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Accountability : The Universal Problem in the Administration of Estates affected by Incapacity or Death

by

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INTRODUCTION

1 The object of this paper is:

(a) to view as a whole the law and practice governing administration of estates affected by incapacity or death, recognising nuanced connections between the protective, probate and family provision jurisdictions;

(b) to note the centrality of the purposive character of those ("estate administration") jurisdictions in problem solving;

(c) to consider how, upon an exercise of an estate administration jurisdiction, importance attaches to "accountability" (that is, holding all participants in an exercise of jurisdiction to the purpose for which the particular jurisdiction exists); and

(d) to demonstrate this by selected examples:

(i) the concept of “interest” in the administration of an estate and the importance of ensuring that “all interested persons” are given reasonable notice of proceedings and an opportunity to participate in them; and

(ii) the fiduciary obligations of an enduring attorney in management of the affairs of an incapacitated principal.

2 The paper’s object requires an appreciation of the nature of “recent” developments in the law and practice governing administration of an estate affected by incapacity or death, with particular reference to legislative authorisation of:

(a) “enduring” powers of attorney and guardianship appointments; and

(b) “statutory wills”,

legal constructs which cross traditional boundaries of the protective, probate and family provision jurisdictions of the Supreme Court.

THE AGE OF REFORM

3 Since 1970 or thereabouts, fundamental changes have occurred in NSW law and practice concerning the administration (management) of an estate (property) affected by incapacity or death. Those changes have been implicitly underwritten by the continuing availability of systems for the supervision of fiduciaries and the auditing of estates. As demonstrated by public debate about “elder abuse” and satellite concepts, we are still coming to terms with the practical implications of this “age of reform”.

4 In broad outline, to illustrate this point, the following developments require notice:

(a) Empowerment of an individual, by an instrument in writing, to appoint:

(i) an enduring attorney.

(ii) an enduring guardian.

(b) Establishment of a specialist tribunal (presently the Guardianship Division of the NSW Civil and Administrative Tribunal, "NCAT") to conduct most of the State's protective business relating to:

(i) financial management orders.

(ii) guardianship orders.

(iii) medical consents.

(c) Development of a system of protective estate management that focuses upon functional incapacity for self management, not dependent upon a finding of mental illness.

(d) Official encouragement of private managers of protected estates, treating the State's public manager (currently the NSW Trustee) as a manager of last resort.

(e) Empowerment of the Supreme Court to authorise the making of a "statutory will" for a person lacking testamentary capacity: eg, *Small v Phillips* [2019] NSWCA 222; *Small v Phillips (No. 2)* [2010] NSWCA 268; and *Small v Phillips (No. 3)* [2020] NSWCA 24.

(f) Development of the family provision jurisdiction by:

(i) expanding the classes of persons eligible to make an application for family provision relief.

(ii) expanding the range of property amenable to a family provision order by empowering the Court to designate property as “notional estate”.

(iii) providing a mechanism for approval by the Court of a release of family provision rights.

(g) Conferral upon the Court of powers for the admission to probate of an “informal will”, and for rectification of a will, for the purpose of giving effect to an expression of testamentary intention which would otherwise fail for non-compliance with formal requirements of a testamentary instrument.

(h) Conferral upon the Court of discretionary powers to vary a scheme for distribution of an intestate estate in the case of:

(i) a testator dying with “multiple spouses”: *Bailey v Palombo* [2020] NSWSC 1209.

(ii) an indigenous estate: *Re Estate Wilson, Deceased* (2017) 93 NSWLR 119.

5 These developments have not taken place in a vacuum. They need to be assessed in the context of fundamental changes to:

(a) the concept of “family”, which often lies at the heart of problems encountered in the administration of an estate affected by incapacity or death.

(b) the nature and extent of property (including superannuation entitlements) available to be managed in the administration of an estate affected by incapacity or death.

(c) the availability of systems for executive government supervision of the process of administration of an estate affected by incapacity or death, and associated curial procedures for the resolution of disputes.

