NSW CIVIL AND ADMINISTRATIVE TRIBUNAL (NCAT)

GUARDIANSHIP DIVISION

TRAINING SEMINAR

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NCAT'S PROTECTIVE JURISDICTION IN CONTEXT

by

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INTRODUCTION

1 The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) exercises statutory jurisdiction which, in character, is similar to the protective jurisdiction exercised by the Supreme Court of NSW.

2 NCAT's protective (guardianship) jurisdiction is governed by:

(a) The *Civil and Administrative Tribunal Act* 2013 NSW.

(b) The *Guardianship Act* 1987 NSW.

(c) The *Powers of Attorney Act* 2003 NSW.

3 Legislative provisions relating to "financial management" of the estate of an incapable person must be read in the context of the *NSW Trustee and Guardian Act* 2009 NSW, which provides the statutory framework within which the NSW Trustee manages a protected estate or supervises financial managers generally.

4 In practice, Tribunal members also encounter a range of other statute-based regulatory regimes in understanding, and accommodating, the NDIS, nursing homes and retirement villages, pension entitlements or the like.

5 The Tribunal's protective jurisdiction is purposive in nature, as illustrated by section 4 of the *Guardianship Act* 1987, which is consistent with section 39 of the NSW *Trustee and Guardian Act* 2009 and reflects the jurisprudential nature of the protective jurisdiction of the Supreme Court, as explained by the High Court of Australia in *Secretary, Department of Health & Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 258-259.

6 Section 4 of the *Guardianship Act* 1987 is foundational to an exercise of the many discretions conferred upon the Tribunal in its exercise of guardianship jurisdiction.

7 A prime illustration of this is that, when deciding whether to review an enduring power of attorney or to treat an application for the review as an application for a financial management order, attention must be given to the section 4 criteria. Due allowance must be made for an incapable person's choice of an enduring attorney but, if management of the person's affairs by the attorney involves unacceptable risks to the welfare and interests of the incapable person, the Tribunal should not hesitate to appoint a financial manager. That is so, even if that manager is the attorney in a case in which the Tribunal's assessment is that any risks arising from the attorney's continuing role can be met by engagement of the administrative regime for the supervision of financial managers by the NSW Trustee for which the *NSW Trustee and Guardian Act* 2009 provides.

8 The jurisdiction of the Guardianship Division revolves around the concepts of:

(a) incapacity for self-management (in management of "the person" and "the estate"): *CJ v AKJ* [2015] NSWSC 498; *P v NSW Trustee and Guardian* [2015] NSWSC 579; and

(b) management of risks associated with the present and future management of the affairs of an incapable person, informed by past experience, present circumstances and future possibilities so far as may be known.

9 The Tribunal is not directly concerned with the determination of property rights or competing claims of right. Nor is it equipped institutionally to deal with disputes about such rights. Its focus is upon prudential "risk management" of the affairs of a person who is functionally unable to manage his or her own affairs: *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [256], [309] and [319]; *H v H* [2015] NSWSC 837 at [31]-[32].

10 Nevertheless, in contemplation of management of "the person" (in dealing with a guardianship order or a review of an enduring guardianship appointment) or in contemplation of management of "the estate" (in dealing with a financial management order or a review of an enduring power of attorney), a material consideration is generally the nature, value and availability of the property (estate) of an incapable person. In dealing with management of the estate the Tribunal is dealing directly with one or more proposals for the management of property. In dealing with management of the person, the Tribunal is concerned to know what resources are available for the care of an incapable person.

11 A key feature of the jurisdiction exercised by the Guardianship Division is that the offices with which it is routinely concerned (that is, those of an enduring attorney, an enduring guardian, a financial manager and a guardian) are fiduciary offices of a particular kind.

12 The holder of such an office is not, by reason only of holding the office, a trustee: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-421; *Clay v Clay* (2001) 202 CLR 410 at [37] *et seq*.

13 Illustrations of the difference between the holder of a "guardianship office" and a trustee can be found in:

(a) the approach taken to conflicts between duty and interest in a family setting: *IR v AR* [2015] NSWSC 1187 at [29]-[35]; *Re L* [2000] NSWSC 721 at [11]-[12]; *SAB v SEM & Ors* [2013] NSWSC 253.

