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WASTE NOT, WANT NOT: RIGHTS AND REMEDIES IN PRESERVATION OF AN ESTATE

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T O P I C S

INTRODUCTION

1 Each of the Common Law, Equity, Probate and Protective jurisdictions of the Supreme Court of NSW provides remedies and procedures to address problems arising from mismanagement of an estate.

2 The focus of this paper is upon remedies and procedures available to address problems arising from mismanagement of the estate of a person who, by reason of incapacity or death, is unable to manage his or her own affairs, necessitating their management by another person.

3 In dealing with estates such as these the Common Law and, particularly, the Equity jurisdiction of the Court provide context in which the Protective and Probate jurisdictions are more often directly engaged. The concept of "management" of an estate is larger than any of these jurisdictions viewed in isolation. Contrasts, especially between management of the estate of an incapacitated person and management of the estate of a deceased person, offer insights into the nature of estate management generally.

4 Under the general law, an "estate" is not a "person" in its own right. It is a bundle of rights in or to property (to which obligations may attach) that must be managed by a legally recognised person, a "manager" by whatever name known. Characteristically, the manager of an estate and the person or persons upon whose behalf estate property is managed are different.

5 It is too simplistic to say that in all cases a "legal estate" vests in the manager and an "equitable estate" resides in a "beneficiary". In the management of a protected estate, for example, the title to property generally remains in the incapable person whose estate is under management; a manager controls an estate but does not own it: *GDR v EKR* [2012] NSWSC 1543 at [36]; *Ability One Financial Management Pty Ltd v JB by his Tutor AB* [2014] NSWSC 245 at [166]-[175]. In the administration of a deceased estate, beneficiaries have only a right to a due administration of the estate until such time as the legal personal representative of the deceased (an executor or administrator) completes executorial duties and, thereafter, holds estate property on trust for the beneficiaries: *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; *Estate Wight* [2013] NSWSC 1229.

6 In the context of an analysis of problems arising from mismanagement of an estate the division between “manager” and “beneficiary” means that attention may be focused upon two (mostly, but not always, distinct) perspectives: one internal, the other external. Internally, a manager is accountable to his or her beneficiaries. Externally, *prima facie*, a manager must represent the estate in dealings with third parties.

7 An analysis of remedies and procedures available to address problems arising from mismanagement of an estate requires (holistically): first, an understanding of the nature and purpose of the different branches of the Court’s jurisdiction; secondly, an understanding of the nature, and duties, of the office of the manager of an estate, by whatever name known; and, thirdly, a consideration of whether “mismanagement” involves: (a) an element of “wilful default” (meaning intentional misconduct, reckless carelessness or gross negligence) on the part of the manager in management of an estate; or (b) an inability, failure or refusal on the part of a manager to pursue or defend a claim on behalf of the estate, necessitating the appointment of another person to represent the estate either generally or in relation to the claim.

8 Cases of “mismanagement” in the first of these two categories (relating to “wilful default”) generally focus upon whether a manager has in some respect or another “wasted” estate assets so as to become liable: (a) in equity, as a fiduciary, to pay compensation or to restore property to the estate; or (b) at least if an executor or administrator of a deceased estate, to pay damages for the commission of the Common Law tort of *devastavit*.

9 Where a manager is, for any reason, unable or unwilling to perform the duties of an office to which he or she has been appointed (the second of the two categories of “mismanagement”, perhaps more accurately described as a breakdown in a management regime) the focus for attention is generally upon whether:

(a) another person should be permitted to represent the estate (either as a representative party in existing proceedings or in a "derivative action" on behalf of the estate); or

(b) the manager should be:

(i) removed from office and replaced in accordance with principles governing the office; or

(ii) displaced by the appointment of a receiver and manager for a particular purpose upon an exercise of Equity jurisdiction or statutory jurisdiction of the type for which section 67 of the *Supreme Court Act* 1970 NSW provides.

10 Not all management problems are the result of "mismanagement". Good management may involve an application being made by a manager to the Court for advice or directions in order to share the burden of decision making; to provide protection of the manager from personal liability; and, in an appropriate case, to allow interested persons (such as a beneficiary or a third party engaged in litigation with an estate) to participate in a process of decision making affecting an estate. A manager may be given judicial advice (of a type for which section 63 of the *Trustee Act* 1925 NSW provides or upon an exercise of the Court's equitable or inherent jurisdiction) or a direction (of a type available under section 63 or upon the making of a general administration order or, more often, on the making of a partial administration order under rule 54.3 of the *Uniform Civil Procedure Rules* 2005 NSW): *Macedonian Orthodox Community Church St Petka Incorporated v Bishop Petar* (2008) 237 CLR 66; *Re Estate Late Chow Choo-Poon; Application for Judicial Advice* [2013] NSWSC 844; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 633-638.

11 Whether the manager of an estate has been guilty of "mismanagement" of the estate intrinsically involves an assessment of the purpose of management and the obligations or duties of the manager in service of that purpose.

12 Generally, a manager is accountable to the person or persons on whose behalf an estate is under management and any other person with whom he or she does business on behalf of the estate. The manager's "accountability" is measured against the duties of his or her office. Those duties generally include a duty to collect and preserve estate property, to manage the property prudently and to apply it for the purposes served by the management regime.

13 A manager who diligently performs his or her duties can generally expect to be indemnified from estate property for any liabilities incurred by him or her in performance of the management function. Whether a manager should be held personally liable for a breach of duty falls to be judged by reference to:

(a) the nature and scope of the breach;

(b) consideration of whether there is jurisdiction in the Court (under section 85 of the *Trustee Act* 1925 NSW, upon an exercise of protective jurisdiction, as discussed in *C v W (No 2)* [2016] NSWSC 945; *Downie v Langham* [2017] NSWSC 113, or otherwise) to excuse the breach on the basis that the manager has acted honestly and reasonably and ought fairly to be excused; and

(c) whether any person whose interests the manager was bound to serve has acquiesced in, consented to or benefitted from the breach.

14 Problems arising from mismanagement can be complex, sufficiently so that this paper is not presented as an exhaustive treatment of its topic. Its object is to provide a framework for the analysis of problems and potential solutions.

