

# FAMILY FIDUCIARIES IN THE PROTECTIVE JURISDICTION

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*Baby boomers in Australia are entering retirement with a higher life expectancy and more wealth than any generation before them. Mental and physical decline can make it difficult or impractical for many older people to safeguard their own financial interests. In particular, guardians and attorneys who manage property for the elderly have the opportunity to misuse their power to enrich themselves. Responding to recommendations from law reform commissions, Australian legislatures tend to impose the strictest form of fiduciary regulation on guardians and attorneys. Bucking the trend, this article argues in favour of a flexible model of fiduciary regulation. This model originates from historical Chancery jurisprudence and continues to enjoy support in New South Wales. The prevailing, strict model not only tends to be overprotective, it also ignores the reality that litigation about the properties of the elderly is often driven by inheritance expectations. The flexible model can alleviate the potential overprotectiveness of fiduciary law and accommodate harmless conflicts in close families.*

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## I INTRODUCTION

As baby boomers in Australia enter retirement with a higher life expectancy and more wealth than any generation before them, courts and legislatures are increasingly pressed to resolve disputes over the properties of the elderly. Empirical research consistently reveals the prevalence of financial misconduct against the elderly.<sup>1</sup> Mental and physical decline can make it difficult or impractical for many older people to safeguard their own financial interests. While their family members may provide assistance, they may also be swayed by their own inheritance expectations. This article addresses the problem of how best to

<sup>1</sup> Prevalence studies show that about 6.8% of people aged 60 or over experience financial abuse: Yongjie Yon et al, 'Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-Analysis' (2017) 5 *Lancet Global Health* e147, e147, e154, cited in 'Elder Abuse', *World Health Organization* (Fact Sheet, 8 June 2018) <<https://www.who.int/en/news-room/fact-sheets/detail/elder-abuse>>, archived at <<https://perma.cc/YC8K-Y5S5>>. For a discussion of empirical studies of elder abuse, see generally Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016).

tackle financial abuse by family guardians and attorneys who manage property for the elderly.<sup>2</sup>

Fiduciary law is the cornerstone of the regulatory framework for guardians and attorneys.<sup>3</sup> While there is no precise and unexceptional definition of a 'fiduciary', fiduciary law uniquely prohibits fiduciaries from making an unauthorised profit from their position, and from acting other than in the sole interests of their principals. This dual prohibition arises from the fiduciary duty of loyalty. Responding to alarming statistics and widespread community concerns, law reform commissions typically recommend to impose the strictest form of fiduciary duty on guardians and attorneys.<sup>4</sup> The majority of Australian jurisdictions have adopted those recommendations by statute.<sup>5</sup>

Bucking the trend, this article will argue that a moderate and flexible model of fiduciary law should be applied to regulate family guardians and attorneys.<sup>6</sup> In recent times, the typical property dispute concerns an elderly incapable person, and their guardian or attorney is usually a family member.<sup>7</sup> It will be argued that the prevailing, strict model of fiduciary regulation overreacts to harmless conflicts within close families, which conflicts may well be consistent with familial norms and the wishes of the elderly incapable person. Moreover, many property disputes concern inheritance; someone who expects to inherit from the elderly incapable person sues the guardian or attorney in order to

<sup>2</sup> For simplicity, this article uses 'guardian' to denote a person who is appointed by a court or tribunal to make decisions on behalf of another person. Depending on the jurisdiction, the period and the function performed, alternative names for guardians include administrators, financial managers, committees, conservators and deputies. This article uses 'attorney' to denote a person who is privately appointed to act on behalf of the appointor. Alternative names for attorneys include agents and donees. See below Part II(A).

<sup>3</sup> See below Part III(B).

<sup>4</sup> Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) 12, 17 ('ALRC Elder Abuse Report'); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 247–8, 263 ('Queensland Guardianship Report'); Victorian Law Reform Commission, *Guardianship* (Final Report No 24, 31 January 2012) 48, 412–13 ('Victorian Guardianship Report'); Tasmanian Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, 17 December 2018) 232–3 ('Tasmanian Guardianship Report'). '[R]egulation of conflict transactions is a key area that can contribute to reducing elder financial abuse': see Trevor Ryan, 'Developments in Enduring Powers of Attorney Law in Australia' in Lusina Ho and Rebecca Lee (eds), *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press, 2019) 179, 181.