6 In combination, procedures for the administration of an estate affected by incapacity or death have been rendered more flexible at the same time as they have been rendered more complex by giving voice to a kaleidoscope of interests that need to be taken into account in the performance of the functions of those responsible for administration of an estate affected by incapacity or death.

7 Family: The expanded definition of "eligible person" in the *Succession Act*, section 57 is perhaps the most graphic illustration that, in dealing with the (implied) concept of "family" upon an application for family provision relief a broader range of relationships is in view beyond that found in, or consequentially upon, a registered marriage. Even then, there is scope (through an application for a statutory will) for a person who lacks standing to make an application for family provision relief to obtain court-authorised participation in the estate of a person lacking testamentary capacity.

8 Property: The nature and extent of property available to be managed in the administration of an estate affected by incapacity or death has changed dramatically in a society that has, on the whole, grown wealthier. An example of this is the widespread enjoyment of superannuation entitlements.

9 The availability of such entitlements has provided property occasioning applications for a distribution order in intestate indigenous estates: *Re Estate Wilson, Deceased* (2017) 93 NSWLR 119; *Re Tighe* [2018] NSWSC 163, 17 ASTLR 304; *Re Estate Jerrard* (2018) 97 NSWLR 1106.

10 The commercial attractiveness of superannuation as an investment, raises questions about the terms upon which an investment may be made in superannuation on behalf of a protected person: *G v G (No. 2)* [2020] NSWSC 818. Care needs to be taken to ensure that an investment in superannuation on behalf of a protected person does not deny him or her access to funds if required and is not used as a means of diverting property away from his or her estate.

11 Executive Government: In the public interest, the administration of an estate affected by incapacity or death requires that there be an effective arm of executive government able to supervise the process of administration. In the case of incapacity, that executive arm is presently the NSW Trustee. In the case of death, the executive arm is principally the Registry of the Supreme Court acting, where appropriate, with involvement of the NSW Trustee as a party to proceedings. In each category of case, the executive performs *a vital role as an auditor* of the process of administration (so far as it can, in practice, be audited) *and in the provision of administrative support for the Court*.

PARAMETERS OF OUR MANAGED SOCIETY

12 Taken together, the tendency of developments concerning the administration of an estate affected by incapacity or death is to recognise that in contemporary society (a "managed society"):

(a) there is an expectation that a person's affairs will be managed on his or her behalf as he or she experiences incapacity for self-management on the path to death.

(b) so far as may be practicable, government encourages the affairs of each person incapable of self-management to be managed "privately" *via*:

(i) the appointment of an enduring guardian and/or an enduring attorney.

(ii) in the absence of an effective, workable management regime involving privately executed "enduring" instruments, the appointment of a guardian and/or financial manager by an order of NCAT or equivalent orders of the Supreme Court.

(iii) estate planning incorporating the making of a will or, in the absence of testamentary capacity, an application to the Court for the making of a "statutory will".

(c) decisions made in management of the affairs of an incapable person should be made, so far as may be practicable, in consultation with that person, giving effect to his or her preferences, as known or presumed (with ongoing debate about whether an incapable person's preferences can, and should, be subordinated to an assessment of his or her "best interests").

"FIDUCIARY LAW" AS A MAINSTAY OF ACCOUNTABILITY

13 Questions of accountability of persons directly or indirectly involved in administration of an estate affected by incapacity or death are larger than equitable principles governing the existence of fiduciary relationships and the obligations of fiduciaries. However, those principles underwrite any process of administration of an estate affected by incapacity or death because they provide guidance as to, and opportunities for enforcement of, the standards required of persons (such as enduring attorneys, enduring guardians, financial managers, guardians, executors and trustees) involved in the administration of such an estate.

