone, if an allegation of "equity undue influence" is to be advanced in a probate suit it should be made expressly, articulated precisely and supported by a tender of evidence at every stage of contested proceedings.

301 Secondly, although estate practitioners often plead that the validity of a will should be challenged because of "suspicious circumstances" attending its execution, an allegation of "suspicious circumstances" is not an independent ground of challenge to the validity of a will. Technically, the existence of

"suspicious circumstances" simply operates to displace a presumption of "knowledge and approval" arising from the due execution of a will.

302 That said, some practitioners routinely proceed on the basis that an allegation of suspicious circumstances is a forensic device for highlighting facts which, upon an exercise of equity jurisdiction, would be indicative of "undue influence" bearing upon the process leading to execution of a will. The practical utility of such an allegation may simply be to alert the Court to factors which, in common experience, caution against taking evidence of due execution of a formal will, rational on its face, at face value.

303 Thirdly, the logical purity of the probate concepts of "testamentary capacity" and "knowledge and approval" is sometimes, in practice, evaded by an intuitive evaluative (rather than a consciously clinical) approach to the questions of "testamentary capacity", "knowledge and approval" and "suspicious circumstances".

304 If it continues to be the case that "equitable undue influence" has no role to play in determining the validity, or operation, of a will, the law may develop by a recalibration of, at least, the concepts of "knowledge and approval" and "suspicious circumstances". In *Mekhail v Hanna* [2019] NSWCA 197 at [171]-[172], approved in *Peacock v Knox* [2025] NSWCA 160 at [206], it was said that the limits of the concept of "suspicious circumstances" cannot be regarded as settled. If that be so neither, it seems likely, can the limits of the concept of "knowledge and approval" with which the concept of "suspicious circumstances" is linked. Both concepts may be more elastic than strict logic suggests, all in the service of the ultimate question.

305 Fourthly, in any event, the ultimate focus of the Court must be on whether a will propounded for admission to probate was the last will of a free and capable testator. This should be the first and last question addressed in a probate suit.

Onus of Proof in a Probate Suit

306 The party propounding a testamentary instrument bears the onus (a "legal onus") of proving the ultimate fact that it represents the last will of a free and capable testator, and the subsidiary elements of testamentary capacity and knowledge and approval.

307 A party alleging undue influence or fraud bears the onus (an "evidentiary onus") of proving the allegation as a factor vitiating the testamentary intention of the deceased.

308 This allocation of the burden of proof largely follows the precept that "he who alleges must prove", starting from the proposition that a sane person who duly executes a formal will is likely to have done so deliberately and that, if he or she is alleged to have done so only at the instigation of another person, that must be proved affirmatively by anybody who opposes admission of the will to probate.

The Subsidiary Questions in Detail

309 Conceptually, upon assumptions that, first, the equity jurisdiction has no role to play on a determination of the validity or operation of a will and, secondly, the focus for attention is on a testator's actual intention, not how the intention was formed, the subsidiary questions underlying the question whether a testamentary instrument was the (last) will of a free and capable testator each have a distinct field of operation:

(a) The concept of "testamentary capacity" is directed to whether the testator had the *mental capacity* to make a valid will. That generally requires consideration of a further layer of logical, subsidiary questions considered, in common experience, to bear upon the existence of testamentary capacity: whether, at the time the will was made, the testator understood the nature of a will and its effects; whether he or she understood the extent of the property available for disposition; whether he or she was able to

comprehend and weigh claims on his or her bounty; and whether his or her faculties were materially impaired by a medical condition: *Banks v Goodfellow* (1870) LR 5 QB 549 at 565.

(b) The concept of "knowledge and approval" is directed (upon an assumption of testamentary capacity) to whether the testator truly *knew* the terms of a will and *intended* to give effect to them.

(c) The concept of "undue influence" (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, "influence" is "undue" if it overbears the testator's independent judgement. In probate law, "undue influence" is often described as "coercion"; but that word, standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person's undue influence (coercion) is not the instrument of the testator, but of the other.

(d) The concept of "fraud" (upon an exercise of probate jurisdiction) is directed to whether the testator was *misled* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

310 Most cases in which the validity of a will is challenged focus upon whether the person propounding the will can discharge the onus of proving "testamentary capacity" and "knowledge and approval", noting that (although the two concepts are logically distinct) in practice the boundary line between them often appears to be blurred.

311 Although the *Banks v Goodfellow* test of testamentary capacity has stood the test of time, despite occasional criticism that "medicine" has changed and the law should catch up, an application of the test to the facts of a particular case sometimes invites a reformulation of the test in modern language: eg *Carr v Homersham* [2018] NSWCA 65; 97 NSWLR 328 at [5]-[6]; *Lim v Lim* [2023] NSWCA 84 at [7]-[9].

