

BLUE MOUNTAINS LAW SOCIETY

A regional Society of the Law Society of New South Wales

2017 SUCCESSION CONFERENCE

Medlow Bath

16-17 September 2017

**ACCOUNTABILITY ACROSS THE SPECTRUM
OF ESTATE ADMINISTRATION IN NSW**

by

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INTRODUCTION

- 1 The focus of this paper is on the administration of the estate of a person who, by reason of death or other functional incapacity, is unable to manage his or her own affairs. It is, more particularly, upon the accountability of those who hold office as an enduring attorney; as a protected estate (or financial) manager; or as the legal personal representative (that is, as an executor, administrator or trustee) of a deceased estate. For want of a more apt descriptive label these disparate office holders are here described collectively as “estate administrators”.

- 2 In the physical world, death sets a limit to each person’s capacity for self-management; but, in modern Australian society, for many people death is preceded by a period during which, by reason of infirmity or otherwise, they are functionally unable to manage their own affairs.

- 3 From the perspective of a lawyer focused upon estate administration, “death” is now, more than it once was, a *process* rather than merely an *event*. GC Lindsay, “A province of modern equity: Management of life, death and estate administration” (2016) 43 *Aust Bar Rev* 9.
- 4 The process may commence before, and extend beyond, physical death. Not uncommonly, it commences at or about the time a person executes an enduring power of attorney (governed by the *Powers of Attorney Act 2003* NSW), and/or an instrument for the appointment of an enduring guardian (governed by the *Guardianship Act 1987* NSW), in contemplation of incapacity for self-management. It may continue, beyond a physical death, until such time as an application for family provision relief (under chapter 3 of the *Succession Act 2006* NSW), in respect of the estate or notional estate of the deceased person, ceases to be a realistic prospect.
- 5 A lawyer instructed to prepare, or to advise upon, an appointment of an enduring attorney (or guardian), the making of a will or estate planning transactions generally must be aware of the possibility that claims may be made on behalf of, or against, an estate at any time during the period occupied by that process. The prudent lawyer must be able to consider the interplay of the protective, probate, family provision and general equity jurisdictions of the Supreme Court (and the analogous, statutory protective jurisdiction exercised by the Civil and Administrative Tribunal of NSW (NCAT)) bearing upon administration of an estate looking forward, and in retrospect.
- 6 In the administration of estates in this context (an area of jurisprudence in which “law” and “procedure” are equally important) there is a loose coalition of ideas which inform both substantive and adjectival law. Those ideas gravitate around the word “fiduciary” (with references to fiduciary officers, fiduciary relationships, fiduciary obligations and duties and, simply, fiduciaries) and the word “account” (with references to accountability, accounting parties and, simply, accounts). Neither of those ideas can be encapsulated in an exhaustive definition.

- 7 An essential object of the law governing fiduciaries, *and* the obligations of accounting parties, is *to prescribe, maintain and enforce standards of conduct in cases in which business (in a broad sense) is transacted by one person on behalf of another in circumstances in which “the other” (the principal or beneficiary) is dependent upon the fiduciary or vulnerable to exploitation.*
- 8 General law principles need to be understood within their own conceptual framework, *and* to be located in the (administrative and legislative) regulatory regime that governs particular classes of fiduciary.
- 9 The legal system endeavours to hold estate administrators accountable for their conduct by a variety of means, including:
- (a) the prescription, maintenance and enforcement of standards of conduct *via* the law governing fiduciaries, administered by courts in the determination of civil proceedings.
 - (b) regulatory regimes grounded in legislation (including the *Powers of Attorney Act 2003 NSW*, the *Guardianship Act 1987 NSW* and the *NSW Trustee and Guardian Act 2009 NSW*), supported by government in the broad sense.
 - (c) the provision of means by which estate administrators can obtain judicial advice (from the Supreme Court of NSW) or the like (*via* the Civil and Administered Tribunal of NSW (NCAT)).
 - (d) the provision of means (*via* proceedings in the Supreme Court or NCAT) by which the conduct of estate administrators can be reviewed and, in an appropriate case, they can be removed from office or displaced by the appointment of another office holder.
- 10 Viewed in their broadest perspective, these mechanisms do not depend necessarily upon a finding that an estate administrator has been guilty of misconduct. Notably: In the administration of a trust, the welfare of the

beneficiaries is the dominant consideration upon a determination whether or not to remove a trustee (*Miller v Cameron* (1936) 54 CLR 572 at 575; *Letterstedt v Broers* (1884) 9 App Cas 371 at 387); similarly in management of a protected estate the welfare and interests of the protected person are the paramount consideration (*Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 237-239; *NSW Trustee and Guardian Act* 2009 NSW, section 39; *Guardianship Act* 1987 NSW, section 4).

- 11 Recent illustrations of the flexibility involved in the selection, or change, of a protected estate manager (building upon *Holt v The Protective Commissioner*) can be found in *M v M* [2013] NSWSC 1495 at [50]; *Re LSC and GC* [2016] NSWSC 1896 at [40]-[41]; *SLJ v RTJ* [2017] NSWSC 137 at [20]-[26]; *Re TLH, a protected person* [2017] NSWSC 737 at [8]-[13].
- 12 Under the regulatory regime presently operating in NSW, each citizen is encouraged to make provision for the possibility of a loss of capacity for self-management by a timely execution of an enduring power of attorney (governed by the *Powers of Attorney Act* 2003 NSW) and/or the appointment of an enduring guardian (governed by the *Guardianship Act* 1983 NSW). Optimally, such appointments serve to allow an incapacitated person's estate, and person, to be managed without invocation of the protective jurisdiction of the Supreme Court or the analogous statutory jurisdiction of NCAT.
- 13 Not uncommonly, a breakdown in the private system of estate management implicit in the appointment of an enduring attorney or an enduring guardian, or an absence of any such appointment, requires engagement with the protective jurisdiction of the Court or NCAT. An appointment of a protected estate manager (by the Court or the Mental Health Review Tribunal under the *NSW Trustee and Guardian Act* 2009 NSW), or the appointment of a financial manager (by NCAT under the *Guardianship Act* 1983 NSW), engages the administrative regime for protected estate management for which the *NSW Trustee and Guardian Act* 2009 NSW provides. By virtue of section 71 of that Act, the appointment of a manager suspends the operation of an enduring power of attorney.