15 This paper does not address the administration of an insolvent estate (as to which, see the *Probate and Administration Act* 1898 NSW, section 46C and the Third Schedule, Part I); the administration of a bankrupt estate, governed (as section 46C acknowledges) by the *Bankruptcy Act* 1966 Cth); or the

entitlements a creditor might have to be subrogated to an insolvent manager's right of indemnity against estate property.

EQUITY'S OVERLAY: STANDARDS REQUIRED OF A FIDUCIARY

16 An essential feature of the law's framework is that, by the nature of the office of a manager of the estate of an incapable or deceased person, the manager is likely to be in a fiduciary relationship with a person, or persons, whose interests he or she must serve. The equity jurisdiction, for that reason, generally overlays any exercise of Protective, Probate or Common Law jurisdiction.

17 The judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96 *et seq* is generally taken as definitive of the nature of a fiduciary relationship. There his Honour wrote the following (omitting references):

> "… [The] categories of fiduciary relationships are not closed. …
>
> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations, viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility. …
>
> It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. …
>
> The classical illustrations of the fiduciary relationship are those in which the fiduciary is under a duty to act not in his own interests or solely in his own interests but in the interests of another or jointly in the interests of another and himself, eg, a trustee and a partner. …
>
> The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. … [The] nature of the curial intervention which is justifiable will vary from case to

> case. … [The] scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case. … The rigourous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respect. …"

18 The character of a fiduciary relationship naturally carries with it, as an incident of the relationship, a need for the "fiduciary" to be *accountable* for his or her conduct to the "beneficiary" (or a representative of the beneficiary) to whom he or she owes an obligation, or duty, of loyalty.

19 A fiduciary's duty of loyalty is often expressed as including, primarily, two duties: first, a duty not to act in a situation where his or her duty and interest conflict; and, secondly, not to make a profit without the fully informed consent of his or her beneficiary: *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467. Those duties are not exhaustive of the obligations owed by a fiduciary which extend, for example, to a duty to keep accounts and a duty to account for any benefits received; but they explain why the office of a protected estate manager and the office of an executor or administrator of a deceased estate is, *prima facie*, a gratuitous one.

20 An exercise of equitable jurisdiction, either to enforce a duty or to restrain conduct so as to prevent unconscionable conduct on the part of a fiduciary, is directed not only to the justice of the case but also to the maintenance of standards of behaviour on the part of fiduciaries.

21 The flexibility of the equity jurisdiction is illustrated by contrasting its application to the case of a protected estate manager and its application to the case of an executor or administrator of a deceased estate.

22 Both types of office are fiduciary in nature. A protected estate manager must act in the interests of the incapable person whose estate is under management. A legal personal representative (that is, an executor or administrator of a deceased estate) must act in the interests of due administration of the deceased's estate and, upon completion of executorial duties, for the persons entitled to the deceased's estate.

23 Both types of office are, *prima facie*, gratuitous. But the nature of their obligation to account for benefits received by them is tailored to the circumstances in which they work. A protected estate manager whose beneficiary lacks capacity to consent to remuneration of the manager cannot charge or retain remuneration from the estate under management unless authorised by an order of the Court or legislation; but he or she will not be held liable to account for any benefit he or she receives from management of the estate if it is incidental to performance of his or her obligation to serve the interests of the beneficiary: *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 and 432-433. A legal personal representative is generally in a different position because remuneration may be authorised not only by an order of the Court or legislation but also by the terms of the will of a deceased person or by the fully informed consent of the deceased's beneficiaries: *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32,763.

24 The role of the equity jurisdiction in the maintenance of standards in connection with management of the affairs of a person who, by reason of incapacity or death, is incapable of managing his or her own affairs is not confined to supervision of managers appointed to an office. It extends to provision of a remedy in cases commonly attached to the labels of "breach of fiduciary obligations", "undue influence" and "unconscionable conduct" upon an exercise of general equitable jurisdiction.

ANOMALOUS OR OBSCURE CONCEPTS AND NAMES?

25 The Protective and Probate jurisdictions are beset by obscure terminology and, unless their purpose be acknowledged, anomalous concepts.

26 In the realm of Protective jurisdiction the most commonly misunderstood concept is that of a "committee of the person", followed closely by a "committee of the estate", concepts encountered upon an exercise of the Court's inherent jurisdiction to refer to what (in the everyday work of the Guardianship Division

of NCAT) are simply, respectively a “guardian” of an incapable person and a “financial manager” of his or her estate.

27 In the Probate jurisdiction (as will be noted below) grants of administration of a deceased estate are commonly known by shorthand, Latin tags far removed from common conversation.

28 A sense of obscurity also attaches to discussion of the tort of *devastavit*, at least in reading judgments of a different era (long before current rules of court and modes of practice) such as those of the High Court of Australia in *Levy v Kum Chah* (1936) 56 CLR 159 and *National Trustees Executors and Agency Company of Australasia Limited v Dwyer* (1940) 63 CLR 1.

29 There one encounters not only the expression *devastavit* but also “a writ *de bonis propriis* (a remedy that allows the Court to seize an executor’s or administrator’s personal property instead of the property of an estate); a “writ *de bonis testatoris* (literally, “of the goods of the testator”), a remedy that allowed the execution of a testator’s property instead of that of the personal property of an executor or administrator; and a defence of *plene administravit* (literally, an estate is “fully administered”). This terminology needs to be deciphered for lawyers of the current era. When deciphered they reveal concepts more readily understood simply as procedural tools for the due management of a deceased estate, allowing for the adjudication of competing claims of executors and administrators, beneficiaries and creditors.

30 It may be historically inaccurate to attribute to an exercise of equity jurisdiction (as distinct from probate jurisdiction) the grant by a court of a remedy against an *executor de son tort* (in Latin, an “executor of his own wrong”): GE Dal Pont, *Law of Succession* (Lexis Nexis, Australia, 3rd edition, 2021), paragraphs [10.15]-[10.19]; Hutley, Woodman and Wood, *Cases and Materials on Succession* (Lawbook Co, 3rd edition, 1984), pages 442-455; FC Hutley, *“The Executor De Son Tort in the Law of NSW”* (1952) 25 ALJ 716. Nevertheless, what is seen as “an anomalous legal institution” could be explained as an example of Equity filling a gap.

