SUCCESSION LAW CONFERENCE

ORANGE

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COPING WITH INCAPACITY IN A LEGAL SETTING

by

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INTRODUCTION

1 On an examination of a concept of "incapacity" directed towards "management of (in)capacity for self-management" in a civil law setting, lawyers must have an appreciation of the full spectrum of the "welfare jurisdiction(s)" of the Supreme Court of New South Wales (the protective, probate and family provision jurisdictions, underwritten by the equity jurisdiction) and an understanding of how the several branches of the Court's jurisdiction fit together.

2 Each branch of the Court's 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.

3 Proceedings which involve an exercise of "welfare jurisdiction" are conducted using procedures (sometimes characterised as "inquisitorial") critically different from those deployed (in what is generally regarded as an "adversarial") action between competent adversaries fighting about competing claims of right and associated obligations.

4 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. 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.

CONCEPTUAL CONTEXT

The Paradigm Assumption

5 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*.

6 *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.

7 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

8 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".

9 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.

10 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 under Chapter 3 of the *Succession Act*.

11 *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*.

12 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.

A Lawyer's Challenge

13 A lawyer needs to be familiar with each branch of the Court's "welfare jurisdiction": the protective jurisdiction, the probate jurisdiction and the family provision jurisdiction, each of which is generally underwritten by the equity 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*.

14 *A succession lawyer, in particular, 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 .

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

16 In dealing with a deceased estate (in the context of probate or family provision proceedings, if not protective proceedings abated by death) a lawyer 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 the possibility of designation of "notional estate" in a family provision suit.

LIVING IN AN AGE OF CHANGE

17 In the modern age (commencing in about 1980 and continuing today) the legal framework in Australia for management of the incapacity of an individual for self-management has embraced several “radical” changes.

18 Those changes reflect seismic shifts in Australian society that include an evolution of the concept of “family”, an embrace of transactional personal relationships in a family context, and an acceptance of management regimes (both public and private) within which an ordinary life must be lived.

19 They also reflect changes in needs and expectations in dealing with inter-generational transfers of wealth as an ageing population, living longer, increasingly looks to institutional care (in need of funding); and the next generations anticipate an inheritance that may not be realised within an expected timeframe.

20 This is a particular problem for families (such as farming families) that have combined their efforts, and resources, in a “small business” the operation of which depends on the preservation of capital in which several family members have invested expectations.

21 Changes that have taken place since the 1980s in how we view incapacity, how we manage it and how we deal with the enjoyment of, and succession to, property include the following:

(a) the focus of the legal concept of “(in)capacity” has shifted from a narrow focus on mental capacity to a broader focus on functionality for self-management.

(b) the management of incapacity has been privatised to the extent that individuals have been encouraged, in contemplation of mental incapacity, to execute agency agreements that “endure” in their operation after a loss of mental capacity.

(c) powers of attorney (usually enduring powers of attorney) are routinely expressed as “general” powers, no longer contained by particular

grants of authority limited to defined topics as was once customarily the case.

(d) management of "the estate" and "the person" of a person incapable of self-management has (through financial management orders and guardianship orders) become more frequent through the routine work of administrative tribunals, currently the NSW Civil and Administrative Tribunal ("NCAT") in its Guardianship Division.

(e) a court-authorised will (a "statutory will") enables a will to be made "vicariously" on behalf of a person lacking testamentary capacity.

(f) expressions of testamentary intention are now able to be made informally despite the traditional requirements of a "formal" will;

(g) the family provision jurisdiction has grown exponentially and shifted its focus away from the maintenance of widows and children towards meeting the needs of adult children approaching retirement.

22 *A common feature of these changes is a need for management systems that accommodate the increasing informality that attends a transactional approach to the ordinary business of life*.

23 *The privatisation of the management of the affairs of an incapable person through the deployment, particularly, of enduring powers of attorney has come at a price of endemic financial abuse (particularly, but not only, abuse of the elderly) because of risks inherent in the concept of an enduring power of attorney*.