- 14 In any event, the operation of an enduring power of attorney, and the operation of the administrative regime for which the *NSW Trustee and Guardian Act 2009* NSW provides, both come to an end with the death of an incapacitated person whose estate is “under administration” in the sense discussed in this paper. At that point, the probate jurisdiction of the Supreme Court (modified by the *Probate and Administration Act 1898* NSW and the *Succession Act 2006* NSW), qualified by the family provision jurisdiction of the Court (governed by chapter 3 of the *Succession Act 2006* NSW) kicks in.
- 15 At each point along an individual’s road from autonomy to death and beyond (not uncommonly *via* functional incapacity), the legal system endeavours to accommodate the fact that, of necessity if not by design, an individual’s affairs must, ultimately if not immediately, be managed on his or her behalf by one or more other persons who should (in the interests of the individual, his or her family and the public generally) be held to account for their conduct.

ACCOUNTABILITY : IDENTIFICATION OF, AND CONSULTATION WITH, INTERESTED PERSONS

- 16 A basic point, easily overlooked in abstract discussion of “accountability” of estate administrators, is that problems of accountability often, in practice, can best be addressed (prospectively or in retrospect) by consultation with all affected “interests”.
- 17 For convenience, I repeat here observations made by me in a paper entitled “Concepts, Patterns and Problems in Probate Litigation : A Perspective of Estate Administration” presented on 24 January 2017:

“THE OBJECTIVE PARAMETERS OF AN ESTATE ADMINISTRATION CASE: WHAT TO LOOK FOR

26. In estate administration proceedings an initial, key step in any decision - making, problem-solving process is generally to identify:

- (a) the central personality (the deceased or a person at risk because of incapacity for self-management) through whose lens the world must be viewed.

- (b) the nature and value of the “estate” (property) to which that key personality is, may be, or has been, entitled.
- (c) the existence or otherwise of any and all legal instruments that may govern, or affect, the disposition or management of such property: eg, a Will, statutory “intestacy provisions”, an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.
- (d) the full range of persons whose “interests” may be affected by any decisions to be made:
 - (i) Probate litigation is “interest litigation” in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *Bull v Fulton* (1942) 66 CLR 295 at 337, citing *Bascombe v Harrison* (1849) 2 Rob Ecc 118 at 121-122; 163 ER 1262 at 1263-1264; *Estate Kouvakas* [2014] NSWSC 786 at [212]; *Re Gardiner* [2016] VSC 541 at [13], [23] and [26]; *Re Przychodski* [2016] VSC 781 at [17].
 - (ii) Family provision litigation is generally an adjunct to, or substitute for, probate litigation; its effective determination requires all competing interests and persons eligible to apply for relief to be identified and, generally, to be given notice of the proceedings.
 - (iii) Protective litigation requires identification of “family” and “carers” who, *in the interests of the person in need of protection*, need to be consulted: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C, 242B-C and 242E-243E; *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 at 101-103; 35 ER 878 at 879.
- (e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration.
- (f) whether any (and, if so, what) steps need to be taken to ensure that all “interested persons” are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

27. A sound working rule of practice generally is that, in management of a probate, family provision or protective case bearing upon administration of an estate, prudence dictates that, as soon as may be practicable, all potentially affected property should be identified, with enquiries made as to its security, and all potential claimants on property at issue should be given notice of the proceedings, with an opportunity to intervene.

28. This is a function of the nature of property and the desirability of the title to property being settled in an orderly way without unnecessary exposure to successive claims. The Court does, and the parties should, generally endeavour to “build an estoppel” against those who might contest the Court’s orders: *Estate Kouvakis* [2014] NSWSC 786 at [276]-[283].”

- 18 Timely consultation with legitimate interests affected by the decision of an estate administrator may subsume more formal questions about accountability for decision making by sharing responsibility for decisions.

FIDUCIARY RELATIONSHIPS AND ACCOUNTING PARTIES

- 19 In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 Mason J (as his Honour then was) wrote the following (omitting references) in what has become the classic Australian exposition of the concept of a “fiduciary” relationship:

“... it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case-by-case approach, we have to distil the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In doing so we must recognise that 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’, 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....”

- 20 Although each case must be analysed on all the facts of the particular case (accommodating the terms of any instrument of appointment, contract or the like governing the parties' relationship), the obligations of a fiduciary are commonly said to be that a fiduciary must not place himself, herself, or itself in a position of conflict, nor obtain or retain a profit or benefit from the fiduciary position (*Chan v Zacharia* (1984) 154 CLR 178 at 198-199), without first obtaining the fully informed consent of the principal (beneficiary) to whom fiduciary obligations are owed (*Maguire v Makaronis* (1997) 188 CLR 449 at 466-467).
- 21 A fiduciary is commonly described as an "accounting party" because liable to account to the principal for unauthorised profits or benefits received within the scope of the fiduciary relationship.
- 22 In his *The Duty to Account: Development and Principles* (Federation Press, 2016) at paragraph [456] Dr JA Watson, in a work of legal history, ventured to define the substance of "accountability" in the following terms:
- "... the idea of accountability can be described more generally [than by reference to established categories of person]. The account, including the categories of accountability surveyed [in Dr Watson's work], does not lie only because a party is or was a derivative of a bailiff or receiver (at law); or trustee or fiduciary (in equity); or any other category of relation. Rather, the substance of accountability was integral to and assumed in each of them. That is to say, in its substance, the duty arises whenever a person *obtains* or *deals* with *property* in circumstances where the entitlement to do so is *qualified* (or conditioned), namely, that it is not free to his, her or its own selfish use; but *ad opus*, to be dealt with to or for *the uses* of another."
- 23 For present purposes, "established categories" of fiduciary (classes of persons to whom a liability to account ordinarily attaches) can be taken to include:
- (a) an agent appointed as an "enduring attorney": *Taheri v Vitek* (2014) 87 NSWLR 403 at 427[115]; *Downie v Langham* [2017] NSWSC 113 at [8].