31 To the extent that they are concerned with due management of an estate, each of the Protective, Probate and Equity jurisdictions has a jurisprudential foundation for adapting to the particular circumstances of the case. The Common Law has demonstrated its adaptability, historically, by the development of trespass on the case but its focus upon the determination of competing claims of right masks developments in the law.

32 Although importance may attach to distinctions between different types of jurisdiction the nature of taxonomy is such that there are always likely to be some "residual categories" of concepts that continue to serve a purpose although regarded as "anomalous". One concept is that of an *executor de son tort*. Another is the concept of a tort of *devastavit*.

33 The imperfectability of systems for the classification of "causes of action" at law or grounds for equitable intervention is a reason for recognising the purposive character of whatever jurisdiction of the Court is exercised (responding to the question "why are we doing this?") and the need, in performance of a management function, to pursue the purpose of the jurisdiction invoked, and (as said of a grant of equitable relief in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 111-115 and *Bridgewater v Leahy* (1998) 194 CLR 457 at 494 [126]-[128]) to do so in a manner calculated to do "practical justice" between contending parties.

34 In marking out the fields of operation of the Common Law, Equity, Protective and Probate jurisdictions relating to management of the estate of a person who, by reason of incapacity or death, is unable himself or herself to manage his estate, it can be important to identify, even at a high level of abstraction, the purpose served by each jurisdiction.

35 The purpose of an exercise of *Common Law jurisdiction* in civil proceedings is generally to adjudicate competing claims of right (often resulting in an award of damages or another form of money judgment) based upon established causes of action in contract, tort or restitution, including the resolution of commercial

disputes focusing upon documentary evidence and the construction of written material.

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

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

38 The *Protective jurisdiction* exists for the explicit purpose of taking care of those who cannot take care of themselves: *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 258-259. The Court focusses upon the welfare and interests of a person incapable of managing his or her affairs, testing everything against whether what is to be done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers. An exercise of protective jurisdiction may look to the present and the past in the management of the estate (and person) of an incapable person; but it is idiosyncratic in its focus on “risk management”, looking forward.

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

67 SR (NSW) 187 at 189 and 191-192. Due administration of an estate includes not only the collection, preservation and prudential management of estate assets, but also the payment of estate debts.

THE OFFICE AND NOMENCLATURES OF A "MANAGER"

40 In dealing with management of the estate of a person who is unable, by reason of incapacity or death, to manage his or her own affairs one encounters a variety of titles attributed to a person who is functionally a manager.

41 In any proceedings in a Court the rules of which provide for the appointment of *a tutor* or the like, the manager might be called a "tutor", a "next friend" or a "*guardian ad litem*", for example. Routinely, a tutor is appointed for an incapable person in particular proceedings to conduct, or defend, the proceedings on behalf of the incapable person and, at the conclusion of the proceedings, a broader regime of protective estate management might be engaged to manage the estate of the incapable person.

42 In any type of proceedings governed by the *Uniform Civil Procedure Rules* 2005 NSW, a *representative order* might be made under Part 7 to enable a deceased estate to be represented *in the proceedings*; that is, for the proceedings to be managed on behalf of the estate. A representative order does not, of itself, provide a mandate for management of an estate beyond the ambit of the proceedings.

43 Where a living person is incapable of managing his or her own affairs a *(protective estate) manager* can be appointed upon an exercise of Protective jurisdiction by the Court or, more frequently, the Guardianship Division of NCAT. Different names are here encountered. A manager appointed by the Court upon an exercise of inherent jurisdiction is called a "committee of the estate". The Court also has jurisdiction to appoint a manager under section 41 of the *NSW Trustee and Guardian Act* 2009 NSW. NCAT has no inherent jurisdiction but it has express power under the *Guardianship Act* 1987 NSW to appoint a "financial manager". A manager appointed under the *NSW Trustee*

and Guardian Act or the *Guardianship Act* is subject to an administrative regime supervised by the NSW Trustee under the authority of the *NSW Trustee and Guardian Act*. The Court retains oversight of the NSW Trustee and NCAT.

44 Commonly, protective orders for the management of the estate of an incapable person will be accompanied by *protective orders for management of the person* of the incapable person. The Court has an inherent jurisdiction to appoint a "committee of the person". NCAT has jurisdiction to appoint a "guardian" under the *Guardianship Act* 1987. The Court retains oversight of NCAT and persons appointed to the office of a committee of the person or a guardian.

45 A person with the requisite mental capacity to do so can, in anticipation of the onset of incapacity, appoint his or her own protective agents whose authority, by virtue of legislation, can operate during the incapacity of the principal. An '*enduring attorney'* appointed under the *Powers of Attorney Act* 2003 NSW is essentially a species of private manager *of the estate* of an incapable person. An "enduring guardian" appointed under the *Guardianship Act* 1987 is essentially a private manager *of the person* of an incapable person. The Court and NCAT have statutory jurisdiction to review the operation of an "enduring" appointment (often leading to the appointment of a financial manager or a guardian) but "enduring agents" are generally subject to no administrative supervision. Mismanagement on their part may attract equitable intervention (eg, for conduct involving a breach of fiduciary obligations, undue influence or unconscionable conduct) on the application of a duly authorised representative. That means (before the death of the principal) a financial manager or the like or (after death) a legal personal representative (executor or administrator) of a deceased principal.

46 The jurisdiction of the Court to appoint *a receiver and manager* (pursuant to its inherent equitable jurisdiction or section 67 of the *Supreme Court Act* 1970 NSW) operates across the spectrum of cases involving an exercise of protective or probate jurisdiction.

47 Persons appointed as *"managers" of a deceased estate* upon an exercise of probate jurisdiction are generally known by a variety of names other than "manager" despite the fact that, in essence, they occupy an office for the performance of managerial functions. It is as well to remember this because, for people unfamiliar with the jurisdiction, the complexity of labels can obscure the true character of an office holder.

48 The expression "legal personal representative" generally refers to a person holding the office of an executor or the office of an administrator. When a will is admitted to probate a grant of probate is made to a person named in the will as an executor or, if a grant is made to a person not named in the will as an executor, the grant takes the form of a grant of letters of administration with the will annexed. An executor's title to estate assets is generally said to derive from the will, but formal proof of a will requires a grant. The title of an administrator to estate property derives from the grant of administration, be it a grant of letters of administration with a will annexed, a grant of administration of an intestate estate or an interim grant. A "grant" of "representation" (that is, a grant of probate or administration) is both an order of the Court and an instrument of title to estate property.