24 There is inherently a tension between protection of an incapable principal and protection of third parties who deal with an enduring attorney: *Taheri v Vitek* (2014) 87 NSWLR 403; *Estate Tornya* [2020] NSWSC 1230. Problems associated with misuse of enduring powers of attorney ultimately point to a need for the enforcement of standards, essentially through an exercise of the Court's equity jurisdiction (as against an attorney and third parties, as the case may be) and the availability of effective procedures for the enforcement of standards in real time.

STANDARD DOCUMENTS FOR PRIVATE PROTECTIVE MANAGEMENT

25 Lawyers (to whom this paper is primarily directed) are commonly engaged in the provision of services relating to the preparation of a suite of documents executed by a client in anticipation of incapacity and death.

26 The standard documents are an "enduring power of attorney" (governed by the *Powers of Attorney Act* 2003 NSW, with a prescribed form), an "enduring guardianship appointment" (governed by the *Guardianship Act* 1987 NSW, also with a prescribed form) and a will (governed, principally, by the *Succession Act* 2006 NSW).

27 Some people do, and others do not, execute an "advance care directive" of the type considered in *Hunter and New England Area Health Service v A by his tutor T* (2009) 74 NSWLR 88. Anecdotal evidence suggests that some nursing homes require an advance care directive as a condition of admission to residents. There is no prescribed form of advance care directive, but guidance is available on the website of "NSW Health".

28 All going well, an appointment of an enduring attorney and an enduring guardian can allow a principal (with the mental capacity to execute those enduring instruments) to have his or her affairs managed by a trusted, empathetic person with no overt supervision by a regulatory authority in the event that he or she loses capacity.

29 It is no accident that when a person contemplates this comparatively private regime of management of his or her affairs in anticipation of incapacity he or she commonly turns to a member of "family" (however defined) or a close friend. So it is that *when the law engages with such a regime it may also be required to engage with personal relationships, both simple and complex, liable to break down, providing an occasion for an exercise of the protective or equitable jurisdictions of the Supreme Court of NSW. "Financial abuse" often starts at home.*

WHEN THINGS GO WRONG

30 It is when things go wrong, when there is an abuse of power on the part of an enduring attorney or an enduring guardian, that the risks of private appointments in the nature of an enduring power of attorney and an enduring guardianship appointment may be realised, without a *timely* remedy, if any.

31 An application for review of an enduring power of attorney or an enduring guardianship appointment might not be sufficient, in real time, to bring under orderly control management of an estate or the person of a vulnerable person subjected to an abuse of power.

32 An application for review to the NSW Civil and Administrative Tribunal ("NCAT"), in its Guardianship Division, for a financial management order or a guardianship order (with or without an application for review of an "enduring" instrument) might be sufficient in a particular case to prevent a misapplication or dissipation of a vulnerable person's estate. However, although proceedings in NCAT may be the most cost-effective and informal way of proceeding, an application to NCAT takes time to be dealt with and NCAT's procedural (adjectival) powers are not as extensive as those of the Supreme Court.

33 In a case that warrants deployment of the Court's powers (in terms of the immediacy and magnitude of risks of harm to a vulnerable person and his or her estate, and the costs potentially involved) the only practical remedy for a person genuinely interested in the welfare of a vulnerable person may be an application to the Court. Commonly, such an application (made by summons) seeks protective orders (relating to management of an estate or the person of a vulnerable person), injunctions, some form of discovery and an appointment of the NSW Trustee as a receiver and manager (and, perhaps, an independent medical examination) pending the determination of an application (made by reference to section 41 of the *NSW Trustee and Guardian Act* 2009 NSW) for a declaration that the vulnerable person is unable to manage his or her own affairs and orders for protected estate management.

34 In theory, it may be possible to appoint a person other than the NSW Trustee as a receiver and manager of an estate upon an exercise of protective jurisdiction but that possibility lies in uncharted waters. That is because the NSW Trustee has an established capacity to take control of an estate in urgent need of protection and the Court has a standard form of order for the appointment of the NSW Trustee as the receiver and manager of an estate (to paraphrase *JMK v RDC and PTO v WDO* [2013] NSWSC 1362 at [68](5)) "with all the powers and discretions that it would have if management of [the estate of the person in need of protection] were committed to it pursuant to section 41(1)(b) of the NSW *Trustee and Guardian Act* 2009 NSW" (which is to say if financial management of the estate were to be committed to it).