- (b) a protected estate manager (appointed under chapter 4 of the *NSW Trustee And Guardian Act 2009 NSW*), a financial manager (appointed by NCAT under the *Guardianship Act 1987 NSW*) or the historical model for those offices, a committee of the estate: *JJK v APK* (1986) Aust Torts Reports 80-042 at 67, 881; *GDR v DKR* [2012] NSWSC 1543 at [36]; *Ability One Financial Management Pty Ltd And Another v JB by his Tutor AB* [2014] NSWSC 245 at [166]-[175].
- (c) a legal personal representative (ie, an executor, administrator or a trustee) of a deceased estate: *Robinson v Pett* (1734) 3 PWms 249; 24 ER 1049, a foundational authority cited in *Willett v Fitcher* (2005) 221 CLR 627 at 631 note 15; *Re Estate Gowing; application for Executor's Commission* [2014] NSWSC 247; (2014) 11 ASTLR 128; 17 BPR 32,763 at [41]-[43].

24 Recognition of “established categories” of fiduciary goes arm in arm with a need:

- (a) to examine all *the facts of each particular case* before imposing upon a person the obligations of a fiduciary or moulding those obligations: eg, *Clay v Clay* (2001) 202 CLR 410 at [46], citing *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 at 102, *Maguire v Makaronis* (1997) 188 CLR 449 at 463-464 and *Chan v Zacharia* (1984) 154 CLR 178 at 205.
- (b) to confine any liability to account to *the scope of the fiduciary's obligations* as a fiduciary: *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 at 102-103.
- (c) to qualify a liability to account by making such *allowances in favour of a defaulting fiduciary as may be just*, so as to avoid unjust enrichment of the principal at the expense of the

accounting party (*Warman International Limited v Dwyer* (1995) 182 CLR 544) or to accommodate an exercise of protective jurisdiction (*Smith v Smith* [2017] NSWSC 408 at [40](a)-(b), [46] and [463]).

- (d) in an appropriate case, to *excuse a fiduciary from a personal liability to account in circumstances in which the fiduciary ought fairly to be relieved*, in whole or part, from personal liability: *Trustee Act 1925 NSW*, section 85; *C v W (No. 2)* [2016] NSWSC 945 at [45]-[47]; *Downie v Langham* [2017] NSWSC 113 at [8]-[12].

THE INTERPLAY OF PRINCIPLES GOVERNING FIDUCIARIES AND UNDUE INFLUENCE

25 There is a close association between equitable principles governing accountability for a breach of fiduciary obligations and those governing the setting aside of a transaction made in favour of a person who exercises, or is presumed to exercise, undue influence over another. The object of both is to provide redress for conduct which is against good conscience. In particular factual settings, their close alignment can be discerned.

26 A leading case for demonstration of this is *Johnson v Buttress* (1936) 56 CLR 113 at 134-135 *per* the following observations of Dixon J:

“The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor’s will or freedom of judgement in reference to such a matter. The source of power to practice such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the parties. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgement based on information as full as that of

the donee. This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry. The facts which must be proved in order to satisfy the court that the donor was freed from influence are, perhaps, not always the same in these different relationships, for the influence which grows out of them varies in kind and degree. But while in these and perhaps one or two other relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgement, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position. He may be taken to possess a peculiar knowledge not only of the disposition itself but of the circumstances which should affect its validity; he has chosen to accept a benefit which may well proceed from an abuse of the authority conceded to him, or the confidence reposed in him; and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour. But, except in the well-recognised relations of influence, the circumstances relied upon to establish an antecedent relation between the parties of such a nature as to necessitate a justification of the transaction will be almost certain to cast upon it at least some measure of suspicion that active circumvention has been practised. This often will be so even when the case falls within the list of established relations of influence. Because of the presence of circumstances which might be regarded as presumptive proof of express influence, cases outside the list but nevertheless importing a special relationship of influence sometimes are treated as if they were not governed by the presumption but depended on an inference of fact. Scrutton LJ has remarked on the inclination of common law judges 'to rely more on individual proof than on general presumption, while considering the nature of the relationship and the presence of independent advice as important, though not essential, matters to be considered on the question whether the transaction in question can be supported' (*Lancashire Loans, Limited v Black* [1934] 1B at 404). Further, when the transaction is not one of gift but of purchase or other contract, the matters affecting its validity are necessarily somewhat different. Adequacy of consideration becomes a material question. Instead of inquiring how the subordinate party came to confer a benefit, the court examines the propriety of what wears the appearance of a business dealing. These differences form an additional cause why cases which really illustrate the effect of a special relation of influence in raising a presumption of invalidity are often taken to decide that express influence which is undue should be inferred from the circumstances."

27 A convenient restatement, and elaboration, of principles governing undue influence can be found in the following extracts from the judgment of McLelland J in *Quek v Beggs* (1990) 5 BPR [97405] and 11,764-11,765:

“Undue influence

... Legal principles

Generally speaking, the law permits a person of full age and capacity to dispose of his or her property by gift or otherwise in such manner as he or she may choose. However in certain recognised categories of case, principles of equity intervene to render such a gift liable to be set aside by the court. One of those categories is where the donor makes the gift as a result of “undue influence” of the donee. In this context “influence” means a psychological ascendancy by the donee over the donor, and “undue influence” means the donee’s taking improper advantage of such ascendancy: *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720. It is not necessary that the ascendancy amount to domination: *Goldsworthy v Brickell* [1987] Ch 378 at 402-6.