49 There is a functional reason for distinguishing between the source of an executor's title to estate assets and the source of an administrator's title. It recognises that, if proven to be valid, a deceased person's will is a source of authority in any system of law that privileges testamentary freedom. Even before a will is admitted to probate it may be acted upon by third parties dealing with "the estate"; for example, in making arrangements for disposal of the deceased's body (*Brown v Weidig* [2023] NSWSC 281) or in community acceptance of a succession to property capable of passing by a transfer of possession.

50 Notice should be taken of the wide variety of descriptive labels traditionally applied to particular forms of orders granting authority for administration (essentially, that means management) of an estate for a particular purpose:

(a) Administration *cum testamento annexo* (with the will annexed).

(b) Administration *de bonis non administratis* (where an executor or administrator dies without having fully administered an estate and a replacement is necessary).

(c) Administration *durante minore aetate* (during the minority of an executor or other person entitled to a grant).

(d) Administration *durante absentia* (during the absence from the jurisdiction of an executor or other person entitled to a grant).

(e) Administration *durante dementia* (during the incapacity of an executor or administrator).

(f) Administration *pendente lite* (granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending).

(g) Administration *ad litem* (granted to provide a person to represent an estate in litigation).

(h) Administration *ad colligenda bona defuncti* (granted for the protection of an estates assets pending delay in making a general grant).

51 Convenience attaches to these descriptive labels because, on closer examination, they provide illustrations of common occurring cases for the appointment of an administrator.

52 However, they should not be allowed to obscure the general proposition that a grant of administration can be made, with limitations of time and purpose or on terms, designed to accommodate the special needs of a particular estate: *Mortimer on Probate Law and Practice* (London, 1911), Chapters 9-10.

53 Anything short of a full grant of administration is generally referred to as a "special grant", a "limited grant" or an "interim grant". In practice, an interim grant of this character simply takes the form of an order of the Court specifying the powers conferred upon an administrator and limiting the duration of the appointment. Unlike a grant of probate or a full grant of administration an order for the "appointment" of a "special" or "interim" administrator (that is, a grant of "special" or "interim" administration) is not accompanied by an order that the proceedings be referred to the probate registrar for "completion of the grant". The Court's order *is* the grant of authority, unaccompanied by a separate instrument issued by the Probate Registry.

54 Whether or not an interim administrator is appointed by reference to a traditional Latin label, prudence dictates that his or her powers of administration be specified in the order of appointment so that management of the estate can proceed in an orderly manner and, if necessary, be reviewed. The nature, terms and limitations of an administrator's powers should be explicit on the face of the order governing his or her appointment so that the administrator, all persons interested in an estate, and those called upon to deal with the administrator can have confidence in the appointment.

55 In the interests of due administration of an estate, an interim administrator is generally appointed for a specified period (commonly six months), subject to review, and the terms of appointment preclude a distribution of estate assets without the leave of the Court.

56 In the management of the estate of a person who is incapable, by reason of incapacity or death, of managing his or her own affairs, upon an exercise of Protective or Probate jurisdiction the Court by one means or another can generally revoke or vary an order for the appointment of a manager (or give directions for management of the estate under management) in the case of mismanagement if it is in the interests of the "beneficiary" or "beneficiaries" of the estate under management: *Letterstedt v Broers* (1884) 9 App Cas 371 at 387; *Miller v Cameron* (1936) 54 CLR 572 at 575, 579, 580 and 581; *Riccardi v Riccardi* [2013] NSWSC 1655; *M v M* [2013] NSWSC 1495.

57 This may be important not only to ensure that an estate is well-managed in the future but to empower a person (that is, to grant a person "standing") to pursue a defaulting manager.

58 To this extended list of variant terminology affecting allegations of mismanagement of the estate of a person who is unable, by reason of incapacity or death, to manage his or her own affairs should be added the term "waste" which features in definitions of *devastavit* (strictly, a tort) and in discussions of an exercise of equitable jurisdiction, not limited to its application to a deceased estate. Meaning depends on context.

AN ACTION OF DEVASTAVIT

59 The following extract from W.S. Holdsworth and C.W. Vickers, *The Law of Succession*: *Testamentary and Intestate* (Oxford, 1899; reprinted by The Lawbook Exchange Ltd) at page 222-223 provides a useful summary of the principles governing *Devastavit*. It does so under the heading "CASES IN WHICH THE ACT OR DEFAULT OF THE REPRESENTATIVE [AN EXECUTOR OR ADMINISTRATOR] EXPOSES HIM TO PERSONAL LIABILITY". In this extract, footnotes are integrated with the text:

> "The representative may make himself liable for a devastavit. [He is then said to be liable as for his wilful default. …]
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> 'This is a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed upon him, for which he shall answer out of his own pocket, so far as he had, or might have had, assets of the deceased': Williams, *Executors*, page 1690.
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> Thus the representative may be personally liable for a devastavit (1) by doing wrongful acts, e.g. if he pays his own debt with the deceased's money; or (2) by neglecting his duties, e.g. if he pays debts out of their legal order [It is otherwise if he pays a creditor of a lower degree without notice of the existence of a creditor of a higher degree; or if being himself the creditor of a lower degree, without notice of a creditor of a higher degree, he retains his debt. *Re Fludyer* (1898) LR 2 Ch 562], or if he pays legacies when there is not enough to pay debts, or if he allows the estate to remain in an improper state of investment.
>
> The rule at law was that the representative was in all cases liable personally for loss of the assets if once they had come to his hands. The rule in equity (which has prevailed in all cases since the Judicature Act) is that the representative is in this respect in the position of a gratuitous bailee; if he lose

> the property through no fault of his own he is not liable [*Job v Job* LR 6 CD 562].
>
> If one of two representatives is guilty of a devastavit in which the other did not participate, only the guilty person will be held liable. If he either by his act or neglect helped to make the devastavit possible both will be jointly and severally liable, e.g. if one assents to his co-representative retaining the property, and the co-representative subsequently misapplies it; for it is owing to such assent that the property was lost [*Clough v Bond* 3 Myl and Craig 490; *Booth v Booth* 1 Beav 125].
>
> A representative cannot as a rule delegate his duties to any third person. In some cases, however, he may do so. 'I think,' said Lord Halsbury, 'it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced [*Learoyd v Whiteley* LR 12 AC 727, 731].' That is where there is 'moral necessity from the usages of mankind [*Lord Hardwick, ex parte Belchier*, Amb 218].' Thus he must employ solicitors to conduct a law suit, or stock-brokers to sell stock. In such cases, he will not, in the absence of fraud, or negligence in the choice of his agents, be liable, if by the acts of these agents loss is caused to the estate [*Speight v Gaunt*, LR 9 AC 1, 4]."