35 The NSW Trustee also has an established, institutional connection with the Public Guardian in the event that the Court sees fit, upon an exercise of its inherent jurisdiction, to appoint the Public Guardian as a "committee of the person".

36 Upon an exercise of its inherent protective jurisdiction the Court may appoint a "committee of the estate" (the equivalent of a "financial manager" appointed by NCAT under the *Guardianship Act* 1987, or a "protected estate manager" appointed by the Court under the *NSW Trustee and Guardian Act* 2009, without engagement of the administrative structure of the *NSW Trustee and Guardian Act* or the supervision of the NSW Trustee pursuant to powers conferred by that Act) or a "committee of the person" (the equivalent of a "guardian" appointed by NCAT under the *Guardianship Act* 1987).

37 In practice, the Public Guardian will accept an appointment as a "committee of the person" with powers articulated in terms similar to those routinely attaching to an appointment of a guardian by NCAT (and defined by the *Guardianship Act* 1987 NSW, section 6E, as standard functions of an enduring guardian): making decisions about residence, health care, personal services and consent to medical or dental treatment,

38 In the ordinary course, there is no occasion to appoint the NSW Trustee as a committee of the estate because it has superior powers if management of a protected estate is committed to it under section 41 of the *NSW Trustee and Guardian Act* or if it is appointed as a receiver and manager by reference to the powers it has under the Act.

39 An exceptional case for the appointment of the NSW Trustee as a committee of the estate might be if such an appointment were to be considered necessary (and compatible with the NSW Trustee and Guardian Act) for the purpose of reinforcing the extra territorial operation of a protected estate management regime.

40 In *IR v AR* [2015] NSWSC 1187 the Public Guardian was confirmed in office as a guardian under a guardianship order made by NCAT, supported by appointment as a committee of the person, on terms designed to facilitate the protected person's travel outside Australia to a jurisdiction with which NSW had no reciprocal arrangements for an exercise of protective jurisdiction.

41 This is an illustration of the adaptability of the Court's inherent jurisdiction, albeit with use of terminology no longer in common usage.

42 *An application for urgent interlocutory relief upon an exercise of protective jurisdiction is commonly made by a member of the family, a "significant other", a close friend or an enduring attorney or an enduring guardian of a person perceived to be in need of protection. An application may be made by a "stranger" (a person who has no social or other connection with a vulnerable person) but may be dismissed as officious if a strong case for an exercise of protective jurisdiction is not made out*.

LOCUS STANDII IN PROTECTIVE PROCEEDINGS

43 Upon an exercise of the Court's protective jurisdiction "standing" is governed by the purposive character of the jurisdiction. The question of standing ultimately focuses upon 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.

44 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: *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].

45 This reflects the public interest, purposive character of the protective jurisdiction and is consistent with the approach 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 Ltd* (2000) 200 CLR 591 at [2], [94], [162] and [211] (*habeas corpus*); *State of New South Wales v Gill* [2024] NSWSC 1263 (disposal of a dead body).

46 *A liberal approach to the question of standing is accompanied by a need to appreciate the importance of timely notice of proceedings being given to all persons who may have a genuine interest in the welfare of the person in need of protection,* not necessarily with a view to their joinder as parties to proceedings but, rather, to facilitate an assessment by the Court of what is required to be done in the interests of the vulnerable person: *W v H* [2014] NSWSC 1696, explaining *Ex Parte Whitbread in the*

Matter of Hinde, A Lunatic (1816) 2 Mer 99; 35 ER 878 (approved by the Court of Appeal in *Protective Commissioner v D* (2004) 60 NSWLR 513 at [152]).

47 *If the NSW Trustee is appointed as the receiver and manager of the estate of a person in need of protection that, in the ordinary course, may bring to an end the formal involvement in the proceedings of the person who applied for the appointment of a receiver and manager. But, commonly, such a person may engage with the NSW Trustee about representation of the vulnerable person in ongoing proceedings and, if a substantial contribution is to be made by the applicant going forward, the Court might entertain in due course an application for costs of the applicant to be paid out of the estate of the vulnerable person*.