A donor (or if he or she is deceased, a representative of his or her estate) will *prima facie* be entitled to have a gift set aside on the ground of undue influence upon proof of:

- (a) facts establishing that the gift was made by the donor as a result of undue influence of the donee; or
- (b) facts that give rise to a presumption that the gift was so made, unless the donee rebuts the presumption in the manner mentioned below.

A presumption of undue influence arises if it is proved:

- (a) that at the time the gift was made there existed a relationship between the donor and the donee of such a nature as to involve reliance, dependence or trust on the part of the donor resulting in an ascendancy on the part of the donee; and
- (b) that the gift is so substantial, or so improvident, as not to be reasonably account for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act: *Allcard v Skinner* (1887) 36 Ch D 145 at 185; *Johnson v Buttress* (1936) 56 CLR 113 at 134-5; *Yerkey v Jones* (1939) 63 CLR 649 at 675; *Goldsworthy* at 400-1.

In such cases, ‘the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused’: *Allcard* at 171 per Cotton LJ, applied in *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133; *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 85; *Antony v Weerasekera* [1953] 1 WLR 1007 at 1011, PC. The donee ‘has chosen to accept a benefit

which may well proceed from an abuse of his position of ascendancy and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour': *Johnson* at 135.

The relationships capable of giving rise to the presumption include certain well defined categories (such as parent and young child, solicitor and client, doctor and patient) but are not limited to those categories...

The donee may rebut the presumption of undue influence, when it arises, by proving that the donor (i) knew and understood what he or she was doing; and (ii) was acting independently of any influence arising from the ascendancy of the donee. See *Lancashire Loans Ltd v Black* [1934] 1 KB 380 at 409; *West v Public Trustee* [1942] SASR 109 at 119; *Inche Noriah* at 135; *Wright v Carter* [1903] 1 Ch 27 at 52, 57.

It is not sufficient to prove only the first of these elements. In the frequently quoted words of Lord Eldon LC in *Huguenin* at 300 [ER 536], 'The question is, not, whether she knew what she was doing... but how the intention was produced', to which Sir John Romilly MR added in *Hoghton v Hoghton* (1852) 15 Beav 278 at 299; 51 ER 545 at 553, 'and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside'. See also *Harris v Jenkins* (1922) 31 CLR 341 at 368; *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 54, 85; *Zamet v Hyman* [1961] 1 WLR 1442 at 1447; *Whereat [v Duff [1972] 2 NSWLR 147]*.

Nor in relation to the second element is it necessarily sufficient to prove that the proposal to make the gift came from the donor (*Spong v Spong* (1914) 18 CLR 544 at 549; *Whereat* at 169) or that the donee took no active steps to procure the gift; *Allcard* at 183-4, 185-6; *Wright* at 52-3.

The matters which in a particular case will need to be proved in order to rebut the presumption will depend upon the nature and incidents of the relationship on which the presumption is founded, since the influence which arises from different kinds of relationships varies in kind and degree: *Johnson* at 134..."

- 28 These observations are particularly apposite in cases in which the holder of an appointment as an enduring attorney is sought to be brought to account. That is because it is not uncommon in such a case that benefits derived by an attorney from his, her or its special relationship of influence with the principal are obtained without specific deployment of the instrument of appointment. In such a case, plausible deniability may attach to the attorney's denial of any abuse of power as an attorney. The existence of an appointment as an enduring attorney (or guardian) might, in such a case, best serve as an incident, and evidence, of a special relationship of influence giving rise, on the facts of the particular case, to a presumption of undue influence rather than as a source of a fiduciary relationship between principal and agent.

29 This type of problem arises more naturally in the context of enduring attorneys than it does in the context of protected estate managers and the legal personal representatives of deceased estates. That is because, although the Supreme Court and the Guardianship Division of NCAT can exercise supervisory jurisdiction over enduring attorneys (illustrated by the *Powers of Attorney Act 2003*, sections 35-36 and 38), attorneys are not subjected to a regulatory regime as comprehensive as those that govern protected estate managers (and the like) and the legal personal representatives of a deceased estate.

CONTRASTING REGULATORY REGIMES THAT BEAR UPON ACCOUNTABILITY

30 The contrast between an enduring attorney and an enduring guardian (on the one hand) and protected estate managers and financial managers (on the other hand) is addressed in *Smith v Smith* [2017] NSWSC 408 at [90]-[98]:

“90. Under current law and practice in NSW, the appointment of an enduring attorney is an alternative to:

- (a) the appointment of a “financial manager” by the Guardianship Division of the Civil and Administrative Tribunal of NSW (“NCAT”), formerly the Guardianship Tribunal, under the *Guardianship Act 1987*; or
- (b) the appointment of a protected estate “manager” by the Court under section 41 of the *NSW Trustee and Guardian Act 2009* NSW or, exceptionally, the appointment by the Court of the general law equivalent, a “committee of the estate”, upon an exercise of the Court’s inherent jurisdiction (*IR v AR* [2015] NSWSC 1187 at [100]-[117], especially [113]).

91. Under current law and practice in NSW the appointment of an enduring guardian is an alternative to:

- (a) the appointment of a “guardian” by the Guardianship Division of NCAT under the *Guardianship Act*, or
- (b) exceptionally, the appointment by the Court of the general law equivalent, a “committee of the person”, upon an exercise of the Court’s inherent jurisdiction (*IR v AR* [2015] NSWSC 1187 at [100]-[117], especially [114]).