60 This extract demonstrates the longevity of the English text now known as *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Thomson Reuters, London, 2018), said to be the 21st edition of *Williams on Executors* and the ninth edition of *Mortimer on Probate*. Chapter 52 of that text (entitled "The Liability for a Representative's Own Acts") provides a fulsome account of *devastavit*.

61 A shift in thinking about estate mismanagement can be seen in the language used to describe a wastage of estate assets. Older texts (such as the 1829 edition of Wentworth, *The Office and Duty of Executors*; Williams' 1841 edition of his *Treatise on the Law of Executors and Administrators*; and Holdsworth and Vickers' *The Law of Succession*, here extracted) do not discuss devastavit in the context of a breach of fiduciary duty. Although the essential concept of a "fiduciary" predates the 19th century its modern usage as a routine expression dates from the mid-19th century.

62 An element of parochial pride warrants attention being drawn to footnote 7 on page 954 ([52-02]) of *Williams, Mortimer and Sunnucks*:

> "For a thorough discussion of the history and nature of *devastavit* see [Justice Nye] Perram [of the Federal Court of Australia] 'The [Origins] and Present

> Operation of the Action in Devastavit' (FCA) [2012] FedJSchol [Federal Judicial Scholarship] 23."

63 Perram J's paper is accessible on Austlii, a product of his Honour's engagement with litigation that culminated in a judgment of the Full Court of the Federal Court of Australia entitled *Frost v Bovaird* (2014) 223 FCR 275."

64 Citing *Bacon's Abridgement* (an ancient legal encyclopaedia) under the heading "Executors", paragraph [52-02] of *Williams, Mortimer and Sunnucks* defines *devastavit* in the following terms (omitting footnotes):

> "A representative may become personally liable or accountable from his own assets if he violates or neglects his duties in respect of the estate. This species of misconduct is called in law a *devastavit*: that is, a wasting of the assets. It has been defined as:
>
> > '… a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased.'
>
> Despite some suggestion that an action in *devastavit* was an action in the tort of trespass, and historical examples of claims for *devastavit* at law, the roots of the modern doctrine lie in equitable actions for administration, in which the representative is liable to account in a manner akin to a trustee or gratuitous bailee."

65 The final section of this paragraph implicitly recognises the shift in focus from tort law to an administration suit in equity under "modern doctrine". In *National Trustees Executors and Agency Co of Australasia Ltd v Dwyer* (1940) 63 CLR 1 at 18 Latham CJ described "[a] personal action against an executor in which the plaintiff relies upon a devastavit" as "an action on the case", a tort. That characterisation is not to be displaced by recognition that most devastavit actions are in "modern" times procedurally subsumed in an administrative suit, characteristic of an exercise of equity jurisdiction.

66 Perhaps the best and most authoritative account of how an action in devastavit played out in the days when court procedures were defined in shorthand Latin is found in the judgment of Dixon and Evatt JJ in *Levy v Kum Chah* (1936) 56 CLR 159 at 167-173.

67 In contrast with most other areas of civil litigation, in which the law is generally analysed in terms of substantive principles and the practice and procedure of courts is of secondary significance, probate law and practice retains an action-based perspective characteristic of a pre-*Judicature Act* system of court administration in which adjectival (procedural) law is to the fore.

68 To a modern lawyer, trained to analyse problems through the prism of substantive law principles and a case management philosophy of court administration, an engagement with the probate jurisdiction is rendered difficult by obsolete terminology. For that reason, an attempt to understand the jurisdiction through caselaw alone is problematic. One must turn to textbooks (such as G.E. Dal Pont, *Law of Succession,* Lexis Nexis, Australia, 3rd edition, 2021 Chapter 12) and published papers.

69 A useful exposition of old style thinking about an action of *devastavit* and defences to such an action can be found in a paper by Archie J Rabinowitz published as "Plene Administravit: Obscure but not Obsolete" (2009) 28 *Estates, Trusts & Pensions Journal* 110, available on the Internet from *HeinOnline".* Its authorship by a Canadian lawyer, and its utility in an Australian context, demonstrate the universality of traditional thinking about probate law and practice in a common law jurisdiction. The following extract omits footnotes and case citations:

> "**1. Introduction**
>
> An estate, unlike a corporation, is not a legal entity that can acquire rights or incur liabilities; more to the point, it cannot sue or be sued. Consequently, the executor of the estate is its legal representative. … The office of the executor received early recognition from the common law courts of England, contributing to the formation of its modern day powers and responsibilities. The plea of *plene administravit* also originates in the English common law courts and is an old, obscure doctrine that has proven resilient in the face of a constantly changing legal system. It functions as a defence for an executor or administrator when an action is brought by a creditor for an outstanding debt owed by the deceased's estate.
>
> **2. What is Plene Administravit and How Does It Operate?**
>
> [The] doctrine of *plene administravit* [can be summarised] as 'a plea by an executor or administrator that he has fully administered all of the assets that have come into his hands, and that no assets remain from which the plaintiff's

claim could be satisfied.' The debt and legal proceeding, however, are not resolved simply by pleading *plene administravit*. The plaintiff/creditor may produce any existing evidence that assets existed, or ought to have existed in the hands of the defendant/executor. In order to prove that assets exist to satisfy the claim, the creditor may give evidence of conduct by the executor which amounts to an admission of assets. Such evidence might include payments of interest on a legacy by the executor [although a single payment of interest will not amount to evidence of assets]. If the plaintiff can prove mismanagement of assets by the executor, resulting in insufficient assets, the executor may be found personally liable to pay the judgment.