(b) the purposive character of the liability of a "guardian" to account: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428-430; *Crossingham v Crossingham* [2012] NSWSC 95 at [15]-[36]; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113; *Dowdy v Clemson* [2021] NSWSC 1273. Cf, *Parker v Higgins* [2012] NSWSC 151 at [53]-[65].

(c) the jurisdiction of the Court to grant to a "guardian" relief from a liability to account incurred in circumstances in which the "guardian" has acted honestly and reasonably: *C v W (No 2)* [2016] NSWSC 945; *Downie v Langham* [2017] NSWSC 113; *Dowdy v Clemson* [2021] NSWSC 1273.

14 Although the guardianship jurisdiction of NCAT is generally discussed as a separate field of study it is, at least in relation to the management of property, inherently tied up with the administration of the estate of a person who is, or may be, incapable of managing his or her affairs and, in due course, the administration of his or her deceased estate.

15 Because of that interconnectedness, it is desirable that Tribunal members have an understanding of the business of the Supreme Court involving an exercise of:

(a) Protective jurisdiction.

(b) Probate jurisdiction.

(c) Family provision jurisdiction.

(d) Equity jurisdiction.

(e) Common Law jurisdiction, upon the recovery of personal injury compensation on behalf of an incapable person.

16 Each of those jurisdictions involves, amongst other things, the management of property of a person who is, by reason of incapacity or death, incapable of managing his or her affairs.

17 For my commentary on the nature, scope and interconnectedness of these jurisdictional heads, see my "Speeches" published on the website of the Supreme Court:

A General Introduction

(a) "Estate Administration - A Province of Modern Equity: Management of Life, Death and Estate Administration" (26 May 2015), reproduced in (2016) 43 *Australian Bar Review* 9.

(b) "A Struggle for Perfection in an Imperfect World: Dignity of the Individual; Incapacity for Self-Management; Rights, Duties and Conflicts of Interest" (26 October 2018).

The Protective Jurisdiction

(c) "The Incapacitated Plaintiff and Personal Injury Compensation Proceedings" (11 March 2017).

(d) "Roles in Protective Management of Person and Property" (8 December 2017).

The Probate Jurisdiction

(e) "Probate Law and Practice: An Introduction" (3 March 2022).

At the Intersection of the Protective and Probate Jurisdictions

(f) "A Platypus in NSW Succession Law: Statutory Wills in a Managed Society" (17 November 2021).

The Family Provision Jurisdiction

(g) "The Family Provision Jurisdiction: An Outline of Themes and Practical Considerations" (26 May 2021).

Accountability across Jurisdictional Boundaries

(h) "Accountability: The Universal Problem in the Administration of Estates Affected by Incapacity or Death" (11 September 2020).

18 These papers include standard forms of orders made in Supreme Court proceedings relating to protective, probate and statutory will proceedings. The standard protective orders can be found in the "incapacitated plaintiff" paper published on 11 March 2017. Standard probate orders can be found in the introduction to the "Probate Law and Practice" paper published on 3 March 2022. Standard orders on the making of an application for a statutory will can be found in the "Platypus" paper published on 17 November 2021.

19 When a person lacks capacity (however defined, whether legal, mental or functional) there may be a need for his or her property to be managed by somebody else on his or her behalf. That fact lies of the heart of the protective jurisdiction and, with different degrees of emphasis with a change in perspectives, it can be seen also upon an exercise of probate or family provision jurisdiction. Through rules of court governing the appointment of a tutor (by whatever name known) it can also be seen in the conduct of litigation generally.

PERSONAL INJURY COMPENSATION PROCEEDINGS INTERSECT WITH AN EXERCISE OF PROTECTIVE JURISDICTION

20 Much of the routine work of the Protective List of the Supreme Court involves the appointment of a financial manager (under section 41 of the *NSW Trustee and Guardian Act* 2009) in circumstances in which an incapable person, suing by a tutor, has received an award of compensation (in common law proceedings in the Supreme Court or the District Court of New South Wales) for personal injuries.

21 Routinely, the defendant in compensation proceedings is ordered to satisfy a judgment in favour of a person under legal incapacity by a payment into court (under section 77 of the *Civil Procedure Act* 2005 NSW) pending an order for a payment out to a financial manager.

22 Where the compensation award is a substantial sum (as is often the case) the Court is commonly asked to appoint, as a financial manager, a licensed trustee company or another "suitable" private manager. A private manager for reward other than a licensed trustee company will not generally be appointed as a financial manager without the provision of a report by the NSW Trustee of the kind identified in *Re Managed Estates Remuneration Orders* [2014] NSWSC 383, a judgment published consequentially upon *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor* AB [2014] NSWSC 245.