92. An appointment of a financial manager or of a protected estate manager engages an administrative regime, which empowers the NSW Trustee and Guardian (also known, simply, as the NSW Trustee) to manage or supervise management of an incapable person’s estate, under the *NSW Trustee and*

Guardian Act 2009: M v M [2013] NSWSC 1495 at [11]-[14]; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [25]-[41].

93. This does not happen, without more, if an incapable person's estate is managed under an enduring power of attorney.

94. Another difference is that, whereas the making or revocation of a management order is a formal act by a public institution, recorded as such, and when required, and justified by an examination of the capacity for self-management of a person in need of protection, the appointment or removal of an attorney under an enduring power of attorney may be an entirely private act in the absence of intervention by the Court, NCAT or the Mental Health Review Tribunal, the institutions in which a power to intervene is or may be vested. The validity of an appointment or revocation of a power of attorney generally falls, then, to be determined *ex post facto* in private litigation.

95. Three practical consequences may flow from this, particularly when families are in conflict over care for, or control of, the person or estate of a person in need of protection:

(a) in the absence of a financial management order or a protected estate management order: As a person descends into incapacity for self-management, there may be a free-for-all in the execution of enduring powers of attorney (and/or enduring guardianship appointments) as competing interests persuade, or impose upon, a person in need of protection to execute a competing instrument;

(b) where an incapable person's estate is managed by an enduring attorney, rather than a financial manager or a protected estate manager, there is no systemic regime for an insistence upon, or supervision of, prudential accounting practices on a day-to-day basis; and

(c) third parties who deal with an enduring attorney (or an enduring guardian) on the basis of a private instrument, albeit one that may have been registered with the Land Titles Office of the Registrar General to facilitate dealings in land, have no assurance (as they have if dealing with an order of the Court, NCAT or the MHRT) that there is no competing appointee lurking in the shadows to challenge or interfere with transactions effected on behalf of the appointor.

96. The management of an incapable person's estate by an enduring attorney is, however, subject to review:

(a) on an application for review made to the Guardianship Division of NCAT, or to the Court, under the *Powers of Attorney Act*, sections 35-36, in circumstances which may enliven the respective, broader powers that NCAT and the Court have to make other protective orders; or

(b) on an application to the Court for an exercise of its protective, *parens patriae* jurisdiction or the general jurisdiction of the Court.

97. Had they chosen to do so, it would have been open to any of the parties to these proceedings (particularly the first plaintiff and the first defendant, those most actively engaged in care of the deceased) to make, during the lifetime of the deceased, an application for a review of the powers of attorney granted by him (or an application for a manager of his estate or for the appointment of a guardian) in order to clarify his status and the authority of each person involved in management of his affairs. Such an application could have served as the equivalent of a trustee's application for judicial advice, protective of all concerned: confirming, extending or limiting powers according to what might be required in the best interests of the deceased.

98. An appointment of a guardian by the Guardianship Division of NCAT engages an administrative regime which permits NCAT, on a routine basis, to review the needs of a person in need of protection, and to call upon the services of the Public Guardian, with whom the NSW Trustee works in close proximity and generally in harmony.”

- 31 The regulatory regime governing the legal personal representatives of a deceased estate (whether an executor, administrator or trustee) is grounded, not in a division of responsibility between the Supreme Court and an administrative tribunal such as NCAT, but in the probate jurisdiction of the Court, serviced by the Court's Probate Registry. The legislative underpinning of that regime is largely found in the *Probate and Administration Act 1898 NSW*, the *Succession Act 2006 NSW* and the “Probate Rules” (the *Supreme Court Rules 1970 NSW*, Part 78). A comprehensive treatment of accounting issues in that context can be found in John Poole, “Essentials for preparing executors estate accounts and procedures for claiming commission” (2016) 43 Aust Bar Rev 248.
- 32 The Australian legal system is presently struggling with how best to ensure that enduring attorneys (and enduring guardians) can best be held accountable when they abuse their positions of trust. It is as well, in that context, to be reminded of the comparatively recent origins of “enduring” appointments.
- 33 For that purpose, *Smith v Smith* [2017] NSWSC 408 at [84]-[89] provides convenient summary:

“84. The principles expounded in the *Countess of Bective* Case do not, in terms, contemplate a situation in which a person manages “the estate” (property) of an incapable person under an enduring power of attorney or “the person” of such a person under an appointment as an enduring guardian.

85. The concept of an “enduring” appointment as an attorney or guardian was introduced by statute in an era that post-dates the *Countess of Bective* Case, and the English case law upon which it stands. But for the intervention of Parliament, the common law would, ordinarily, have held that such an appointment lapses upon the appointor’s loss of mental capacity: *Drew v Nunn* (1879) 4 QBD 661 at 665-666; *Ghosn v Principle Focus Pty Limited (No. 2)* [2008] VSC 574 at [36]. The concept of “enduring” appointments entered NSW law in the 1980s (with the benefit of recent English experience with law reform) after reports of the NSW Law Reform Commission: *Report on Powers of Attorney* (LRC 18, August 1974); *Report on Powers of Attorney and Unsoundness of Body or Mind* (LRC 20, February 1975); *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 at [162]-[163]; *Szozda v Szozda* [2010] NSWSC 804 at [40].

86. The concept of an “enduring” appointment as an attorney or guardian needs to be viewed in the context of the protective regime it serves. The Court and various statutory authorities exercise jurisdiction which, historically, was known by various names including, at a high level of abstraction, the *parens patriae* jurisdiction of the Crown.

87. In NSW, enduring powers of attorney are presently governed by the *Powers of Attorney Act*, and the appointment of an enduring guardian is governed by the *Guardianship Act 1987* NSW. Both types of instrument are actively promoted by government agencies, including the NSW Trustee, as a “self help” alternative to more formal regulatory appointments of an office holder to manage the affairs (the estate and/or the person) of a person who, unable to manage his or her own affairs, is in need of protection.