In the alternative, if a personal representative fails to plead *plene administravit* (that he has fully administered the estate yet cannot satisfy the debt), this amounts to an admission that the executor or administrator has sufficient assets to satisfy that judgment. At this point, the court may order an execution *de bonis testatoris* [literally, 'of a testator's goods'] to determine whether sufficient assets do in fact exist. If sufficient assets do exist and the debt can thus be satisfied, there is no personal liability on the executor. Alternatively, if the sheriff returns with a finding of *nulla bona*, meaning that the sheriff was unable to find any goods upon which to levy execution, the executor may be held personally liable. However, a return of *nulla bona* is only *prima facie* evidence of a *devastavit*, it is not conclusive. A *devastavit* is the mismanagement of the estate by the executor, in squandering or misapplying the assets contrary to the duty imposed upon him or her.

Failure to plead *plene administravit* does not automatically result in personal liability of the executor; it is simply an implicit admission of the existence of assets. The plaintiff must charge the estate trustee with a *devastavit* and present evidence to support such a charge. The court in *Commander Leasing* referred to the oft-cited case of *Brown v Fox*, which stated:

> 'It does not follow that because the defendant has impliedly admitted assets the creditor is entitled to recover against him personally in the event of assets of the estate proving insufficient … He can only get judgment for payment by the executor or administrator personally by charging the defendant with *devastavit* and seeking relief in damages.'

Furthermore, the defending executor is afforded the opportunity to present evidence and a defence as to why there are no longer sufficient assets and that the depletion of those assets were not a result of any *devastavit*.

3. Proving a *Devastavit*

The plaintiff will only be entitled to relief personally from the executor by successfully proving a *devastavit*. A *devastavit* will involve a very close review of the administration of the estate. There is no exhaustive list of what actions or omissions will constitute a *devastavit*. There are a wide range of instances where the courts have found that an executor has committed a *devastavit* such as the deliberate misuse of the estate assets by converting them to his or her own use or applying them to pay his or her own debts to a third party and acts of negligence or wrongful administration that defeat the rights of beneficiaries and creditors.

> An important yet difficult determination to make is how a *devastavit* is distinguished from the more commonly pleaded breach of trust. *Williams, Mortimer and Sunnucks* explains this distinction in the following manner:
>
> > 'The same act may amount both to breach of trust and *devastavit*, but the strict distinction between the two, so far as material, is that *devastavit* is a breach of the duty of administration and may therefore arise where there is no express or implied trust at all, whereas simple breach of trust will normally occur after administration is complete when the assets are being held upon trust of the will or statute.'
>
> The liability for breach of trust extends to all loss thereby caused directly or indirectly to the trust estate (e.g., improvident investment). *Devastavit*, however, is not concerned with losses, but with wasting the estate's assets, whether losses occurred or not. It is not enough for the plaintiff merely to prove insufficient assets to satisfy the trust or a mere technical breach; in order to prove a *devastavit*, and for the court to impose personal liability, the conduct must amount to a degree of neglect, violation or mismanagement of the executor's duty. If there are legitimate reasons why the assets no longer exist in the estate, no *devastavit* will be proven.
>
> There is a substantial public policy concern supporting this standard. If an executor could be held personally liable for all breaches of duty, who would agree to become an executor or administrator of an estate? Accordingly, executors are afforded relief and defences to claims of mismanagement of the estate independent from pleading *plene administravit*."

70 Rabinowitz's paper then identifies those other defences to a claim of *devastavit* in terms which, in a New South Wales context, include references to sections 63 and 85 of the *Trustee Act* 1925 NSW and a denial by an executor or administrator of knowledge of a creditor's debt at the time of administration.

71 On the last point, Rabinowitz reverts to the perspective of a creditor:

> "Therefore, in order to prove a *devastavit* in cases involving a premature distribution of assets, the plaintiff should provide evidence indicating that the executor was aware of the claim against the estate prior to distribution. This once again speaks to the higher degree of fault necessary in order to hold an executor personally liable for his or her mismanagement of the estate."

72 In a NSW context it is sufficient for present purposes to adopt the following extract from Hutley, Woodman and Wood, *Cases and Materials on Succession* (3rd edition, 1984) at page 731-732 (reproducing what appeared in the first, 1967 edition at page 678) as an explanation of probate law and practice before the adoption in NSW of a *Judicature Act* system of court administration and a case management philosophy:

> "The executor or administrator, when sued at law in respect of the liability of the deceased, could plead certain special defences which, if established, negatived any personal liability for the judgment recovered except to the extent of assets and admitted.
>
> The pleas were, plena administravit, plena administravit praeter, debts of higher degree and no assets, or no assets except a certain amount, ultra. The general effect of these pleas is to establish that there are no assets, or no assets beyond a certain amount, to meet the claim of the plaintiff. It can be seen that an executor faced with a number of claims may be placed in an impossible position by the need to raise and prove these special defences; he is forced to anticipate the results of the actions themselves. If he is unable or unwilling to have the estate administered in bankruptcy he can obtain a decree for general administration, thereby converting rights of action into the right to establish the validity of the claim before the Court.
>
> The efficient administration of the estate requires that claims against the estate be crystallised and speedily determined. The executor needs to know what claims are going to be made and, when a claim is made, that it be processed, and the claimant who will neither enforce nor withdraw a claim presents special problems. Apart from statute, the executor could not distribute the estate without the protection of a decree of the Court - the long lease presented special difficulties and, in theory, could defer the distribution of an estate for centuries. The necessity for resorting to the Court has been dispensed with in most cases by compliance, in New South Wales, with the provisions of ss. 92, 93 and 94 of the [*Probate and Administration Act* 1898 NSW] - note the similar provision in regard to trustees under s. 60 of the *Trustee Act* 1925 NSW …
>
> Assuming that these precautions have either not been taken or, if taken, an error has been made and the estate has been wrongly distributed, what then? The effect of the abovementioned sections is not to extinguish the claim but to give the executor a personal immunity from suit. If this personal immunity is not obtained for any reason, he remains the person primarily responsible to creditors, beneficiaries and next of kin; if it is or if all rights against the executor have been exhausted, they have rights against volunteers who take the assets of the estate, these rights being equitable, and subject to equitable defences."