CAPACITY FOR SELF-MANAGEMENT IS "FUNCTIONAL"

48 Incapacity for self-management (under the *NSW Trustee and Guardian Act* 2009 and the *Guardianship Act* 1987 and the general law) is a broader concept than "mental incapacity". It is primarily concerned with a person's "functional" capacity to manage his or her own affairs: *David by her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 437-438; *PB v BB* [2013] NSWSC 1228; *CJ v AKJ* [2015] NSWSC 498.

SEARCHING FOR A "GOOD ROOT OF TITLE": WHERE TO BEGIN?

Management of Life, Death and Estate Administration

49 Attention is drawn to a paper of mine published as "A Province of Modern Equity: Management of Life, Death and Estate Administration" (2016) 43 *Australian Bar Review* 9, reproduced without the "postscript" on the website of the Supreme Court of NSW as a speech delivered to the NSW Bar Association on 26 May 2015. It provides a starting point for a reflection on current law and practice.

The Role of "Undue Influence" in a Probate Suit

50 Not much has changed unless, perhaps, the recent judgment of the Court of Appeal in *Schwanke v Alexakis; Camilleri v Alexakis* [2024] NSWCA 118 puts an end to speculation noted in the postscript as arising from *obiter* of the High Court of Australia in *Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63] about the availability of the equitable principles governing undue influence in a challenge to the validity or operation of a will in a probate suit.

51 I suspect that grounds for speculation remain. I say this for reasons explained in paragraphs [172]-[188] of, and an "addendum" comprising paragraphs [196]-[227] to, a paper entitled "Current Issues and Routine Patterns in Estate Litigation, Across Jurisdictional Boundaries and in Social Context" (delivered as a STEP NSW seminar on 20 November 2024, published in the "Speeches" section of the Court's website).

52 The observations of the Court of Appeal in refusing to follow *obiter* of the High Court were themselves *obiter* and the High Court's refusal of special leave to appeal recognised the existence of "a question of law of public importance". The findings of fact made at first instance and in the Court of Appeal rendered the *Alexakis Case* unsuitable as a vehicle for the High Court's determination of the controversial question about the interplay of the probate and equity jurisdictions. Whether, when, and from whence a "suitable vehicle" for a High Court appeal may emerge remains to be seen.

"Assisted (or Supportive)" v "Substitute" Decision-Making

53 A question lingering in the background in NSW, but to the fore of protective estate management in Victoria and Tasmania after legislative changes there (embodied in the *Guardianship and Administration Act* 2019 Vic and the *Guardianship and Administration Act* 1995 TAS as amended), is whether estates under protective management should be managed by reference to a binary distinction between "assisted (or supported) decision-making" and "substitute decision-making", with a detailed protocol for *decision-making* that might be thought to lend itself to administrative review more readily than *management* of an estate or person or a incapacitated person mindful of the paramountcy principle.

54 Without institutional safeguards or a recalibration of the fiduciary obligations of a financial manager (designed to maintain standards) a person in need of protection whose affairs are under a system of protective management governed by statutory rules based upon a perceived binary distinction between "assisted (or supported) decision-making" and "substitute decision-making" might be exposed to as much risk of "financial abuse" as is an incapacitated principal in the hands of an enduring attorney who favours self-interest over fiduciary obligations.

55 This may be so unless both the powers and duties of a financial manager are emphasised in equal measure. *The key to this in a NSW context may be a focus upon the obligation of a financial manager (even if making a decision in "substitution" for a*

protected person) actively to consult both the person, and the interests, of a protected person and, subject to considerations of prudence, to endeavour to do that which the protected person, if capable, would do in like circumstances.

56 Problems with protected estate management are, at the best of times, likely to arise at the tipping point for a manager in saying "yes" or "no" to a proposal of the protected person at the point of intersection between what is prudent and imprudent in terms of risk management. At that point a manager is required to be empathetic, prudent, patient and mindful of the purpose served by protected estate management (including the general principles enunciated in the *NSW Trustee and Guardian Act* 2009, section 39), but a manager must be empowered and capable of saying "no" to an improvident proposal.

57 That said, the practical wisdom required of a competent, independent manager is on display when it is realised that it may be in the best interests of an incapable person that he or she be allowed an opportunity to fail (or to succeed) in pursuit of a favoured proposal.