23 In making a financial management order affecting an incapable person who has pending before a court a claim for personal injury compensation, the Tribunal needs to consider whether some reasonable estimate can be made of the amount of compensation likely to be awarded to the person so as to ensure that a person nominated as financial manager has the training, experience and competence to manage an estate enlarged by that compensation. Otherwise, the tutor of an incapable plaintiff in compensation proceedings, in combination with an unsuitable financial manager, might persuade a busy common law judge to make an order that the compensation award be paid to the financial manager under CPA section 77 without further enquiry.

24 If the Tribunal decides to appoint as a financial manager a person who is a tutor for an incapable person in personal injury compensation proceedings brought in the name of the incapable person (ostensibly as a convenient way to manage both the proceedings and the incapable person's protected estate), it should consider the desirability of providing for an early review of the appointment, anticipating finalisation of the compensation proceedings and a need to ensure that the estate is managed by a financial manager competent to do so.

25 Not uncommonly, an award of personal injury compensation includes an allowance for "funds management" costs (recognised in *Willett v Futcher* (2005) 221 CLR 627 and *Gray v Richards* (2014) 253 CLR 660 as a head of damage) based upon an assumption that management of the affairs of the incapable person will be entrusted to an institutional manager, such as the NSW Trustee or a private manager for reward. A private manager for reward is either a licensed trustee company or a manager who (having obtained a report from the NSW Trustee of the type contemplated by *Re Managed Estates Remuneration Orders* [2014] NSWSC 383) is authorised by the Court to receive remuneration for service as a financial manager.

26 Where an application is made to the Supreme Court for the appointment of an institutional manager for the protected estate of an incapable person who, through a tutor, is pursuing a claim for personal injuries compensation, the Court not uncommonly directs the manager, subject to further orders of the Court, to conduct the proceedings through the tutor and legal representatives retained by the tutor. It would be open to the Court to give such a direction (under section 64 of the *NSW Trustee and Guardian Act* 2009 NSW) in supervision of a financial manager appointed by the Tribunal.

THE ROLE OF EQUITY IN THE RECOVERY OF ESTATE PROPERTY

27 Not uncommonly, an exercise of equity jurisdiction is called into play when an incapable person, or the manager of his or her estate (be it a financial manager, an executor or an administrator), seeks to recover property or compensation arising from an *inter vivos* transaction.

28 An exercise of equity jurisdiction is generally *transactional* (and often focused on *past* events) whereas an exercise of protective jurisdiction is generally focused upon the availability of *systemic* protection *for the present and future*.

29 In exercising protective (guardianship) jurisdiction (whether in relation to the person or the estate of the person who is or may be an incapable person and whether engaged in a review of an enduring instrument or consideration of a guardianship order or financial management order), members of the Tribunal need to be aware of: (a) the possibility that a participant in proceedings before the Tribunal may have been involved in a transaction (ostensibly with the incapable person) liable to be set aside in equity; (b) a possibility that the estate of the incapable person might include an entitlement to recover property or compensation in equity; and (c) a possibility of future financial abuse if an unsuitable person is allowed to have legal authority to manage the affairs of the incapable person.

30 The Tribunal may need to weigh these possibilities in the context of an assessment of the existence, or potentiality, of an unacceptable risk of a conflict between duty and interest in the assessment of the suitability of a person who has a power of management affecting the incapable person or who is proposed as a person suitable for the exercise of such a power.

31 Not uncommonly, the grounds upon which a transaction is challenged in equity comprise one or more of the following associated concepts:

(a) undue influence;

(b) unconscionable conduct (as explained in Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*, 5th edition, 2015, chapter 16) in the nature of a "catching bargain";

(c) a breach of fiduciary obligations.

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

33 Whereas undue influence may be established by means of a presumption in some cases, no presumption is available in support of an allegation of unconscionable conduct.

