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WHO GUARDS THE GUARD?
Incapacity in a Family Context

by

Justice Geoff Lindsay,
Probate and Protective List Judge,
Equity Division, Supreme Court of NSW

I. INTRODUCTION

- 1 This paper is prepared in aid of a presentation to an audience comprising lawyers from several Australian jurisdictions.
- 2 The focus for attention, in the context of a family, is on problems associated with the management of the property (and, to a lesser extent, the person) of a person incapable of managing his or her own affairs. A family member might be appointed as a protected estate manager or guardian to protect the estate or person of a vulnerable member of the family ... but who guards the guard?
- 3 That is a perennial question, particularly in an era in which courts are commonly confronted by cases involving families at issue about “presumptive” rights of inheritance and misapplications of “family” property.
- 4 An endeavour is made to draw together ideas that inform the existence, and operation, of the several heads of jurisdiction encountered in dealing with the onset, and management, of incapacity.

- 5 This is done by adopting as a model for discussion the jurisdiction of the Supreme Court of NSW, as an exemplar of the jurisdiction of comparable courts elsewhere in Australia. It is important to remember, though, that, in dealing with a particular case, significance may attach to the legislative and institutional framework that operates in the particular state or territory in which problems and solutions arise for consideration.

II. CONTEXT

“Death” as a Legal Process

- 6 It is now commonplace for Australians, in anticipation of incapacity for self-management, and in preparation for death, to execute (perhaps in combination with a will) an enduring power of attorney and an enduring guardianship appointment.
- 7 Seen from the perspective of a lawyer engaged in a practice involving succession law, estate administration or elder law (to embrace several common but inadequate descriptive labels), “death” may be viewed as a legal *process* (rather than merely a physical *event*) that extends, at least, from the time at which an enduring instrument is executed until the expiry of any practical likelihood of an application being made for family provision relief.

Jurisdictional Sources of Law, Practice and Procedure

- 8 That is because, to comprehend the issues that might arise at any point of the process, a conscientious lawyer must have an appreciation of the several interlocking jurisdictions of the Supreme Court (and any analogous jurisdiction of a statutory tribunal) respectively known as the protective jurisdiction (formerly, the lunacy and infancy, or wardship, jurisdictions), the probate jurisdiction (formerly, the ecclesiastical jurisdiction) and the family provision jurisdiction.
- 9 Each head of jurisdiction is also closely related to the Supreme Court’s general equity jurisdiction, the source of principles governing:

- (a) fiduciary relationships; and
- (b) a fiduciary's liability to account.

- 10 Nor can one ignore the Court's common law jurisdiction, commonly encountered in dealing with contracts and title to property.
- 11 In short, legal history matters. See, generally, GC Lindsay, "A Province of Modern Equity: Management of Life, Death and Estate Administration" (2016) 43 *Australian Bar Review* 1.
- 12 Although the jurisdiction of an Australian Supreme Court can be viewed as a seamless web in a system of court administration in which the historical sources of jurisdiction inherited from 19th century English law and institutions have been brought together, if not blended, there remains utility in understanding the historical sources of Australian law, practice and procedure. That is because each head of jurisdiction once identified with a different English institution served a particular purpose which continues to inform modern day problem solving.
- 13 The province of the *protective* jurisdiction is the protection of a person who is, or might reasonably be suspected of being, unable to manage his or her affairs (person or estate) by reason of incapacity. An exercise of protective jurisdiction focuses firmly upon the welfare and interests of a particular person who, by reason of incapacity, is in need of protection: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. Everything is tested 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 (*Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 Qd R 1 at [48]), taking a broad view of what may benefit that person (*Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545), but generally subordinating all other interests to his or hers (*Re Eve* [1986] 2 SCR 388 at 427-430 and 434; (1986) 31 DLR (4th) 1 at 29, 31 and 34).

- 14 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 without undue delay: *In the Goods of William Loveday* [1900] P154 at 157; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192. 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: *Estate Wight; Wight v Robinson* [2013] NSWSC 1229 at [20].
- 15 The *family provision* jurisdiction also 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 an eligible applicant for relief out of the estate (or, in NSW, notional estate) in whose favour an order for provision "ought" to be made.
- 16 The purposive nature of each head of jurisdiction needs to be borne in mind if an exercise of the jurisdiction is to be managed efficiently, and not to be hijacked by the adversarial imperatives of particular competing interests.
- 17 In a modern setting, old jurisdictional divides no longer suffice for analyses of common problems. The tendency of solicitors to speak of "Elder Law" is a manifestation of that. Law reforms of relatively recent origin have blurred historical, jurisdictional divisions. For example:
- (a) An application for a statutory will does not neatly conform simply to an exercise of protective or probate jurisdiction and, upon such an application, the Court has to bear in mind the possibility of a family provision application being made after the death of the incapable person for whom a court-authorized will might be made.