14 Their continuing importance needs to be recognised, as well as their adaptability to a variety of situations, as the practical implications of the current "age of reform" are worked through. This is particularly important, perhaps, in the context of transactions effected by means of an enduring power of attorney (*Estate Tornya, Deceased* [2020] NSWSC 1230), and proposals that protected estate management be guided by "assisted (or supported) decision making" concepts, where opportunities for conflicts between duty and interest abound.

15 Problems associated with the performance of fiduciary obligations can present themselves in a different light, at different times, in the process of administration of an estate affected by incapacity or death.

16 The law relating to estate administration is a fertile ground for fiduciary relationships because property is routinely required to be held by one person (a fiduciary) on behalf of another (a beneficiary, or principal).

17 A classic passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 (with editorial adaptation) informs a common understanding in Australia of the essential features of a "fiduciary relationship" and, incidentally, what it is to be a "fiduciary":

> "… 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 so doing we must recognise that the categories of fiduciary relationships are not closed: *Tufton v Sperni* [1952] 2 TLR 516 at 522; *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 at 110.
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> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v Boardman* [1967] 2 AC 46 at 127), 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 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….
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> 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: see generally Weinrib, 'The Fiduciary Obligation', *University of Toronto Law Journal*, Vol. 25 (1975), pages 4-8… [Emphasis added]".

18 On the whole, a fiduciary has a duty of loyalty to his or her principal not to place himself or herself in a position of conflict, nor to obtain a profit or benefit from his or her fiduciary position, without first obtaining the fully informed consent of the principal: *Hospital Products Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68, 96 and 141; *Chan v Zacharia* (1984) 154 CLR 178 ay 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467. Where that duty is breached, the nature of the case will determine the appropriate remedy, moulded to the circumstances of the particular case.

19 An object of the law governing fiduciaries is *to maintain standards of conduct* on the part of a party (fiduciary) who exercises a power or discretion affecting the affairs of another party vulnerable to abuse by the fiduciary of his or her position: Paul Finn, *Fiduciary Obligations* (1st ed, 1977; Reprint, 2016), paragraph [698]; *Johnson v Buttress* (1936) 56 CLR 113 at 135. The law endeavours to allow a fiduciary to be held accountable for an abuse of his or her position.

ACCOUNTABILITY IN A BROADER CONTEXT

20 Questions about accountability often arise in retrospect when a party seeks curial relief for what is alleged to have been a breach of a fiduciary obligation. However, they also commonly arise (but, perhaps, less obviously so) when a court or tribunal is called upon to appoint "a suitable person" to a fiduciary

office, necessitating an exercise of risk management (looking forward) in the selection of a person to be relied upon to uphold fiduciary standards.

21 The nature of "accountability" varies depending on context. There are, for example, subtle but important differences between the nature of the office of an executor or trustee and that of a "guardian" (an expression sometimes used in description of management of an estate as well as management of a person): *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at [37]-57]; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113.

22 A concern for "accountability" affects all who are called upon, or empowered, to make decisions affecting the interests of a person whose estate is under consideration. In the case of a person whose incapacity for self-management arises from physical or mental incapacity – a living person – similar considerations apply to management of "the person" as apply to management of the person's "estate".

23 The procedural context in which questions of "accountability" arise can be important. In both its formulation and operation, the law governing administration of estates involving incapacity for self-management remains largely "action-based", with a strong emphasis on the availability of remedies and comparatively less emphasis on underlying, governing principles. Nevertheless, the complexity of the law, and its administration, requires that ongoing efforts be made to identify principles that inform decision making.

24 In the course of practice, a succession lawyer may well observe that, in the course of an ordinary life and in the lives of "family", there is a progression of engagements with the law: in turn, the law of agency, the law of wills, the protective jurisdiction of the State, the law governing administration of deceased estates (testate or intestate), and the law governing an application for family provision.

25 Experience of this character justifies the observation that, in the eyes of modern law, death is now, more than formerly, less an *event* and more a *process* that may commence before, and extend beyond, *physical death*.