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

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

36 The critical feature of a fiduciary relationship, and the attendant obligations of a fiduciary, can be identified by reference to the observations of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97:

> "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 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 the other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion, to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibilities.
>
> 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. …"

37 The categories of fiduciary relationships are not closed. Fiduciary relationships are of different types, carrying different obligations and they may entail different consequences: *Hospital Products* at 68-69 and 96. An example of this is the relationship between a guardian (by whatever name known) and a person under the care of the guardian where the guardian is entrusted with funds to be expended in the maintenance and support of the person under care. The guardian is not liable to account as a trustee, but has a liability to account assessed by reference to whether the purpose of his or her appointment has been served. A guardian may be relieved of the obligation of accounting precisely for expenditure and, if he or she fulfils the obligation of maintenance of the person under care, in a manner commensurate with the property available to him or her for the purpose, an account will not be taken: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.

38 Fiduciary obligations may be owed to a person under care by a carer who holds appointments as the person's enduring attorney and enduring guardian and who occupies a position of ascendancy over the person under care.

39 For an enduring attorney (eg *Smith v Smith* [2017] NSWSC 408) or a financial manager (eg *Dowdy v Clemson* [2021] NSWSC 1273) who refuses or wilfully fails to recognise the fiduciary obligations of his or her office, the financial consequences of enforcement of his or her liability to account can be significant. *Dowdy v Clemson* demonstrates a need for the Tribunal, as well is the NSW

Trustee, to bring home to a prospective financial manager the burdens of a fiduciary office .

ESTATE ADMINISTRATION

The Nature and Scope of the Protective Jurisdiction

40 The protective jurisdiction of the Supreme Court includes what was historically known as the "infancy" or "wardship" jurisdiction over minors and the jurisdiction historically known as the "lunacy" jurisdiction (*Marion's Case* (1992) 175 CLR 218 at 258-259), the focus of which has shifted (as noted in *PB v BB* [2013] NSWSC 1223 at [8]; *David by her tutor the Protective Commissioner* (1993) 30 NSWLR 417 at 436E-437C) from a concern about mental incapacity to a concern about functional incapacity.

41 Care needs to be taken in the use of descriptive labels because some expressions vary with context. The word "guardianship" is one such label; it can refer to management of "the person", management of "the estate" or both. The *Guardianship Act* 1987 itself illustrates this. In the NSW Supreme Court the expression "*parens patriae*" jurisdiction is generally used to describe the "infancy" jurisdiction, although, historically, the expression "*parens patriae*" jurisdiction (derived from historical recognition of the Crown as parent of the nation) applies, not only to both the infancy and the lunacy jurisdictions, but also (as illustrated by Joseph Chitty's *A Treatise on the law of the Prerogatives of the Crown*, London, 1820) to the jurisdiction over charities.

42 Modern discussion of "elder law" provides insights into the operation of the protective jurisdiction, but it is nevertheless limited in its horizons. Many cases involving an exercise of protective jurisdiction (including a concern for the estate of an incapable person) relate to protection of a person who is a minor.

43 Where the expression "elder law" comes into its own is its application to an ageing population, intent upon preparation for an anticipated period of incapacity on the path towards death.

Attorneys, Guardians and Wills

44 A practical illustration of the interconnectedness of the protective, probate and family provision jurisdictions of the Supreme Court is the tendency of Australians to prepare for incapacity and death by the simultaneous execution of an enduring power of attorney (governed by the *Powers of Attorney Act* 2003 NSW), an enduring guardianship appointment (governed by the *Guardianship Act* 1987 NSW) and a will (governed by the *Succession Act* 2006 NSW).

45 Although separate, individual transactional documents these instruments have a unity of purpose in their expression of the preferences of a person (currently possessed of mental capacity) about management of his or her affairs (potentially affecting both property and the person) in anticipation of incapacity for self-management and death.

Associated Jurisdictions: Protective, Probate and Family Provision

46 One thing that the protective, probate and family provision jurisdictions have in common is a central focus on estate administration.

47 Here one sees a shift in emphasis as a capable person approaches incapacity, dies and parts company with all things temporal. Accepting that the paradigm of Australian law is the autonomous individual living, and dying, in community, there is a shift in emphasis from the individual to community as one moves, in timely sequence, from an exercise of the protective, probate and family provision jurisdictions.

48 The protective jurisdiction is governed by “the paramountcy (or welfare) principle”, according to which the welfare and interests of an incapable person are the paramount concern of the Court.

49 Upon exercise of probate jurisdiction one sees a shift from a concern about a deceased person’s testamentary intentions (in the making of a grant of probate or administration) to the rights of beneficiaries (as the character of a legal personal representative changes from that of an executor to that of a trustee).