<sup>5</sup> See below Part III(B).

<sup>6</sup> 'Mental incapacity' is typically a conclusion regarding a person's mental ability. See below Part II(A).

<sup>7</sup> See below Part II(A).

enlarge the asset pool available for distribution when the person passes away.<sup>8</sup> The strict model fails to recognise potential conflicts between the elderly incapable person and the inheritance-motivated claimant. The primary beneficiaries of strict regulation are often not the incapable persons themselves, but those claimants who are driven by inheritance expectations.

In contrast, moderate and flexible fiduciary regulation appropriately responds to the problem of financial abuse by family guardians and attorneys. This article favours a flexible model that originates from historical Chancery jurisprudence and continues to find support in New South Wales. Several first instance judgments from New South Wales recently incorporated much-needed flexibility into the fiduciary regulation of guardians and attorneys. These judgments continue to impose a duty of loyalty to prohibit conflicts of interest, but the errant guardian or attorney can avoid liability if they had acted to promote the best interests of the incapable person. This article proposes a subjective interpretation of best interests. This interpretation recognises that conflicts of interest are ubiquitous in close familial relationships. It further recognises that biological and affective bonds, as well as moral and social norms, can partially deter misconduct. In the subset of cases brought by claimants who are motivated by inheritance expectations, the proposed subjective interpretation further mitigates the perverse incentives that these claimants may have.

The approach taken in this article is primarily grounded in equitable doctrine and theory. Although guardianship and power of attorney statutes are diverse across Australian jurisdictions, on the specific issue of fiduciary duty, they either adopt the equitable principles governing trustees or stay silent.<sup>9</sup> Equitable doctrine and theory thus remain relevant even in the 'age of statutes'. Moreover, the *Convention on the Rights of Persons with Disabilities* ('CRPD') — which has been the focus of recent scholarship and law reform regarding guardianship and power of attorney — is vague on the issue of fiduciary duty.<sup>10</sup> Equitable doctrine and theory can provide a surer guide to adjudicators and law reformers.

This article aims to fill in several gaps in the private law literature and disability rights literature. While there is a large body of scholarship on mental capacity to make health care and medical decisions,<sup>11</sup> issues regarding property

<sup>8</sup> See below Part V(C).

<sup>9</sup> See below Part III(B).

<sup>10</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'), discussed below in Part V(D)(2).

<sup>11</sup> See the literature cited below at nn 246–7.

and financial decisions are often marginalised.<sup>12</sup> Leading texts on equity and fiduciary law also tend to avoid grappling with the complex web of statutes and equitable principles that govern the fiduciary duties of guardians and/or attorneys.<sup>13</sup> Moreover, existing studies of private law's response to elder financial abuse tend to focus on the doctrines of undue influence and unconscionability.<sup>14</sup> Covering all Australian jurisdictions, this article joins a small but growing number of specialist treatises to provide an account of how fiduciary law can deter and sanction misuse of power by guardians and attorneys.<sup>15</sup>

There are nonetheless important issues that fall outside the scope of this article. In atypical cases, the guardian (of property) or attorney is a private professional or institution or a government agency, rather than a relative or friend of the incapable person. Focusing on typical cases, this article has little to say about how best to regulate professional or institutional guardians and attorneys. Another issue concerns the fiduciary regulation of supporters — defined as persons who offer supportive, rather than substituted, decision-making assistance to persons who may lack mental capacity. While law reform commissions and human rights scholars tend to recommend supported decision-making,<sup>16</sup> they

<sup>12</sup> For instance, empirical studies tend to consider a large sample of healthcare and medical matters but only a very small sample of property and financial matters: see, eg, Val Williams et al, *Making Best Interests Decisions: People and Processes* (Report, 2012) 5, 13, 45. But see Ryan (n 4).

<sup>13</sup> See, eg, Paul Finn, *Fiduciary Obligations: 40<sup>th</sup> Anniversary Republication with Additional Essays* (Federation Press, 2016) 5 [9].