26 Individuals, living in community, are increasingly called upon to take steps in anticipation of incapacity and death. And the steps they routinely take involve execution of an enduring power of attorney, an enduring guardianship appointment and a will as legal documents framing management of their affairs as incapacity and death vest in possession.

27 Within the legal system's administrative framework for the administration of an estate affected by incapacity or death, equitable principles operate as a means of guiding conduct and resolving disputes. Those principles, in large measure, are principles governing fiduciary relationships and fiduciaries.

28 In the "standard" case of a person who executes an enduring power of attorney, an enduring guardianship appointment and a will, there is a nuanced change in the operation of fiduciary principles as the person progresses from full capacity to none at all.

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

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

31 The law is not yet settled in the approach it takes to an enduring attorney who takes a benefit under a transaction effected pursuant to a "standard form" enduring power of attorney in circumstances in which the principal is incapacitated.

32 In a domestic setting, where an attorney is both a member of the "family" of his or her principal and engaged in care of the principal, the fiduciary obligations owed by the attorney to the principal might be less than dictated by the general law of agency. That is because they may be assessed by analogy with the fiduciary obligations owed by a guardian entrusted with funds for the maintenance and support of an incapable person: *Estate Tornya, Deceased* [2020] NSWSC 1230. Any such assessment is likely to require familiarity with aninterplay between the Court's equity and protective jurisdictions.

THE PURPOSIVE NATURE OF ESTATE ADMINISTRATION JURISDICTIONS

33 A common connection between governing principles and available remedies is the purposive nature of the jurisdiction of the Supreme Court of NSW (and interstate equivalents) in solving problems attending incapacity or death. In a particular case, close attention may need to be given to the operation of legislation bearing upon the Court's jurisdiction or the availability of analogous forms of jurisdiction exercised by a statutory tribunal, notably the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT"). However, ideas that inform problem solving can usefully be identified by reference to the Court's non-statutory jurisdiction.

34 Each head of jurisdiction is governed by the purpose for which it exists, and each has a different functional imperative which may need to be recognised in problem solving that crosses jurisdictional boundaries:

(a) The protective jurisdiction (based, historically, on the English Lord Chancellor's lunacy jurisdiction, his infancy or wardship

jurisdiction or, as they may be variously described, his *parens patriae* 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 focuses upon the welfare and interests of a person incapable of managing his or her affairs, testing everything against whether what is 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.

(b) The probate jurisdiction (formerly described as "ecclesiastical jurisdiction", historically derives from England's Ecclesiastical Courts) 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.

(c) The family provision jurisdiction (conferred and governed by legislation) operates as an adjunct to the probate jurisdiction, looking 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 (out of a deceased person's estate or notional estate) in whose favour, because they have been left without "adequate provision for their proper maintenance, education or advancement in life", an order for provision "ought" to be made.

(d) The equity jurisdiction (historically based on the Lord Chancellor's Chancery jurisdiction) generally looks to grant, or withhold, discretionary relief (to restrain conduct or to compel the performance of a duty) for the purpose of preventing conduct which, according to its precepts, is unconscionable. The primary contribution of equity jurisprudence in this context is its articulation of principles, and its provision of remedies, designed: (i) to bring an estate under the control of the Court, to preserve it and provide for its orderly administration; (ii) to facilitate the conduct of proceedings in which all affected interests are represented; and (iii) to hold a fiduciary to account for a breach of standards of conduct required of a fiduciary.

35 Each of these heads of jurisdiction involves an element of discretionary, administrative decision making which differs from the adversarial model of decision making characterised by the common law jurisdiction historically derived from the old English common law courts of Queen's Bench, Common Pleas and Exchequer. Common law rules continue to be informed by their historical derivation from a system of decision making grounded on trial by jury. "Rules" and "exceptions", with binary outcomes of contested issues, are commonplace in common law modes of thought, whereas an exercise of discretionary jurisdiction generally requires identification of "principles" that guide decision making. To some extent, the development of "administrative law" as a separate field of study in Anglo-Australian law since the mid-19th century blurs these types of distinctions, but they remain important.