73 A key feature of traditional probate procedure was that competing claims affecting an estate could, if contested, be determined in the context of an order for general administration of the estate by the Court. If an executor/administrator contested a creditor's devastavit claim assertion by the executor/administrator of a defence to the action could bring the estate within the Court's control with the prospect of an order for general administration of the estate. The effect of such an order was to take administration of the estate out of the hands of the executor/administrator and to provide procedures for the investigation and determination of competing claims: *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 633-638.

74 The forensic function of an action for devastavit was, as it remains, to recognise an entitlement in a creditor to complain about mismanagement of an estate notwithstanding that, ordinarily, a creditor (unlike a beneficiary) is not owed a fiduciary duty by an executor/administrator. Upon a personal action against him or her for devastavit an executor/administrator had it within his or her power, by filing a particular form of defence, to bring the creditor's claim within the purview of an administration suit.

75 The device of an order for general administration was found to be cumbersome in practice (because it required accounts to be taken before competing claims on an estate could be determined) and it has been displaced in practice by procedural devices designed to permit the Court to supervise the administration of an estate in a piecemeal fashion. The two most prominent of these devices are a "partial administration order" under rule 53.4 of the *Uniform Civil Procedure Rules* 2005 NSW and section 63 of the *Trustee Act* 1925 NSW. Both provisions have their historical roots in reforms to English equity procedures in the late 19th century, although section 63 differs from its English counterparts. Other reforms to equity procedures in the 19th century include, in their NSW analogues, section 85 of the *Trustee Act* 1925.

76 The introduction of a *Judicature Act* system of court administration in NSW (in 1972, with the commencement of the *Supreme Court Act* 1970 NSW and the *Supreme Court Rule*s 1970 NSW) streamlined administration of the Court's several jurisdictions. The progressive adoption of a case management philosophy in the administration of cases (culminating in enactment of the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW) focused further attention on a need to rise above procedural forms in pursuit of "the just, quick and cheap resolution" of "real issues" in proceedings.

77 What, perhaps, has not been entirely grasped however is the idiosyncratic nature of proceedings involving an exercise of the Court's Protective and Probate jurisdictions. They do not conform in all respects to the "adversarial" model of dispute resolution that conceptually underpins much thinking about standard rules of court. It is no accident that the Probate jurisdiction, in

particular, has its own special legislation governing its business: the *Probate and Administration Act* 1898 NSW, the *Succession Act* 2006 NSW and the "*Probate Rules*", Part 78 of the *Supreme Court Rules* NSW 1970. The Protective jurisdiction is similarly blessed with special legislation: principally the *NSW Trustee and Guardian Act* 2009 NSW and the *Guardianship Act* 1987 NSW, read with the *Powers of Attorney Act* 2005 NSW and (in relation to the activities of the Guardianship Division of NCAT) the *NSW Civil and Administrative Tribunal Act* 2013 NSW.

78 Although the analysis of a problem arising from mismanagement of an estate must still focus on the different perspectives of a legal personal representative, a beneficiary, a creditor and the nature of property under management, the focus for attention in a "case management" world is upon identifying the capacity in which parties sue or are sued; the nature of claims for relief made in proceedings; the necessity or otherwise for orders joining parties or providing for representation of interests; the need for the publication of notice of the proceedings and for service of notice on particular persons; and steps needed for the identification, collection and preservation of property the subject of a claim in proceedings.

79 Not uncommonly (perhaps encouraged by the injunction in section 63 of the *Supreme Court Act* 1970 that "all matters in controversy between the parties [should] be completely and finally determined" without a "multiplicity of legal proceedings") litigants endeavour to combine in the one proceedings a claim for a grant, or revocation of a grant, of probate or administration; a claim for a declaration of trust of estate property or equitable compensation attending an allegation of *inter vivos* undue influence, breach of fiduciary obligations or unconscionable conduct; and, for good measure, a claim for a family provision order under Chapter 3 of the *Succession Act* 2006.

80 One set of proceedings cannot easily or conveniently accommodate all these claims although, it seems, litigants sometimes optimistically hope that everything might be resolved in a mediation. A fallacy in that approach is that it is not until there is a determination of competing claims to a grant of probate

or administration that confidence can be expressed about who has authority to represent an estate in relation to collateral litigation. Parties sometimes become so bogged down in disputes about the provision of accounting information that they lose sight of the question of estate representation, often an important preliminary question. A solution commonly proposed by the Court is that orders are made under rule 28.2 of the *Uniform Civil Procedure Rules* 2005 for the separate determination of questions. Case management principles require each case to be considered in its own context.

PARTIES, REPRESENTATIVE ORDERS AND DERIVATIVE ACTIONS

Introduction

81 In proceedings concerning the management of an estate questions of "parties" can loom large and spill over into a consideration of questions about the terms upon which "absent parties" might be bound by a determination of the Court and about who should be given formal notice of proceedings.

82 Traditionally, this was not such a problem in Common Law proceedings (where contests were confined to an adjudication by a judge and jury of competing claims of right by adversarial parties present before the Court) as they were in other types of proceedings, typically those involving present or future rights to property and the management of an estate of a person who, by reason of incapacity or death, was incapable of self-management.

Protective Proceedings

83 In Protective proceedings, although the Court focuses clearly on the interests and preferences of a person incapable of self-management (as "the paramount consideration"), the welfare of the incapable person generally requires his or her family, "significant others" or carers to be consulted about any orders of substance likely to be made affecting his or her interests, though not parties to the proceedings. The practical reality is that attention must be given to the circumstances in which he or she lives, and the views of those who live with

him or her on a regular basis need to be taken into account in assessing his or her best interests.

Probate Proceedings

84 In their administration of Probate jurisdiction the English Ecclesiastical Courts (whose jurisdiction informs the Probate jurisdiction of the NSW Supreme Court) historically acknowledged the need to accommodate the interests of "absent parties" in two ways. One was to acknowledge a distinction between a grant of probate "in common form" and a grant "in solemn form", the former of which is more readily revoked than the latter, permitting estates to be dealt with administratively (rather than in contested litigation) in most cases: *Estate Kouvakas* [2014] NSWSC 786. The other was adoption of the principle (encapsulated in *Osborne v Smith* (1960) 105 CLR 153 at 158-159) that a person may be bound by the determination of Probate proceedings if he or she does not intervene in the proceedings after having been given reasonable notice of the proceedings and an opportunity to intervene.