<sup>14</sup> See, eg, Fiona R Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499; Fiona R Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29(2) *Monash University Law Review* 336; Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *University of New South Wales Law Journal* 145; Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59(2) *Cambridge Law Journal* 310; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 (October) *Law Quarterly Review* 617; C Peisah et al, 'The Wills of Older People: Risk Factors for Undue Influence' (2009) 21(1) *International Psychogeriatrics* 7; Brian Sloan, *Informal Carers and Private Law* (Hart Publishing, 2013) ch 7; Yvette Maker et al, 'From Safety Nets to Support Networks: Beyond "Vulnerability" in Protection for Consumers with Cognitive Disabilities' (2018) 41(3) *University of New South Wales Law Journal* 818; Victorian Law Reform Commission, *Succession Laws* (Report, August 2013) ch 2; *ALRC Elder Abuse Report* (n 4) 211–12. An exception is Ryan (n 4).

<sup>15</sup> See, eg, GE Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2020) ch 8; RF McCullagh, *Australian Elder Law: Accommodation, Agency and Remedies* (Lawbook, 2018) ch 19; Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute, 3<sup>rd</sup> ed, 2019) [8.11.1], [10.6.1], [10.7].

<sup>16</sup> See, eg, Australian Capital Territory Law Reform Advisory Council, *Guardianship Report* (Report, 29 July 2016) 10 ('ACT Guardianship Report'); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Law* (Final Report No 124, August 2014)

disagree on whether to impose fiduciary duties on supporters.<sup>17</sup> How best to regulate supporters is an issue that may arise when supported decision-making systems become more prevalent.

Part II below will elaborate upon the problem of financial misconduct by guardians and attorneys, and provide illustrative examples. Part III will introduce the prevailing, strict model of fiduciary regulation. Part IV will show that recent first instance judgments from New South Wales have developed an alternative, flexible model. The crux of this article, Part V, will argue in favour of the flexible model that emerges from these judgments. Part VI will conclude.

## II FINANCIAL MISCONDUCT BY GUARDIANS AND ATTORNEYS

### *A Asset Management for the Elderly: Guardianship and Durable Power of Attorney*

Population ageing is old news. Recent estimates suggest that 3.8 million Australians (15% of the Australian population) are aged 65 years or over, and both the number and the proportion of older people are projected to grow.<sup>18</sup> The trend in population ageing coincides with decades of significant economic growth. Since 1960, the Australian economy has grown 77-fold.<sup>19</sup> In the modern economy, the stereotype that older people are ‘frail, out of touch, burdensome or dependent’ is outdated.<sup>20</sup> Physical and/or cognitive decline is nonetheless common among the elderly. In particular, recent studies estimate that about 459,000 Australians live with dementia.<sup>21</sup>

Guardianship is a common legal mechanism to facilitate the provision of property management services to the elderly. To create a guardianship for a

11 (*ALRC Equality Report*); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 71 (*NSW Guardianship Report*); *Queensland Guardianship Report* (n 4) vol 3, 92; *Tasmanian Guardianship Report* (n 4) 131.

<sup>17</sup> For example, in the Australian Capital Territory and Victoria, it was argued that supporters should owe fiduciary duties: *ACT Guardianship Report* (n 16) 59; *Victorian Guardianship Report* (n 4) 148 [8.130]. However, in New South Wales, it was argued that supporters may not owe fiduciary duties: *NSW Guardianship Report* (n 16) 84 [7.62]–[7.65].

<sup>18</sup> ‘Older Australia at a Glance’, *Australian Institution of Health and Welfare* (Web Page, 10 September 2018) archived at <<https://perma.cc/4GLK-MLQE>>.

<sup>19</sup> ‘GDP (Current US\$) Data: Australia’, *World Bank* (Web Page) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=AU>>, archived at <<https://perma.cc/8R5N-ABMT>>.

<sup>20</sup> World Health Organization, *World Report on Ageing and Health* (Report, 2015) 10, 16 (*WHO Ageing Report*).