50 Upon an exercise of family provision jurisdiction the Court, with due respect for the testamentary intentions of a deceased person, makes a judgement about whether testamentary provision "ought" to have been made for an eligible person (a member of the deceased's community).

51 An exercise of equity jurisdiction is often concerned with estate administration with a more eclectic than systemic focus. Its purposive character manifests itself in a tendency to intervene in the administration of an estate to restrain conduct that is unconscionable, or to order that a duty be performed. Classically, it sets a standard in requiring a fiduciary neither to act in circumstances in which the fiduciary's duty and interest conflict nor to receive, or retain, an unauthorised gain. This standard, spoken of as involving proscriptive obligations of a fiduciary, is inherent in an undertaking or agreement on the part of a fiduciary to act for or on behalf of or in the interests of another as explained in *Hospital Products* (extracted above): *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Maguire v Makaronis* (1997) 188 CLR 449 at 466-467.

52 Although the interlocking fields of operation of the protective, probate, family provision and equity jurisdictions each throw light upon the others, the concepts of an enduring guardianship appointment, an enduring power of attorney and a statutory will do not fit into neat jurisdictional categories. They are "recent inventions " of the last half century.

53 The concept of an "enduring" agent reflects a policy of privatisation for management of the affairs of a person incapable of managing his or her own affairs. It is coupled with the idea, embraced at about the same time as the concept of an "enduring" instrument, that the "estate" and "the person" of an incapable person may best be managed by somebody other than a public official.

54 A price paid for privatisation of management of the affairs of an incapable person is the tendency of private fiduciaries to favour personal interest over public duty in a manner that is less able to be regulated than a public official.

The price payable for private management of the affairs of an incapable person is a need for vigilance in the enforcement of standards of conduct required by law or enforceable in equity.

ENDURING POWERS OF ATTORNEY

Evidence Bearing Upon Incapacity

55 It is, perhaps, a quirk of human nature that disputes in the Supreme Court about the operation of an enduring guardianship appointment are rarely unaccompanied by a dispute about the operation of an enduring power of attorney.

56 Disputes about the operation of an enduring power of attorney in the Supreme Court are often accompanied, below the surface, by a dispute about the prospective operation of a will.

57 In theory, the existence or otherwise of a will is irrelevant to an exercise of protective jurisdiction because prospective beneficiaries have no interest in the estate of an incapable person and an incapable person's welfare and interests are the paramount concern. An incapable person's "significant others" are consulted, not to advance or protect their interests, but to aid the Court in its enquiries about the personal circumstances of the incapable person.

58 In practice, some disputes about the validity or operation of an enduring power of attorney cannot be understood outside the context of a narrative that reveals an active attempt by another person to take control of the body and property of an incapable person for ulterior purposes in securing execution of an enduring power of attorney, an enduring guardianship appointment and a will.

59 A sure sign of incapacity for self-management may be a person's execution in rapid succession of competing enduring instruments and wills.

Breaches of Fiduciary Obligations

60 An enduring power of attorney is a mixed blessing, particularly if it includes a "benefits" clause.

61 A power of attorney which ostensibly authorises an attorney to do anything that the principal might lawfully have authorised an attorney to do (even with benefit to the attorney and no benefit to the principal) provides protection for a third party transacting business with the attorney: *Taheri v Vitek* (2014) 87 NSWLR 403 at [1], [36] and [130].

62 As between an incapable principal and an enduring attorney, the existence of a benefits clause is not, of itself, enough to relieve the attorney of the attorney's fiduciary obligation to act only in the interests of the principal: *Estate Tornya Deceased* [2020] NSWSC 1230. Not all attorneys realise that. Those who don't are likely to expose themselves to the jeopardy of a claim in equity that they restore to the principal's estate property they have diverted from the estate, or pay compensation in lieu thereof.

Review of an Enduring Power of Attorney

63 When parties ostensibly interested in management of the affairs of an incapable person fall out about the validity, or operation, of an enduring power of attorney, a fundamental question is often whether the affairs of the incapable person should be left in the hands of an enduring attorney (without any practical administrative oversight) or made the subject of a financial management order (supported by the administrative framework for which the *NSW Trustee and Guardian Act* 2009 provides).