Representative Orders (Equity and UCPR Part 7)

85 An engagement of the Court's Equity jurisdiction brings with it a procedural flexibility not found upon an exercise of Common Law jurisdiction.

86 *Daniell's Chancery Practice* (Stevens and Sons, London, 8th ed, 1914) at page 147 (omitting footnotes) provides a template for understanding Equity's approach to "parties":

> "It was the aim of the Court of Chancery to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent future litigation. For this purpose, it was necessary that all persons materially interested in the subject should generally be made parties to the suit, either as plaintiffs or defendants.
>
> The strict application of this rule in many cases created difficulties, which induced the Court of Chancery to relax it; and it became the established practice of that Court to allow a plaintiff to sue on behalf of himself and all the others of a numerous class of which he was one, and to make one of a numerous class (as the members of a joint-stock company) the only defendant

> as representing the others, on the allegations that they were too numerous to be all made parties."

87 The equitable jurisdiction of the Court to make representative orders was governed by "considerations of justice and convenience", and the management of proceedings by the Court "to ensure fairness" in the conduct of litigation: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 21-22 [6], citing *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 415-417 and 427-429.

88 The equitable jurisdiction to make representative orders has not been displaced but, in practice, generally simply informs the jurisdiction to make representative orders found in Part 7 of the *Uniform Civil Procedure Rules* 2005 NSW.

89 Care needs to be taken not to confuse the authority to conduct proceedings on behalf of an estate by reason of a "representative order" (or, indeed, an order under section 91 of the *Succession Act* 2006 NSW in family provision proceedings) with the authority that is conferred on a legal personal representative by a formal grant of representation upon an exercise of Probate jurisdiction. If property is to be dealt with beyond the conduct of proceedings a grant of probate or administration is, or may be, necessary to convey title to a deceased estate.

Proper Parties and Derivative Actions

90 The general principle (in management of a protected or deceased estate) is that in litigation against a third-party the proper party to represent the estate is "the manager" (a financial manager, executor, administrator or trustee) not a "beneficiary" of the estate on whose behalf the estate is managed.

91 By the nature of a protected estate, a protected person lacks capacity to conduct proceedings on his or her own account. In any event, the prime responsibility for management of an estate is "the manager" and it is "the manager" and only "the manager" who is authorised to conduct business with a third party. Even if a "protected person" within the meaning of section 38 of

the *NSW Trustee and Guardian Act* 2009 NSW does not lack the mental capacity to transact particular business (*Gibbons v Wright* (1954) 91 CLR 423 at 437-438), section 71 of the *NSW Trustee and Guardian Act* 2009 NSW operates to suspend his or her power to deal with his or her estate under management.

92 Only in "special circumstances" can a beneficiary conduct proceedings against a third party on behalf of an estate: *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 438. "Special circumstances" are generally those in which an executor/administrator/trustee is unwilling or unable to conduct proceedings which ought reasonably to be conducted on behalf of an estate. A factor to be taken into account in this context is whether "the manager" can be indemnified from estate property, or by beneficiaries, for his or her costs of the proceedings.

93 In a case scenario in which a "manager" has a common law chose of action vested in him or her, equitable principles governing estate administration, and property, are predicated on the principle that the manager, in his or her capacity as manager, can sue a third party (holding any proceeds of a recovery for the benefit of the beneficiaries); but, if the manager is unable or unwilling to do so, entitlements of an estate can be enforced by a beneficiary in at least one of two ways. First, anticipating nothing, the beneficiary (*if competent*) can sue the manager for an order that he or she perform his duty (so as to compel the manager to sue the third party), joining all other beneficiaries in the proceedings (or obtaining an order for their representation in lieu of joinder) as interested parties or, at least, serving notice of the proceedings upon them. Alternatively, in order to avoid a multiplicity of proceedings, the beneficiary can sue the third party, joining the manager and all other beneficiaries (or obtaining a representative order in lieu of joinder of the beneficiaries) so that all questions in dispute can be determined in the one set of proceedings.

94 Use of the expression "manager" in this context is almost always likely to refer simply to an executor, administrator or trustee of a deceased estate. In practice, a protected person is unlikely, in most cases, to have the mental

capacity to conduct proceedings on his or her own account; but a newly appointed financial manager might need to conduct proceedings against a third party in the name of a displaced financial manager or with the displaced manager joined as a party.

CONCLUSION

95 A comparative examination of management of the estate of a person incapable of managing his or her affairs and the administration of a deceased estate offers insights into the management functions of those entrusted with control (if not also the legal title) of an estate of either type.

96 A manager by whatever name known has a duty to collect and preserve estate property, to manage it prudently and to apply it for the purposes served by the office he or she occupies or (in the absence of an appointment to a formal office) the fiduciary relationship he or she assumes towards those on whose behalf an estate is under management.

97 A manager who, by act or omission, wilfully fails to discharge the duties of a manager may be personally liable to make good any loss to the estate or to account to the estate for any unauthorised benefits he or she receives, and in the administration of a deceased estate to pay compensation to a beneficiary or creditor who suffers loss as a result of wastage of an estate.

98 In this one sees a pragmatic interplay of the several jurisdictions of the Court, with an increasing tendency to recognise the role of fiduciary principles.

99 The management functions of a “manager” can be viewed through two inter-related prisms: one focusing upon relationships internal to the management regime, the other focusing on relationships external to it. In dealing with a “beneficiary” in internal management of an estate analyses in terms of a fiduciary relationship are predominant. In dealing with a creditor in external management of an estate the Common Law action of *devastavit* retains an important role.

100 In litigation between an “estate” and another party (whether a defaulting manager, a beneficiary or a third party) the proper party to represent the estate is generally the current, duly authorised manager of the estate; but, if that manager is unwilling or unable to act, a beneficiary entitled to enforce the duties of a manager may be allowed to conduct proceedings on behalf of the estate if the current manager either lends his or her name to the proceedings or is joined in the proceedings as a defendant and the beneficiary accepts an obligation to indemnify the manager against liability for costs of the proceedings.

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