88. When of sound mind (as *McLaughlin v Daily Telegraph Newspaper Co Limited* (1904) 1 CLR 243 cautions), individuals in our community are entitled, to execute an instrument appointing an attorney or a guardian of choice on the basis that an appointee to that office will occupy it, with a continuing authority, beyond a loss of mental capacity by the appointor. The appointment, thus, “endures”.

89. The nature of the office of an enduring attorney or an enduring guardian is such that it is likely, if not bound, to be a fiduciary one: *Taheri v Vitek* (2014) 87 NSWLR 403 at 427[115]; *Downie v Langham* [2017] NSWSC 113 at [8]. It is difficult to imagine the holder of an office designed to manage the affairs, and to protect the interests, of a person lacking capacity for self-management that would not, in an appropriate case, attract the intervention of equity.”

ILLUSTRATIONS OF VARIABLE APPROACHES TO ACCOUNTABILITY

- 34 The principles expounded in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423 provide, perhaps, the best illustration of the general proposition that the nature and scope of fiduciary obligations

(and of a commensurate liability to account) depend very much on the nature, and purpose, of particular relationships.

- 35 A finding of a liability to account for a breach of a fiduciary obligation is fact-specific. It should not be thought that the respective fiduciary obligations, and any liability to account, of an enduring attorney, a protected estate manager and the legal personal representative of a deceased estate are necessarily the same.
- 36 The following extracts from the *Countess of Bective* case (with references omitted and emphasis added) are seminal. Insofar as they use the expression “guardian” they may be taken to refer to a class of persons which includes protected estate managers and the like:

“... an obligation to apply moneys in the maintenance of children or others does not involve the liability which arises from an ordinary trust. It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees. They need not vouch the items of their expenditure, and, if they fulfil the obligation of maintenance in a manner commensurate with the income available to them for the purpose, an account will not be taken. Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness. It would defeat the very purpose for which the fund is provided, if its administration were hampered by the necessity of identifying, distinguishing, apportioning and recording every item of expenditure and vindicating its propriety.

Although these considerations furnish an independent foundation for the general rule, yet, after all, it is a doctrine regulating the application of moneys payable under an instrument, whether a will, a settlement or an order of a Court of equity, and the operation of the doctrine must depend upon the provisions contained in the instrument, both express and implied. But the effect of the instrument will often be governed by the circumstances in which it was intended to apply, and, in particular, by a consideration of the nature of the actual abode, the condition of the household and the state of the family of the infant or other person to be maintained. Courts of equity have not disguised the fact that the general rule gives to a parent or guardian dispensing the fund an opportunity of gaining incidental benefits, but the nature and extent of the advantages permitted must depend peculiarly upon the intention ascribed to the instrument... Statements to be found in some authorities that any surplus remaining after adequate maintenance has been provided belongs to the person having the care of the infant or of the lunatic cannot be safely used unless careful attention is given to the scope and

purpose of the instrument under which the moneys arise and the conditions to which its operation is directed.... [The] difficulty relates to the application rather than to the nature of the rule, and in any case it is evident that to reach the conclusion that savings belong to the guardian is much easier if the allowance is meant to include some inducement to the recipient to undertake the care of the person to be maintained, or if the intention is that the guardian should be associated with a child in a mode of life, or standard of living or in the enjoyment of pursuits which, otherwise, he would not adopt. The conclusion is less easy when the fund is meant simply to provide the proper charges of the infant.

A guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain and not otherwise. Upon his default the Court will administer the fund or intercept the payments and has jurisdiction to order an account or an inquiry.... Where, however, the condition is performed the Court does not inquire whether the money has been completely expended or whether the recipient has spent small sums for his personal benefit, but, nevertheless, it remains an allowance to a person in a fiduciary capacity and for a definite purpose.”

- 37 Illustrations of the operation of these principles can be found in *Clay v Clay* (2001) 202 CLR 410 at 428-430 and *Crossingham v Crossingham* [2012] NSWSC 95 at [15]-[36]; *Woodward v Woodward* [2015] NSWSC 1793; and *Downie v Langham* [2017] NSWSC 113.
- 38 Reference should also be made to *Parker v Higgins* [2012] NSWSC 151; (2012) 17 BPR 32,817 at [53]-[65]. There Slattery J dismissed an application for accounts made by one of two enduring attorneys against the other by reference to section 36(4) of the *Powers of Attorney Act* 2003 NSW. The case concerned management by the attorneys of the affairs of their aged parents (joined in the proceedings as the second and third defendants). His Honour made the following observations about the standard of accounting required of the attorneys (the plaintiff and first defendant):

“(a) Whether trustee standard accounts are required?”

53. Susan [the plaintiff] has in substance requested that Margaret [the first defendant] provide accounts and keep records in conformity with accounting standards that would be acceptable for a trustee's set of accounts. Margaret opposes this on the basis that the trustee standard of account keeping does not apply here.

54. *This is a decisive question. There is little doubt that the documents that have been produced do not meet the trustee standard for accounts. But, in my view, they do meet the lesser standard, which the law provides for attorneys. I conclude in this section that: (1) the powers that Susan and Margaret are exercising are not those of trustees; and (2) the law in this jurisdiction does not require attorneys such as Susan and Margaret to produce accounts to the standard that would apply to trustees.*

55. *I accept Margaret's argument that these two attorneys are not trustees. The position of an attorney is one that carries with it fiduciary duties. But not every fiduciary is a trustee. I therefore disagree with the submission put on behalf of Susan that "an attorney is effectively a trustee of the power of attorney give that the duties of an attorney are fiduciary, not simply contractual". One of the factors distinguishing trusteeship from agency is that trustees hold legal title to trust property. But an agent does not ordinarily hold the principal's property in the agent's name. Agents only have possession of property on behalf of the principal, not title to that property: *Cave v McKenzie* (1877) 46 LJ Ch 564, at 567 and *Jacobs Law of Trusts in Australia, Seventh Edition, 2005, J.D. Heydon and M.J. Leeming, [210]*. It is clear from the material Margaret produced in these proceedings about George and Gwenda's financial affairs that all share certificates, holder identification numbers in respect of listed securities, bank accounts and other documents of title in respect of financial assets are held in the name of George and Gwenda, not in the name of the attorneys.*