312 As recently illustrated by *Peacock v Knox* [2025] NSWCA 160 at [188], NSW judges have found insightful the observations of Myers J, writing extra-judicially ("Testamentary Capacity" (1967) 2(2) Australian Bar Gazette 3), who referred to the *Banks v Goodfellow* test as requiring a need for a testator to have the capacity "to remember, to reflect and to reason".

313 The ostensibly logical precision of probate law concepts provides a structured approach to a determination of whether a testamentary instrument was the (last) will of a free and capable testator. However, their application is not a mechanical exercise: *Carr v Homersham* (2018) 97 NSWLR 328 at [6] and [133]-[134]; *Re Estate of Griffith (Dec'd); Easter v Griffith* (1995) 217 ALR 284 at 295-296. Any "tests" they embody are ultimately evaluative in character in the sense that an element of practical wisdom is required in the evaluation of evidence, focusing upon the perspective and personal circumstances of the testator, whose absence from the witness box is a central fact of probate proceedings.

314 Medical evidence may be critical but, in contested proceedings it may not in the final analysis be determinative. A judge is not obliged to accept expert evidence even if it is unchallenged: *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [245]-[247]; *Peacock v Knox* [2025] NSWCA 160 at [94].

315 The evidence of an experienced solicitor of observations made in taking instructions for a will and supervising its execution can be valuable (at least where the solicitor has taken care not to lead a vulnerable person to a particular outcome): *Drivas v Jakopovic* [2019] NSWCA 218; 100 NSWLR 505 at [52]; *Peacock v Knox* [2025] NSWCA 160 at [215].

Standard Form Probate Pleadings

316 The standard form of pleadings in a contested probate suit generally reflects the subsidiary, substantive law concepts, albeit with an appreciation of the importance of probate presumptions.

317 A statement of claim will ordinarily allege that the deceased person died, leaving property in New South Wales, having duly executed a particular instrument as his or her last will.

318 A defence to such a pleading ordinarily denies the validity of the will and, in terms, alleges (in most cases) a want of testamentary capacity and/or a want of knowledge and approval, and (less frequently) an allegation of undue influence or fraud.

319 Customarily, a defence identifies those grounds for opposition to a grant of probate (that is, it identifies an issue) without a narrative form of pleading of facts, but simply setting forth particulars of each ground.

Beware of Distraction by Premature "Accounting" Disputes

320 A trap to be avoided in the establishment phase of contested probate proceedings is the danger of allowing parties to become deflected, in their conduct of the proceedings in an adversarial manner, by concerns about identification of estate assets.

321 Some parties focus such attention on questions of accounting (particularly if there is an allegation that an estate includes property recoverable by reason of a breach of fiduciary obligations by a carer or relative of the deceased during the lifetime of the deceased) without reflecting sufficiently on the fact that, before property may be recovered on behalf of the estate, somebody must be appointed (by the issue of a grant of probate or administration or by the making of a special grant) to represent the estate.

EQUITY AND FAMILY PROVISION JURISDICTION

The Challenge

322 The challenge for the equity jurisdiction at its intersection with the family provision jurisdiction is largely one of how best to manage family provision proceedings without overwhelming them in collateral disputes, often focused on equitable claims for relief in identification of estate property, before the evaluative tasks involved in an exercise of family provision jurisdiction can be performed.

323 Family provision jurisdiction is "a creature of statute", any analysis of it must begin and end by reference to the statute which confers, and governs, the Court's jurisdiction.

324 Family provision legislation is both simple and complex. It generally provides a template for decision making amenable to expression in terms of a checklist of steps to be taken and facts to be consulted. To this extent it is, or may appear to be, simple. However, to an uncommon extent, the text of family provision legislation requires an understanding of the context in which it is to be read and applied.

325 Layers of complexity require an understanding of the jurisprudence and practice attending the general law of succession (including the law of governing wills, intestacies and the administration of deceased estates), the law governing management of the affairs of a person incapable of self-management (including the law governing enduring powers of attorney and financial managers), the law of property (including the law governing co-ownership of property) and the law governing contracts and trusts. The family provision jurisdiction assumes familiarity with the general law, broadly understood.

326 Nevertheless, the starting point for any analysis is the text of the legislation governing the family provision jurisdiction. Complexity enough is embodied in a legislative text that requires "evaluative" reasoning, as well as discretionary

decision-making, not merely findings of primary fact to which established rules of law are applied.