64 For the most part, in the absence of compelling evidence the Tribunal should resist the temptation (often held out by adversarial litigants) to provide an authoritative adjudication on the validity or otherwise of an enduring power of attorney, a question generally best left for determination in other proceedings instituted to determine competing claims to property rights. Upon an exercise of protective jurisdiction, the primary focus is on the welfare and interests of the

incapable person “now and in the future”. What happened in the past may provide insights into what is happening at the present time, and what may happen in the future; but care needs to be taken not to become enmeshed in adversarial contests about the past.

65 In deciding how to exercise a discretion to treat an application for review of an enduring power of attorney as an application for appointment of a financial manager, the purposive criteria for which section 4 of the *Guardianship Act* 1987 provides should be the guiding light.

The Family Provision Jurisdiction

66 Chapter 3 of the *Succession Act* 2006 NSW provides a statutory scheme authorising the Court, upon the application of an “eligible person”, to make orders for testamentary provision out of the estate, or notional estate, of a deceased person where the applicant has been left without “adequate provision” for his “proper maintenance, education or advancement in life” from the estate of the deceased.

67 Section 57 contains a broad definition of eligibility. Section 58(2) imposes a limitation period (of one year after the death of the deceased) for the commencement of proceedings for a family provision order, but permits the Court to “extend” that period for cause shown. Section 59(1) establishes jurisdictional hurdles on the making of a family provision order. If those hurdles are overcome, section 59(2) empowers the Court to make a discretionary order it thinks “ought” to be made. Section 60 contains a checklist of factors relevant to characterisation of an applicant as an eligible person and the making of a family provision order.

68 To succeed on his or her application for a family provision order, a plaintiff must satisfy the Court that, at the time when the Court is considering the application, adequate provision for his or her proper maintenance, education or advancement in life has not been made by the will of the deceased or the intestacy rules in Chapter 4 of the *Succession Act* 2006: section 59(1)(c).

69 The concepts of “adequate” and “proper” embedded in section 59(1)(c) must be understood as relative to the facts of the particular case: *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 19. As generally understood, “adequate” is a word concerned with *quantum* whereas “proper” is a word directed to a *standard* of maintenance, education and advancement in life. Both words focus attention on the circumstances of the particular case, viewed from the perspective of the deceased and contemporary community standards.

70 Upon a consideration of section 59(1)(c), and upon an exercise of the discretionary power to make a family provision order for which section 59(2) of the *Succession Act* provides, the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 479; *Scales Case* (1962) 107 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and generally consulting the specific statutory criteria referred to in section 60(2) of the Succession Act so far as they may be material: *Bassett v Bassett* [2021] NSWCA 320 at [171].

71 A unique provision in the NSW legislation is the power of the Court to make an order that property, not forming part of the estate of a deceased person, be “designated” as “notional estate” of the person for the purpose of a family provision order being made. Some complexity attaches to the concept of “notional estate”, but the key idea is that a property transaction that takes effect up to three years before the death of the deceased can result in property being clawed back into the estate for the purpose of satisfying a family provision order.

72 The family provision jurisdiction of the Supreme Court is of no direct concern to NCAT. Nevertheless, Tribunal members need to be aware of its existence and the possibility that it may impact upon decisions to be made by the Tribunal

about the necessity for a financial manager and selection of a person suitable to occupy that office.

73 An illustration of this is the case where an incapable person might be an "eligible person" vis-à-vis the deceased estate of a family member, and other members of the family (who have a competing interest in the estate) seek appointment as the incapable person's financial manager. It is not beyond experience that the parent of an incapacitated child will make only nominal provision for that child in expectation that other, capable children will voluntarily take care of him or her. In such a case, the interests of the capable children in maintaining the *status quo* might unacceptably incline them to refrain from assisting the incapable child to make an application for family provision relief. In such a case, the prudent course might be to appoint the NSW Trustee (or some other, independent person) as financial manager. A need for a protected person to apply for a family provision order not uncommonly arises when the provision made for him or her in a parent's will is inadequate to fund his or her transition to nursing home accommodation.

CONCLUSION

74 Upon an exercise of protective jurisdiction the purposive character of the jurisdiction is central at all stages of decision-making.

75 The purposive character of the jurisdiction is implicit in the current focus on functional disability rather than an earlier generation's focus on mental incapacity.

76 In making orders affecting the person or the estate of a person who lacks capacity for self-management, attention must be focused (through the prism of the incapable person) on the management of risks associated with the present

and future management of the incapable person's affairs, informed by past experience, present circumstances and future possibilities so far as they may be known.

Date: 14 June 2022 (revised 20 June 2022)

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