<sup>21</sup> ‘Dementia Statistics’, *Dementia Australia* (Web Page, January 2020) <<https://www.dementia.org.au/statistics>>, archived at <<https://perma.cc/P49F-7VQR>>.

person, an Australian court or tribunal must first be satisfied that the person lacks mental capacity to manage an aspect of their life or property. Mental capacity is typically a functional concept that accounts for cognitive functioning, the specific tasks to be undertaken, and concerns for autonomy and protection.<sup>22</sup> The presence of some mental or physical disability in the medical sense is usually neither sufficient nor necessary for meeting the legal test of mental incapacity.<sup>23</sup> Once a person is found mentally incapable of managing some aspect of life or property, the court or tribunal has a discretion to appoint a substitute decision-maker — the guardian — to make decisions regarding that aspect of life or property. The discretion to create a guardianship is typically exercised to promote the best interests of the incapable person, taking into account their known wishes and the availability of less restrictive forms of decision-making support.<sup>24</sup>

While a guardianship is officially created, a power of attorney is a private instrument through which a person — the principal — authorises another person — the attorney — to act on behalf of the principal.<sup>25</sup> Under modern power of attorney statutes, a durable (or enduring, or lasting, depending on the jurisdiction) power of attorney can commence, or remain valid, upon the principal losing mental capacity.<sup>26</sup> These statutes allow individuals who anticipate their loss of capacity in the future to choose their own representatives. The underlying purposes are to promote personal autonomy and dignity, and to avoid the cost, emotional stress and embarrassment of invoking the official guardianship system.<sup>27</sup>

The elderly are the main [users of] guardianships and durable powers of attorney, typically with a family member serving as guardian and/or attorney.<sup>28</sup>

<sup>22</sup> See, eg, *Secretary, Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218, 266 (Brennan J) (*Marion's Case*); *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ); *CJ v AKJ* (2015) 16 ASTLR 24, 28–30 [17]–[29] (Lindsay J) (*CJ*); *P v NSW Trustee and Guardian* [2015] NSWSC 579, [52]–[62] (Lindsay J). See generally O'Neill and Peisah (n 15) [1.1], [8.11.5].

<sup>23</sup> O'Neill and Peisah (n 15) [1.3]. See, eg, the finding that a young man with autism has mental capacity: *CJ* (n 22) 34 [54]–[58]. However, some states require a 'disability' before a guardian or administrator may be appointed: *Guardianship and Administration Act 2019* (Vic) ss 22, 23(1); *Guardianship and Administration Act 1995* (Tas) s 20(1)(a); *Guardianship and Administration Act 1990* (WA) s 64(1)(a).

<sup>24</sup> See generally O'Neill and Peisah (n 15) [8.11.7]–[8.11.8].

<sup>25</sup> Dal Pont (n 15) 5 [1.2].

<sup>26</sup> *Ibid* 67 [3.8], 70–1 [3.14], 76 [3.24]–[3.25].

<sup>27</sup> *Ibid* 16–17 [1.25]–[1.27], 35–8 [1.58]–[1.64].

<sup>28</sup> Terry Carney, 'Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia' in Lusina Ho and Rebecca Lee (eds), *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press, 2019) 3, 9.

Empirical observations suggest that the combination of wealth and natural decline contributes to a steady increase in demand for guardianship.<sup>29</sup> While the private nature of powers of attorney renders it difficult to obtain reliable statistics on them, informal observations suggest that their primary users are older people who have had a whole working life to accumulate wealth.<sup>30</sup>

### B *Misuse of Power or Discretion*

Guardians and attorneys typically have a broad discretion over how to take actions that affect the incapable persons they serve. (This article does not consider attorneys who act under a non-durable power only.) Such a discretion may be abused. First, the incapable person tends to lack the ability to monitor the exercise of discretion by the guardian or attorney to a satisfactory degree.<sup>31</sup> Second, any actual wrongdoing by the guardian or attorney is often undetectable; record keeping can be imperfect or poor, and the guardian or attorney is easily able to produce evidence favourable to their position. Thus, unless sufficiently constrained, the guardian or attorney has the opportunity to abuse their discretion. They may well be tempted to act on that opportunity.

### C *Examples*

This Part will introduce two examples to facilitate subsequent analysis of fiduciary law and its practical operation. Consider first the New South Wales case of *Smith v Smith* ('*Smith*').<sup>32</sup> In that case, the wife of an elderly incapable person (both in their second marriages) served as his attorney while he lived in a nursing home.<sup>33</sup> Using her husband's money without proper prior authorisation,<sup>34</sup> the wife 'enjoyed holiday cruises with her side of the family, bought an

<sup>29</sup> See, eg, New South Wales Civil and Administrative Tribunal, *Annual Report 2016–2017* (Report, 2017) 43–5.