327 An application for a family provision order involves management of property, people and relationships in, or in relation to, administration of the estate of a deceased person. Grounded upon an eligible person's statutory right to apply for a family provision order, it is not otherwise specifically directed towards a determination of a contested claim of right; the family provision jurisdiction is discretionary in character. The reasoning process attending assessment of an application for a family provision order requires an empathetic, but clear-eyed, assessment of personal relationships in a family setting, respectful of the deceased's assessment of those relationships and his or her testamentary intentions.

328 In common understanding, family provision proceedings are concerned with identification of property of a deceased person available for disposition and his or her testamentary intentions; and considerations of "moral duty" on the part of a deceased person to make provision for a plaintiff, any identifiable "need" on the part of the plaintiff for provision, and the weight of competing claims on the bounty of the deceased.

329 This may involve a consideration of the past, the present and, insofar as can be known, the likely course of the future in the lives of persons affected by the proceedings. In a colloquial sense, the Court is called upon, within a strictly limited framework, to manage the affairs of a deceased person in his or her absence.

330 This process of "evaluative" reasoning stands in sharp contrast to that required for the determination of contested rights and obligations in commercial litigation where (unlike in family provision proceedings) the parameters of problem solving are often defined by written instruments, established rules of law governing claims of right and defined disputes of fact.

331 Expressions like “moral duty” and “need” require the Court to place itself in the position of a deceased person, who lived and died within a community, viewing claims on the bounty of the deceased at the time of consideration of an application for a family provision order, a time at which the deceased (by reason of the nature of the jurisdiction) is not available to give evidence, to make submissions or to be heard generally. The Court is required to weigh up competing considerations and to make a rationally expressed judgement which may be essentially intuitive.

332 Although the family provision jurisdiction is statutory, the statutory criteria invite elaboration of guidelines or the like in their application to the facts of the particular case under consideration. However, any attempt at elaboration is at risk of including observations about family relationships liable to be characterised as an impermissible gloss on the statute. There is an inevitability about this that is paradoxical; but central concepts embedded in the legislation (“adequate”, “proper”, “ought” or the like) invite an exercise of intuitive judgement not always amenable to precise articulation, but prone to “error” in a world in which intuitive judgements easily differ.

333 In other areas of the law, judicial consideration of a statute is likely to inform construction of the statute in subsequent cases. That happens in family provision cases as well, but only to an extent. Every so often, general observations about “family”, “relationships”, “moral duty” and “need” (which are difficult to avoid in addressing statutory criteria tend to be disclaimed by an appellate court as a “gloss” on the statute as attention is re-focussed on the text of the statute. It is by this means that the jurisdiction is constantly refreshed and adapted to social change.

334 There is no harm in using common “short word” expressions such as “moral duty” and “need” provided everyone remains conscious of a need to begin, and end, every analysis of a particular case by reference to the text of the governing statute.

335 Despite corrective statements made by judges from time to time, some ideas persist in the minds of those who encounter the family provision jurisdiction. For example:

(a) Although an application for a family provision order is commonly seen by the lay community as "challenging the will" of a deceased person, the criteria to be applied by the Court on the hearing of a family provision application are directed to a determination whether there should be provision made out of an estate, or notional estate, not whether a will should be "set aside" or rewritten in some way. The distinction might not appeal to the lay mind, but it is critically important to correct decision-making.

(b) Contrary to the intuitive belief of many "eligible persons", a deceased person is under no general obligation to treat family members (or, in particular, children) "equally" or "fairly", expressions which can be deceptive in their application depending upon the comparative needs of competing claimants on the deceased's bounty and the provision, if any, made by a deceased person during his or her lifetime for those who may have had claims on his or her bounty.

(c) Despite pleas of judges, many, if not most, lay participants in family provision litigation (and, sadly, many advocates) cannot resist the temptation to canvass longstanding grudges or complaints in presentation of evidence for, or against, an application for a family provision order.

(d) Some plaintiffs (in support of an application for a family provision order) and defendants (in opposition to an application) fail to address the forensic realities of proceedings by persuading themselves that the case for which they contend is a vindication of the deceased's "true" testamentary intentions. Although the deceased is the central personality in family provision

> proceedings, the object of the proceedings is not to vindicate the testamentary intentions of the deceased (actual or presumed) but to consider whether an order can, and should, be made for the plaintiff to receive provision, or further provision, out of the estate, or notional estate, of the deceased. Speaking broadly, whereas probate proceedings are directed to ascertaining, and giving effect, to a testator's testamentary intentions, family provision proceedings are directed to providing a safety net of one description or another for claimants on the bounty of the deceased who, for whatever reason, are (in the judgment of the Court, representing the community) left without "adequate provision for their proper maintenance, education and advancement in life" from resources attributable to the deceased's wealth.