Advance Care Directives

58 The wisdom of execution of an advance care directive being "required" for the administrative convenience of an institution, in an abstract setting, well in advance of its deployment may be open to doubt. Circumstances may change and, with changed circumstances, the wishes and preferences of a vulnerable person may change.

59 In principle, it may be that an advance care directive offers true guidance, and protection, for an institution or medical practitioner who relies upon it in defence of criticism only if it is contemporary to the time at which it is to be deployed; patently voluntary on the part of the vulnerable person; and executed by the vulnerable person only after he or she has had an opportunity to take disinterested advice from his or her family or significant others.

60 The concept of an advance care directive is ostensibly a long way from the formal procedures prescribed for euthanasia by the *Voluntary Assisted Dying Act* 2022 NSW, but time will tell whether the two concepts have any overlapping operation in practice.

THE NEED FOR AN "OVERVIEW"

61 In dealing with any case that engages, or may engage, any of the "welfare jurisdictions" of the Supreme Court of New South Wales it is important to have an "overview" understanding of how, and why, they all fit together.

62 In this paper I use the expression "welfare jurisdiction" (for want of a better label) as a collective description of the protective, probate and family provision jurisdictions of the Court, underwritten by the Court's equity jurisdiction.

63 As has been noticed, 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.

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

65 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)

66 The purpose for which a jurisdiction of the Court exists generally governs its exercise.

67 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?

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

69 **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.

70 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.

71 **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.

72 The logical, purposive framework of a probate suit, as I perceive it to be, is summarised in *Estate Rofe* [2021] NSWSC 257 at [104]-[166].

73 **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.

74 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.

75 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, making due allowance for current social conditions and standards and, generally, consulting specific statutory criteria so far as they may be material: *Bassett v Bassett* [2021] NSWCA 320 at [170-[171].

76 **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, the *Surrogacy Act* 2010 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.

77 Managerial decision-making is generally associated with categories of jurisdiction routinely exercised in the Supreme Court by judges of the Equity Division ("equity judges") who, as with their predecessors, are accustomed to hear and determine proceedings without a jury.

78 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].

79 A tendency to conceptualise the grounds for an exercise of equity jurisdiction in terms of "rules" akin to a common law "form of action" can be discerned in the majority judgment of the High Court of Australia in *Kramer v Stone* [2024] HCA 48 at [34]-[41], articulating the elements of a claim based "upon an equitable estoppel which arises by

reason of encouragement from a promise", as it happens in a farming context. It should not be forgotten, however, that the touchstone for equity's intervention in the enforcement of a legal right is a finding that strict enforcement of the legal right would, in the circumstances of a particular case, be against good conscience. An example of the role of "conscience" in the case of a claim of "proprietary estoppel" in a farming family's succession planning is the judgment of Ball J in *Wantagong Farms Pty Ltd as Trustee for the Bulle Family Trust v Bulle* [2015] NSWSC 1603.

MANAGEMENT OF THE ESTATE OF A PERSON INCAPABLE OF SELF MANAGEMENT

80 In cases involving administration (that is, management by another name) of the estate of a person who (by reason of incapacity or death) is incapable of self management, a major field of operation for the Court's equity jurisdiction is in the identification of estate assets by an administrator (or manager) authorised to act on behalf of the estate.

81 In this connection, patterns of conduct are commonly noticed as attracting "an equity" (akin to a common law cause of action) in *augmentation* or *depletion* of an estate.

82 The "equitable causes of action" (an heretical term) commonly relied upon to recover property on behalf of an estate, in *augmentation* of the estate, are claims based on an allegation of:

(a) undue influence;

(b) unconscionable conduct;

(c) a breach of fiduciary obligations; and/or

(d) misappropriation (theft).

83 These concepts may be subtly different but, in practice, they may operate together in identification of unconscientious conduct that warrants an equitable remedy at the suit of a person (such as a financial manager of a protected estate or as an executor or administrator of a deceased estate) authorised to represent the estate or to maintain a derivative action on behalf of the estate.