56. *An agent can take on a role as a trustee, especially where money is entrusted to the agent and the intentions of the parties are not clearly expressed: J.D. Heydon and M.J. Leeming, *Jacobs Law of Trusts in Australia, 7th Edition, 2005, at [211]* and *Walker v Corboy* (1990) 19 NSWLR 382 at 386, 389 & 397. But there is no evidence before the Court here that Susan and Margaret have by words or conduct taken upon themselves a role as trustees of George and Gwenda's property. Rather, the evidence is more consistent with the two powers of attorney fully defining the relevant legal relationship between Susan and Margaret and George and Gwenda. Both Susan and Margaret have joint and several powers as attorneys to act in relation to the property of George and Gwenda. They do not act as trustees. It follows, in my view, that they do not have the account keeping obligations of trustees.*

57. *Susan's submission about the quality of accounts that she claims Margaret should keep and provide here are therefore based upon a mis-statement of the applicable account keeping standard. It is true, as Susan submits, that the keeping of proper accounts is an integral part of a trustee's duties. As Susan points out, *Ford on Trusts, Law Book Company, 2nd edition, 1990 [940] to [950]* describes the standard of accounts to be kept by trustees. Such accounts, Ford says, should normally include an information file, a schedule of trust property, capital and income accounts, a cash account, vouchers and receipts for transactions and the maintenance of a separate bank account for trust payments and receipts. This standard of account keeping that the law requires of trustees is justified by a trustee's wider rights and obligations and is referred to in these reasons as "trustee standard accounts". A trustee has a right of indemnity out of trust property by virtue of the trust relationship. The trustee has an obligation to keep the trust property separate from the trustee's own property and is required to make only authorised investments with trust property. Maintaining accounts to the*

requisite standard assists the exercise of these rights and the performance of these obligations.

58. *The trustee's duty is to keep 'proper' accounts: J.D. Heydon and M.J. Leeming, Jacobs Law of Trusts in Australia, 7th Edition, 2005, [1713]. The trustee's obligation to keep proper accounts is matched by the trustee's right of indemnity out of trust property. To ensure that the trustee's account keeping to the necessary standard is adequately funded, the trustee may have recourse to the trustee's right of indemnity out of trust funds, for example, to engage professional accounting services: see Trustee Act 1925, s 51.*

59. *Importantly, from the materials produced to Court it can be seen that neither Margaret nor Susan has maintained schedules of property, kept capital and income accounts, or a complete cash account separate from bank statements. They have not maintained trustee standard accounts.*

60. *But the standard of account keeping under a power of attorney for attorneys appointed in New South Wales is not the trustee standard. It is less demanding. The relevant law in this State is summarised in G D Dal Pont's, Powers of Attorney, LexisNexis Butterworths, Australia, 2010:-*

[8.55] Although courts speak of agents, and attorneys, being obliged to account to their principals, the general law remains relatively vague on detail. At a basic level accountability presupposes the maintenance of records of transactions, with sufficient particulars in readily accessible form, that afford the principal, or a third party in the principal's stead, the ability to ascertain with clarity the dealings in which the attorney has engaged. General law obligations are reflected by statute in most jurisdictions, which speaks in terms of an obligation to keep accurate records and accounts of all dealings and transactions made under the power.

[8.56] Excepting the Northern Territory legislation, which requires the accounts be furnished 'to the donor at the donor's request and expense', the statutes are silent as to when and to whom the records and accounts are to be supplied. It stands to reason, though, that these must be directed to the principal or, in the event of the principal's incapacity, to person(s) prescribed by law, pursuant to a request by the principal or those persons. It also stands to reason that, in the usual case, the cost of providing and maintaining the records should be recoverable, whether directly or by way of indemnity, from the principal.'

61. *In New South Wales there is no statutory obligation upon an attorney under a power of attorney to keep trustee standard accounts. In other jurisdictions the attorney's account keeping obligations have been formalised by statute: see for example Powers of Attorney Act 2005 (ACT), s 47. The Powers of Attorney Act does not set any account keeping standards.*

62. *But an attorney in this jurisdiction has a general law obligation, as Dal Pont says, to keep records of transactions in which the attorney is involved on behalf of the principal and to maintain those particulars in a readily accessible form, so that when the attorney is called upon, the principal can ascertain with clarity, in what transactions the attorney has been engaged. This obligation*

necessarily follows from the attorney's obligation of accountability to the principal in relation to transactions entered on behalf of the principal.

63. Other text writers express the obligation in similar terms: an agent is under an obligation to keep an accurate account of all transactions entered into on his principal's behalf: Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1995] QB 174 and Bowstead and Reynolds on Agency, Thomson Sweet and Maxwell, 18th Edition, London, [6-090].

64. The attorney's obligation is really one to keep accurate primary accounting records, for which the principal can call, if necessary, for the principal's examination. If the principal then wishes to produce secondary accounts, or full financial accounts, that is a matter for the principal.

65. In my view this is the applicable standard by which Susan and Margaret's account and record keeping as attorneys must be judged. As will be seen below the material Margaret has produced, analysed by sample, generally meets this standard.

- 39 As noted in *Smith v Smith* [2017] NSWSC 408 at [239]-[240], [244] and [427], the notes which form part of the prescribed form of an enduring power of attorney, found in schedule 2 of the *Powers of Attorney Act 2003 NSW*, put an attorney on notice that: (a) an attorney is bound to act in the best interests of the principal, without unauthorised benefit to the attorney; (b) an attorney should keep the property of the attorney at the principal separate; and (c) an attorney should keep reasonable accounts and records about the principal's money and property.
- 40 By an attorney's express, formal acceptance of such an appointment (endorsed on the instrument prescribed for the appointment of an enduring attorney) the attorney must be taken generally to have accepted that, insofar as the attorney might act on the authority conferred by the instrument, the attorney is bound to act within the limits of authority defined by the instrument, informed by the prescribed notes.