336 A brake on excessive family provision orders may be a perceived need on the part of a Court to respect the views of the deceased in the evaluation of competing claims upon his or her bounty, particularly where the assets amenable to an order are insufficient to satisfy all claims.

337 In the presentation of a family provision claim, parties may best assist the Court by early identification of: (a) the deceased; (b) the age and date of death of the deceased; (c) the operative, and any other known, wills of the deceased; (d) the dates and terms of any grant of probate or administration affecting the estate of the deceased; (e) a family tree depicting personal relationships, with dates of births, deaths and marriages where material; (f) the pool of assets available, or (especially in NSW, if a claim is made for designation of notional estate) potentially available, for the making of a family provision order; (g) a list of "eligible persons", potentially competing applicants for family provision relief; and (h) evidence confirming that all eligible persons have been given due notice of the proceedings. Where (in NSW) an order is sought for designation of property as notional estate, confirmation is required as to the necessity for joinder of affected parties other than an Executor of Administrator.

338 An application for a family provision order is incidental to the administration of a deceased estate. With that in mind, an assessment of a potential application for a family provision order requires a perspective that takes into account factors material to the administration of an estate, including identification of the following:

(a) The central personality (the deceased) through whose lens the world must be viewed.

(b) The nature and value of the estate to which that key personality was entitled at the date of his or her death, including any property that may be recoverable on behalf of the estate where, for example, property has been transferred away from the deceased during his or her lifetime in breach of fiduciary obligations owed to him or her by an attorney or financial manager.

(c) In NSW, the existence or otherwise of any transactions effected by or on behalf of the deceased during his or her lifetime that might support a designation of property as notional estate, and the nature and value of property that might be available for designation as notional estate.

(d) The existence or otherwise of any and all legal instruments (broadly defined) that might govern, or affect, the disposition or management of the deceased person's estate: e.g., a will, an informal will, statutory "intestacy provisions", an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.

(e) The full range of persons whose "interests" may be affected by any decisions to be made:

(i) Family provision litigation is generally an adjunct to, or substitute for, probate litigation; its effective determination

requires all competing interests and persons eligible to apply for relief to be identified and, generally, to be given notice of proceedings on an application for a family provision order.

(ii) Family provision litigation generally requires notice of proceedings to be given to all persons who are, or may be, "eligible persons". It is also predicated upon an expectation that the representative of an estate charged with acting as contradictor to an applicant for a family provision order will consult with known beneficiaries of the deceased's estate.

(iii) This contrasts with, but complements, the approach to notification of interested parties in probate litigation. Probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634; *Estate Kouvakis* [2014] NSWSC 786 at [212].

(iv) If an application for a family provision order is made in proceedings in which an application is also made for a grant of probate or administration, notice of the proceedings will ordinarily be required to be given to all parties interested in the application for a grant of probate or administration as well as those who, as an eligible person, might themselves have standing to apply for a family provision order.

(f) Whether any (and, if so, what) steps need to be taken to preserve the estate under consideration: for example, by an application in probate for an interim grant of administration or by an application for injunctive relief.

(g) Whether any (and, if so, what) steps need to be taken to ensure that all persons required to be notified of the proceedings are in fact notified or to confirm, or dispense with, service of notice of the proceedings on any person.

339 Requirements for the service of notice of proceedings (whether upon an exercise of probate or family provision jurisdiction) is no mere formality. Ultimately, it serves the purpose of ensuring that arrangements for succession to property can be implemented in a way that allows the title to property to pass in an orderly way without unnecessary exposure to successive claims.

CONCLUSION

340 Much of the work of an estate practitioner involves routine, often tedious attention to detail, interspersed with seemingly intractable or novel problems lacking a ready answer.

341 All cases, whether routine or not, benefit from a conceptual understanding of the welfare jurisdiction(s); their different fields of operation; and how they fit together.

342 The equity jurisdiction is the common heritage of Australia's State and Territorial Supreme Courts. It underwrites the protective, probate and family provision jurisdictions, each of which (in pursuit of its particular purpose) operates within administrative arrangements which vary over time and space, relying upon the equity jurisdiction to adapt to those arrangements in maintaining standards in the due administration of justice.

343 Recognition of the purposive nature of the protective, probate, family provision and equity jurisdictions of a Supreme Court, viewed as a whole and both prospectively and retrospectively, is essential if "elder abuse" is to be combated effectively within the court system.

GCL
31 July 2025