- (b) Enduring powers of attorney and enduring guardianship appointments allow decisions to be made on behalf of, and affecting, an incapable person, despite the person's loss of mental capacity, leaving open a possibility of abuse of the incapable person's rights under colour of authority.

- (c) In the administration of a deceased estate, a legal personal representative – an executor or administrator – who is bound to identify, and to take possession of, an estate may be obliged to consider whether property of the deceased was, during the lifetime of the deceased, misapplied by a person (such as a protected estate manager or guardian) who owed him or her the obligations of a fiduciary. Failure to do so might expose the legal personal representative to personal liability in *devastavit: Bird v Bird (No 4)* [2012] NSWSC 648 at [104]-[105]; *Smith v Smith* [2017] NSWSC 408 at [130]-[134].

Fiduciary Relationships and Obligations

- 18 A fiduciary may have acted within authority sufficient to pass a legal title, but nevertheless be exposed to equitable remedies for breach of the obligations of a fiduciary.

- 19 There is no exhaustive definition of a “fiduciary”, but:
 - (a) a working definition (based on observations of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97) focuses on a relationship in which one person (“the fiduciary”) undertakes or agrees to act for, or on behalf of, or in the interests of another person (generally called “the principal” or “the beneficiary”) in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense; and

- (b) each of a protected estate manager, a guardian and a legal personal representative occupies an office routinely regarded as fiduciary in character.

20 The duties of a fiduciary are generally described as the following (flowing from a duty of loyalty to act in the interests of the beneficiary and not otherwise):

- (a) a duty not to place himself, herself or itself in a position of conflict between his, her or its duty to the person in need of protection and his, her or its own interests; and
- (b) a duty not to obtain, or retain, a profit or benefit from the fiduciary office,

without obtaining the fully informed consent of the beneficiary to whom fiduciary obligations are owed: *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467.

21 *Prima facie*, a person incapable of managing his or her affairs might reasonably be thought to be incapable of giving his or her fully informed consent to a transaction otherwise in breach of fiduciary obligations.

22 A fiduciary may be described as an “accounting party” because liable to account to the beneficiary for unauthorised profits or benefits received within the scope of the fiduciary relationship.

23 A duty to account arises whenever a person obtains or deals with property in circumstances where the entitlement to do so is qualified (or conditioned) by a requirement that the person is not free to advance his or her own self interest but is required to act in the interests of another: JA Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016), paragraph [456].

Undue Influence in Equity

- 24 In practice, an allegation of breach of fiduciary duty made in connection with management of the affairs of an incapable person may be closely associated with an allegation of undue influence. There is a close association (although not a precise identity) 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 has exercised, or is presumed to have exercised, undue influence over another. The object of both is to provide redress for conduct which is against good conscience. This can be seen, for example, in the High Court of Australia's classic exposition of the concept of undue influence in *Johnson v Buttress* (1936) 56 CLR 113 at 134-135.
- 25 Neither type of allegation (a breach of fiduciary obligations or an exercise of undue influence) is limited to misconduct of a person who occupies the formal office of a protected estate manager or guardian.
- 26 In dealing with allegations of undue influence, equity recognises certain relationships as giving rise to a presumption of undue influence (eg. trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, doctor and patient, and parent and young child); but, as *Johnson v Buttress* illustrates, the concept has a broader field of operation.
- 27 A presumption of undue influence, generally, may arise if it is proved that: (a) at the time a gift was made there existed a relationship between the donor and 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) the gift is so substantial, or so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act: *Quek v Beggs* (1990) 5 BPR [97405] at 11,764-11,765.

- 28 A presumption of undue influence may be rebutted by a donee proving that the donor (a) knew and understood what he or she was doing; and (b) was acting independently of any influence arising from the ascendancy of the donee: *Quek v Beggs*.
- 29 *Prima facie*, a person who accepts a substantial gift from a person incapable of self-management might reasonably be thought hard-pressed to demonstrate these requirements.

Undue Influence in Probate

- 30 Recognition must be given to the difference between “undue influence” (as thus described) upon an exercise of equity jurisdiction and the more limited concept (of coercion) known by the same name in probate law, together with the possibility (recognised in *Bridgewater v Leahy* (1998) 194 CLR 457 at 474-475) that there might be scope for equitable principles to be applied in a probate context: *Boyce v Bunce* [2015] NSWSC 1924 at [32]-[60] and [198]-[207].