84 **(Equitable) Undue Influence and Unconscionable Conduct**. Undue influence (explained in *Quek v Beggs* (1990) 5 BPR 11,761 at 11,764-11,675, informed particularly by *Johnson v Buttress* (1936) 56 CLR 113 at 134-136) looks to the quality of the consent or assent of the weaker party to a transaction, whilst unconscionable conduct (commonly described by reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 or *Bridgewater v Leahy* (1998) 194 CLR 457 at [75]) looks to the attempted enforcement or retention by a stronger party of the benefit of a dealing with a person under special disadvantage.

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

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

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

88 **A Breach of Fiduciary Obligations.** A fiduciary has a duty of loyalty to his or her principal (sometimes described as a beneficiary) not to place himself or herself in a position of conflict with the principal, nor to obtain a profit or benefit from his or her fiduciary position, without first obtaining the fully informed consent of the principal: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 67-69, 96-97 and 141; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467. Where that duty is breached, the nature of the case will determine the appropriate remedy, moulded to the circumstances of the particular case.

89 **A misappropriation of funds** (a “straight steal”) may attract the principles enunciated in *Black v S. Freedman & Co* (1910) 12 CLR 105 (considered by the NSW Court of Appeal in *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230) in tracing stolen funds into the hands of a volunteer.

90 “Elder abuse” (or, more precisely, “financial abuse”) of a vulnerable person is often associated with abuse of the powers of an enduring attorney or an enduring guardian in a family context. Not uncommonly, an adult child, as the enduring attorney of an incapable parent, attempts to justify self-dealing with property of the parent as an anticipatory inheritance rationalised on the basis that the parent’s needs are less than those of the next generation.

91 Not uncommonly, an intervention of the Court is necessary to recover property of the incapable parent from a greedy son or daughter so as to finance his or her entry into a nursing home.

92 The recognised patterns of conduct giving rise to an entitlement in the party to a declaration that an estate asset is held on trust for that party (thus *diminishing* an estate) are commonly known as "trust claims" based upon principles governing:

(a) a contract to make a will, and not revoke it (*Birmingham v Renfrew* (1937) 57 CLR 666 at 683; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at [31]-[34]);

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

(c) a proprietary estoppel, usually an estoppel by encouragement (*Kramer v Stone* [2024] HCA 48 at [36]-[41]); and

(d) a joint endeavour trust based upon a division of property the subject of a joint endeavour which has failed prematurely and without attributable fault (*Muschinski v Dodds* (1985) 160 CLR 583 at 620; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147-149).

93 A claim based upon an allegation of "proprietary estoppel" 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 personnel representative.

94 *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.

95 *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 under Chapter 3 of the *Succession Act*.

96 The purposive character of the several branches of the Court's welfare jurisdiction may govern not only substantive decisions but also discretionary decisions about costs, as I endeavoured to explain in a paper entitled "*The Dynamics and Dilemmas of Costs Orders Upon an Exercise of Welfare Jurisdiction*", presented to the 2024 Blue Mountains Succession Conference on 7-8 September 2024 and published on the Court's website.

FRAMEWORK FOR CONSIDERATION OF THE CONCEPT OF "(IN)CAPACITY"

97 Interrogation of the concept of "(in)capacity" invites the question of "(in)capacity for what?" and location of that question in an identified context.

98 A core authority that informs Australian law generally in relation to the concept of ("in)capacity" is the judgment of the High Court of Australia in *Gibbons v Wright* (1954) 91 CLR 423 at 437-438 where Dixon CJ and Kitto and Taylor JJ made the observations (here editorially adapted) to the following effect:

> "… The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. …
>
> … [The] mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. … [One] cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and subject-matter of the particular case.

> Ordinarily, the nature of the transaction means in this connection the broad operation, the 'general purpurt' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out. …"

99 The Court's concern for the transactional capacity of each person is both pragmatic and a reflection of a foundational concern for the dignity of each person. That same concern for the dignity of each person is, perhaps, more to the fore when, for example, considering the capacity of a minor to give informed consent to medical treatment (*Marion's Case* (1992) 175 CLR 218 at 237-238, approving *Gillick v West Norfolk* AHA [1986] AC 112). It is also reflected in the legislative criteria for the Court's authorisation of a "statutory will" under the *Succession Act* 2006 NSW, which focus attention on the presumed intention of an incapacitated person.