FORENSIC CHALLENGES IN DEALING WITH DEFICIENT ACCOUNTING RECORDS

- 41 Whatever may be the proper standard of accounting required of a fiduciary in a particular setting, a failure on the part of an accounting party to meet that standard places that party at a significant, forensic disadvantage in proceedings instituted for accounting.
- 42 The principal authorities are summarised in the following extract from *Smith v Smith* [2017] NSWSC 408 at [448]-[450]:

“448. Where an accounting party fails to keep proper accounts, and thereby renders problematic any exercise of accounting by the Court, the Court generally proceeds on a presumption against that party, resolving doubtful questions against the party whose actions have made an accurate determination problematic: Houghton v Immer (No. 155) Pty Limited (1997) 44 NSWLR 46 at 59D, applying Armory v Delamirie (1722) 1 Stra 505; 93 ER 664. This principle may require moderation in its application to the facts of the particular case in order to serve the interests of justice; but, in a case in which an accounting party has deliberately put it out of the power of an adversary to obtain an accounting to which there is an entitlement, the accounting party cannot complain if the Court presumes the worst against him, her or it.

449. Pointing in the same direction is the principle that, where a fiduciary has mixed trust funds with his, her or its own so as to render identification impossible, the whole fund will be treated as trust property except so far as the fiduciary may be able to distinguish what is his, her or its own: Brady v Stapleton (1952) 88 CLR 322 at 336-337; Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41 at 109-110; Warman International Limited v Dwyer (1995) 182 CLR 544 at 561-562; Cf, In the marriage of Wagstaff (1990) 14 Fam LR 78 at 86. The accounting party bears the onus of proving what, if any, part of a mixed fund is his, her or its own.

450. It is for the errant fiduciary to establish that it would be inequitable for the Court to make against the fiduciary an order for an account of the entire profits, gain or benefits derived by the fiduciary from a breach of fiduciary obligations: Warman International Limited v Dwyer (1995) 182 CLR 544 at 556-562, especially 559 and 561-562.”

JUDICIAL ADVICE AND THE LIKE

- 43 The law offers means for the protection of those charged with solving problems for which there is no easy solution. One way that it does this is by provision of procedures for “judicial advice”, or something analogous, to be sought so that the responsibility for decision-making can be shared.

- 44 The Supreme Court has jurisdiction, both inherent and statutory, to provide judicial advice to a trustee. Section 63 of the *Trustee Act* 1925 NSW provides a comparatively summary procedure for the provision of such advice to a “trustee” (broadly defined by section 5 of the Act to include an executor or administrator to whom a grant of administration has been made by the Court): see, generally, *Macedonian Orthodox Community Church Saint Petka Incorporated v Bishop Petar* (2008) 237 CLR 66; *Re Estate Late Chow Cho-Poon; Application for Judicial Advice* [2013] NSWSC 844; (2013) 10 ASTLR 251.
- 45 Under the *NSW Trustee and Guardian Act* 2009 NSW, the Supreme Court (under sections 61, 64 and 65) and the NSW Trustee (under sections 64 and 65) have statutory powers to give directions in relation to the administration and management of protected estates. Those powers supplement the broad inherent jurisdiction of the Supreme Court to do what is for the benefit of an incapacitated person: *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258-259.
- 46 By virtue of section 38 of the *Powers of Attorney Act* 2003 NSW, the Supreme Court and NCAT have an express statutory power to provide advice or direction on any matter relating to the scope of the appointment of an enduring attorney or the exercise of any function by such an attorney.
- 47 Such powers, specifically directed towards the provision of advice in a formal setting, complement the general powers of the Court, NCAT and the NSW Trustee engaged in the course of their ordinary work.
- 48 In a way analogous to the operation of a system for “judicial advice”, a legal practitioner might also protect himself or herself from criticism in professional disciplinary proceedings by demonstration that he or she has responsibly sought, and acted upon, the advice of a regulatory body: *Law Society of NSW v Moulton* [1981] 2 NSWLR 736 at 757.

CONCLUSION

- 49 Although (as Dr Watson reminds us in *The duty to account*) the concept of accountability has a long history, both at common law and in equity, the accountability of enduring attorneys, protected estate managers and the like, and legal personal representatives of deceased estates generally falls for consideration as an incident of the equitable jurisdiction of the Supreme Court as presently understood or, in limited respects, as an incident of analogous statutory powers exercised by administrative decision makers.
- 50 Practitioners, judges and the community as a whole need to remain mindful of the purposive character of the several heads of jurisdiction exercised by the Court bearing upon estate administration: GC Lindsay, “A province of modern equity: Management of life, death and estate administration” (2016) 43 Aust Bar Rev 9 at 25-27.
- 51 The *protective* jurisdiction of the Court is squarely focused 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 left undone is or is not for the interests, and benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.
- 52 The *probate* jurisdiction 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 testator’s testamentary intentions, and to see that beneficiaries get what is due to them. Once the character of a legal personal representative passes from that of an executor to that of a trustee (upon completion of executorial duties) his, her or its obligations shift in focus from the deceased to his or her beneficiaries.

- 53 As an adjunct to the probate jurisdiction, the *family provision* jurisdiction, equally, 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.
- 54 The several purposes of the Court in exercising these heads of jurisdiction are best served by conscientious endeavours to ensure that fiduciaries acknowledge, and strive to give orderly effect to, the standards of probity required of them, and associated accounting obligations.

Date: 15 September 2017

GCL