Retrospective and Prospective Perspectives

- 31 Upon an exercise of probate, family provision or general equitable jurisdiction, the Court *generally* examines *past* events relating to *a particular transaction* with a view to restoration of an estate then to be duly administered.
- 32 Upon an exercise of protective jurisdiction, the focus is *generally* upon securing control of an estate, in the interests of a person in need of protection, and considering whether there is a need for, and utility in, *a system of management* going forward, *assessing future risks*.

III. PARTICULAR PROBLEMS IN FAMILY RELATIONSHIPS

- 33 Dealing with incapacity in a family with a member increasingly vulnerable as he or she drifts into incapacity can be profoundly difficult for reasons commonly associated with the following “problems”.

- 34 First, there is the problem of *recognising, and acknowledging, incapacity* (a concept the meaning of which depends on the business to be performed): *Gibbons v Wright* (1954) 91 CLR 423 at 437-439 (general principles); *CJ v AKJ* [2015] NSWSC 298 at [27]-[43] (protective jurisdiction); *Banks v Goodfellow* [1870] LR 5 QB 549 at 564-565 (probate jurisdiction).
- 35 Secondly, there is the problem of *recognising the existence of conflicting interests within the family*. Not uncommonly, even professional advisers erroneously assume that no conflicts of interest arise, or need to be guarded against, in a family setting: eg, *Reilly v Reilly* [2017] NSWSC 1419 (appeal pending).
- 36 Thirdly, even if the existence of conflicting interests within the family is recognised, there is the problem of *constructing a regime of management* which ensures that: (a) conflicts of interest are eliminated, or at least minimised; and (b) due performance of duties owed to the incapable person remains paramount: *IR v AR* [2015] NSWSC 1187 at [29]-[35].
- 37 Fourthly, there is the problem of *accounting* for the estate of an incapable person who lives in community with those in whose care he or she resides (necessitating a relaxation of “the no profit” rule for the purpose of serving the interests of the incapable person): *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 416 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433; *Crossingham v Crossingham* [2012] NSWSC 95; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113; *Smith v Smith* [2017] NSWSC 408.
- 38 Fifthly, there is the related problem of how to account for an estate where a fiduciary has mixed his, her or its property with that of a beneficiary and/or failed to keep records sufficient to allow a proper audit: *Smith v Smith* [2017] NSWSC 408 at [447]-[451].
- 39 Sixthly, there is the problem of working out *whether a “family” transaction involves the exercise the powers of a fiduciary office* (such as those of an

enduring attorney) or not. Even if not exercised, a power of attorney might, in combination with other evidence, evidence a special relationship of influence capable of supporting fiduciary obligation: *Hartley v Woods* [2017] NSWSC 1420 at [65]-[66]. A person occupying a special relationship of influence might unconscionably obtain benefits at the expense of a vulnerable person (eg, by accessing bank deposits) by inducing the vulnerable person to confer benefits without deployment of a power of attorney.

- 40 Seventhly, there is the problem of defining the respective rights and obligations of co-owners of property (particularly, in equity) where one co-owner lacks capacity for self-management and another has assumed management of his or her affairs, with a fiduciary obligation to act in the interests of the incapacitated person: *Smith v Smith* [2017] NSWSC 408 at [296]-[325].
- 41 Eighthly, there is the problem of *whether a breach of fiduciary obligations might be excused* in the interests, and for the benefit, of an incapable person emotionally and socially dependent upon a defaulting fiduciary family member: *C v W (No 2)* NSWSC 945 at [45]-[47]; *Downie v Langham* [2017] NSWSC 113. A related problem might be whether an allowance should be made from the estate of the incapable person by way of *ex gratia* provision of maintenance for the defaulting family member: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545.
- 42 Ninthly, there is often a latent problem of the *extent to which (if at all) testamentary intentions, or expectations, can or must be taken into account* upon an assessment of behaviour within a family, if not in shaping relief available from the court; including whether a family settlement might be approved by the Court (*W v H* [2014] NSWSC 1696).
- 43 Tenthly, there may be the problem of *expectations of remuneration* for the performance (by a fiduciary) of functions which, absent a grant of authority by a court, would be required to be performed gratuitously: *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 and

Re Managed Estates Remuneration Orders [2014] NSWSC 383 (*Remuneration of Protected Estate Manager*); *Re Estate Gowing* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32, 763 and *Re Estate Ford* [2016] NSWSC 6 (Executor's Commission).

IV. CONCLUSION

- 44 Sometimes problems such as these might best be addressed by putting in place a system of regulatory oversight – such as may be provided by the NSW Trustee as the monitor of all protected estates, and the manager of some – but *undue formality might unduly constrain the freedom of action of family members and lack utility when measured against the size of an estate or potential risks of misadventure.*
- 45 Ultimately, each problem must be analysed with close attention to its own facts, and an appreciation of the purposive character of jurisdiction available to be invoked to help solve it.

GCL

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