100 In practice the Court's welfare jurisdictions share common concerns that mark them out, collectively, as different from the jurisdiction exercised by the Court in dealing with ordinary adversarial proceedings between competent parties engaged in a dispute about competing claims of right and associated obligations.

101 Those common concerns relate generally to questions of standing, parties, service of notice of proceedings, representation of absent parties or interests, discovery procedures, and the importance of public interest considerations.

102 Where an "independent administrator" (by whatever name known) is appointed by the Court to administer (manage) an estate (whether in the context of an exercise of protective, probate, family provision or equity jurisdiction) an administrator confronted by conflict with, or between, persons who may have a material interest in a dispute relating to the estate may need to give consideration:

(a) to making to the Court an application for judicial advice (generally pursuant to section 63 of the *Trustee Act* 1925 NSW, rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW or the inherent jurisdiction of the Court): *Macedonian Orthodox Community Church St Petka Inc v His Eminence Peter Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; *Re Estate of Chow Cho-Poon* [2013] NSWSC 844; 10 ASTLR 25; or

(b) in an exceptional case, to inviting a person with a material interest (eg, as a beneficiary) to commence proceedings in the nature of a derivative suit in which that person sues "on behalf of the estate" and bears a risk of costs, joining the administrator as a party, leaving the administrator to submit to the orders of the Court or to act, as the Court may direct, as an *amicus curiae*: *Ramage v Waclaw* (1988) 12 NSWLR 84; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.

103 Where the welfare jurisdictions mark themselves out as different from one another is perhaps clearest in relation to the question of *locus standii*. Each jurisdiction applies principles which reflect the distinctive purposive nature of the jurisdiction.

104 Probate proceedings are sometimes described as "interest proceedings" because, generally, a person must have a proprietary interest in the outcome of a probate suit to be joined in the suit as a party.

105 No such interest is required for participation in protective proceedings or family provision proceedings but neither jurisdiction tolerates officious proceedings.

106 In protective proceedings, the Court might enquire of the social or other connection of a plaintiff with a vulnerable person as a means of gauging whether he or she has a genuine interest in the welfare of the vulnerable person and may assist the Court in protection of a person in need of protection.

107 In family provision proceedings a claimant for a family provision order does not have to be named in a will or have an interest in an estate on intestacy to be an "eligible person" with standing to make a claim, but the criteria for the status of an eligible person (found in section 57 of the Succession Act) implicitly mark out the boundaries of an extended concept of "family".

108 In the conduct of proceedings in the protective, probate and family provision jurisdictions idiosyncratic but common problems concern (in a broad sense) identification of potential participants in the proceedings (not necessarily named as parties), service of notice of proceedings, representation of affected parties and interests, identification of the net assets of the (not wholly present) central personality, and a review of the personal circumstances of that personality (including the existence of competing wills, enduring powers of attorney and enduring guardianship

appointments). Unlike "ordinary" civil proceedings (in which adversarial parties identify themselves and the parameters of a dispute), upon an exercise of the welfare jurisdiction the Court generally must supervise a search for parties, interested persons and the like.

AN ASIDE: The Protective Jurisdiction

109 Much of the work of the Court's protective list is routine, particularly that relating to the appointment of a protective estate manager to manage the estate of a party who has been awarded compensation for a personal injury, and in consideration of an application for the revocation of management orders. That said, interesting problems often arrive at Court unheralded.

110 The Court's jurisdiction and standard orders, together with practice guidance, are the subject of my paper dated 15 March 2017 (entitled "The Incapacitated Plaintiff and Personal Injury Compensation Proceedings") on the Supreme Court website.

111 A recent example of a novel case is *Re An Incapacitated Principal* [2025] NSWSC 89. There an order for rectification was made in respect of an enduring power of attorney after the principal had become mentally incapacitated.

112 A perennial problem with controversial applications for protective orders is that, with emotions charged, parties and their lawyers treat the proceedings as adversarial, insist upon war by affidavits, and expose themselves and the estate of a vulnerable person to excessive costs.

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GCL
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This is a revised version of a paper presented to a Legalwise Seminar on "Succession Law" on 13 March 2025, and a "Wills and Estates" seminar conducted by UNSW Edge on 19 March 2025, under the title, "Reflections on Management of (In)capacity for Self Management (A Work in Progress)".