36 In the administration of an estate affected by incapacity or death, importance also attaches to recognition that debates between adherents of "common law" jurisprudence and "equity" jurisprudence do not cover the field. The protective, probate and family provision jurisdictions are idiosyncratic.

“INTERESTS” AFFECTED BY AN EXERCISE OF ESTATE ADMINISTRATION JURISDICTION, AND REQUIREMENTS THAT THEY BE GIVEN NOTICE OF PROCEEDINGS

37 In practice, the purposive character of the Court’s protective, probate and family provision jurisdictions governs the type of “interests” involved in an exercise of the Court’s jurisdiction and the steps taken to consult those interests:

(a) Upon an exercise of protective jurisdiction, the interests and welfare of the person in need of protection are paramount. It is through that lens that steps are taken to consult others (members of family, friends, carers) for information about the person in need of protection. If any label is needed to describe the interest in protective proceedings of a person’s “significant others” it is “social interest” (although care needs to be taken to notice the existence or otherwise of any conflicting interests, legal or otherwise).

(b) The probate jurisdiction is classically described as an “interest” jurisdiction, meaning (for the most part) that standing to participate in probate proceedings depends upon identification of a property interest in the outcome of the proceedings.

(c) Upon an exercise of family provision jurisdiction, the interests to be consulted are: (i) those of persons who (absent a family provision order) have a property interest in the estate of the deceased under consideration; and (ii) the range of people who, falling within the definition of “eligible person”, might have a competing claim to participation in the deceased’s estate.

38 “Accountability” (for all persons participating in decision making about an estate affected by incapacity or death) commonly focuses upon ensuring that steps are taken to serve on all “interested persons” a formal notice of

proceedings affecting the person or estate under consideration, with a reasonable opportunity to be heard in the proceedings.

39 The potentially critical nature of any requirement for service of “notice of proceedings” is highlighted, from the perspective of a judge, by the reluctance of some parties to ensure that notice is duly given.

40 In the modern era, the Court needs to be vigilant to make sure that, where possible, notice of proceedings is given personally to each interested person or that, in the absence of personal service of notice, there is satisfactory evidence explaining its absence. Particular vigilance is required where a deponent to service of notice simply swears that a letter has been posted to an address, or an email has been sent, without proof of the effectiveness of any such communication.

41 There is a strong public interest in ensuring that “notice of proceedings” is duly given to all interested persons.

42 In the context of an exercise of protective jurisdiction, the public interest requires due notice to be given so that a proper assessment can be made of the capacity and needs of a person in need of protection, the availability to the person in need of protection of resources and assistance, and identification of the person’s exposure to risk at the hands of those in whose community he or she might live.

43 In probate and family provision proceedings, due notice is required to make sure that there is an orderly succession to property and that community expectations about testamentary succession can be dealt with justly.

44 An application for a statutory will does not fit neatly into this analytical scheme because it occupies territory at the intersection of the protective, probate and family provision jurisdictions.

45 A simple application for a statutory will is one in which all persons affected by a proposed statutory will are readily identifiable and consent to the proposed will. In such a case, the jurisdiction works beneficially and well.

46 In a complex case, the jurisdiction can be a mixed blessing. The Court not uncommonly has to make a preliminary judgment (sometimes on inadequate evidence) about whether, having regard to the protective character of the Court's jurisdiction, particular people or classes of people should or should not be given notice of the application. Sometimes problems about "notice" can be overcome by the authorisation of a statutory will, coupled with directions for proceedings to return to court *after* service of notice on persons who may have an interest in arguing against it.

47 Care needs to be taken not to allow an application for a statutory will to be a dry run for family provision proceedings.

48 Caution may also be required in dealing with an application made in anticipation of the applicant not having standing to make an application for family provision relief. The protective character of the statutory will jurisdiction is of paramount importance. Care needs to be taken to ensure that an incapacitated person is not placed under pressure by or on behalf of a prospective beneficiary to make statements, or to take steps, that might be solicited or provoked by a prospective beneficiary in aid of an application for a statutory will.

OPERATION OF AN ENDURING POWER OF ATTORNEY AS THE PRINCIPAL BECOMES INCAPACITATED

49 The legislative reforms which introduced the concept of an enduring power of attorney (by amendment of Part 16 of the *Conveyancing Act* 1919 NSW, now replaced by the *Powers of Attorney Act* 2003 NSW) effected three reforms of present significance.

50 First, they authorised a conferral of authority on an attorney in plenary terms in a standard, short form of instrument. Secondly, they contemplated that in a standard form of power of attorney the attorney might be authorised "to execute an assurance or other document, or do any other act, whereby a benefit" was conferred on the attorney. Thirdly, they authorised a continuing operation of a power of attorney in the event of a loss of mental capacity on the part of the principal.

51 The existence of a "benefits clause" in an enduring power of attorney has given rise to difficulties.

52 In *Taheri v Vitek* (2014) 87 NSWLR 403 the Court of Appeal held that a third party is entitled to rely upon a power of attorney (in the form of Schedule 7 to the *Conveyancing Act* 1919), containing a benefits clause, without inquiry as to whether a transaction effected by the attorney is beneficial to the principal.

53 That has given rise to speculation in some quarters about whether an enduring attorney, authorised by the text of a standard form power of attorney to confer a benefit on himself or herself, remains accountable to his or her incapacitated principal (or the principal's deceased estate) for self-dealing which, absent a benefits clause, would constitute a breach of fiduciary obligations.

54 *Estate Tornya, Deceased* [2020] NSWSC 1230 analyses this problem, noting the importance of distinguishing between: (a) a contest between a principal and a third party who has transacted business with the principal *via* an attorney; and (b) a contest between a principal and attorney, focussing on the existence, nature and extent of any fiduciary obligations owed by the attorney to the principal. The particular focus of analysis is on a domestic setting in which an enduring attorney who engages in self-dealing is both a member of the family, and a carer, of an incapacitated principal.

55 The judgment suggests that an attorney who acts under an enduring power of attorney, after his or her principal has become incapable, necessarily stands in a fiduciary relationship with the principal, a relationship in which the principal is at a special disadvantage *vis a vis* the attorney in the event that the attorney acts otherwise than conscientiously in the exercise of his or her powers.

56 In summary, the judgment suggests that in those circumstances:

(a) an enduring attorney may be held liable as a fiduciary to account for his or her dealings with property of his or her incapacitated principal if a benefit obtained by the attorney from self-dealing:

(i) 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; or

(ii) flows from an unconscientious taking of advantage of the special disadvantage to which the incapacitated principal is subject *vis a vis* the attorney.

(b) the existence, nature and extent of any liability to account an attorney may have (which is to say, any remedy available to the attorney's incapacitated principal, or the principal's deceased estate) may depend upon whether the attorney is able to persuade the Court that the standard of accounting required of him or her should take into account factors such as those considered upon an exercise of protective jurisdiction so as to avoid an unreasonable and inequitable application of the law; and

(c) in deciding whether to make an order for an enduring attorney to account for his or her dealings with property of the principal, the Court may take into account the possibility that, had the attorney applied to the Court for an exercise of protective jurisdiction affecting management of the incapacitated person's affairs, the Court might have made orders to the effect that:

(i) the attorney having acted honestly and reasonably, he or she should be relieved of liability for any breach of a fiduciary obligation; or

(ii) the attorney be granted a voluntary allowance from the estate of the incapacitated person for the maintenance or benefit of the attorney as a member of family.

CONCLUSION

57 The law and practice governing administration of an estate affected by incapacity or death needs to be considered in overview (embracing the several jurisdictions of the Court that may be engaged at different times in the process of a person moving towards incapacity, death and its sequelae) rather than as several non-intersecting areas of practice.

GCL
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