<sup>30</sup> See, eg, Carney (n 28) 6–7.

<sup>31</sup> See generally Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 308–9, describing the 'agency' problem; Robert H Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91(3) *Boston University Law Review* 1039, 1041, discussing the limited role of monitoring in fiduciary law; Elizabeth S Scott and Robert E Scott, 'Parents as Fiduciaries' (1995) 81(8) *Virginia Law Review* 2401, 2419–21, discussing the limits of monitoring mechanisms in the family context. The courts have also recognised the 'agency' problem in trust law: see *Murad v Al-Saraj* [2005] EWCA Civ 959, [74] (Arden LJ, Jonathan Parker LJ agreeing at [96]) ('*Murad*').

<sup>32</sup> [2017] NSWSC 408 ('*Smith*').

<sup>33</sup> *Ibid* [1]–[2] (Lindsay J).

<sup>34</sup> Part V(A) below will explain the significance of authorisation.



expensive car and expensive jewellery, gambled and enjoyed regular entertainment'.<sup>35</sup> She also used her husband's money to buy real property for herself, her daughter from her first marriage and the daughter's husband. Some of these expenses substantially devalued what her husband's children from his first marriage expected to inherit under his will.<sup>36</sup> After the husband passed away, these children sued to recover the wife's expenses (or their proceeds) to the deceased's estate. The children did so to increase their expected inheritance. Their claim was successful, but they realistically could not recover a significant proportion of the funds that the wife had misapplied; only a real property purchased with some of these funds remained traceable.<sup>37</sup>

The second example is the Nebraska case of *Re Conservatorship of Hanson* ('*Hanson*'),<sup>38</sup> which also concerned a couple in their second marriages.<sup>39</sup> Years before the husband became mentally incapable, the couple made an agreement pursuant to which the husband regularly paid the wife for the added expense of his living in her home. The wife became the husband's guardian when he lost mental capacity, and she continued to receive payments without proper prior authorisation.<sup>40</sup> The wife had no sinister motive and merely engaged in 'family financial management in the family's accustomed manner'.<sup>41</sup> The husband lived in the wife's home until he passed away. His children from his first marriage then sued to recover the payments that the wife received during the period of guardianship. The children again did so to increase their expected inheritance, and were similarly successful.<sup>42</sup>

*Hanson* — a foreign case — is chosen not because it coheres with Australian law, but because it is a neat contrast to *Smith*. When concerning similar issues and applying similar legal approaches, foreign cases may be instructive to Australian courts and tribunals.<sup>43</sup> Moreover, as Part III(B) will elaborate,

<sup>35</sup> *Smith* (n 32) [5].

<sup>36</sup> *Ibid* [6], [248]–[249]. See below Part V(C) for a discussion of fiduciary conduct that aims to diminish the incapable person's estate upon their passing away.

<sup>37</sup> *Smith* (n 32) [12], [434], [486]–[488].

<sup>38</sup> 682 NW 2d 207 (Neb, 2004) ('*Hanson*').

<sup>39</sup> *Ibid* 208 (Stephan J for Wright, Connolly, Gerrard, Stephan, McCormack and Miller-Lerman JJ).

<sup>40</sup> *Ibid* 209.

<sup>41</sup> *Ibid* 211.

<sup>42</sup> *Ibid*.

<sup>43</sup> See, eg, Justice Mark Leeming, 'The Comparative Distinctiveness of Equity' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 403, 405, 407–8. In particular, the High Court of Australia 'roams the world in search of enlightenment': Leslie Zines, 'The Vision and the Reality' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis

codification of fiduciary duty in strict and inflexible terms is a recent phenomenon in Australia; Australian cases that apply the relevant statutory provisions are therefore sparse. Foreign cases that apply a similarly strict model are thus useful as illustrative examples or counter-examples.

### III THE STRICT MODEL OF FIDUCIARY REGULATION

Using *Smith* and *Hanson* as illustrations, this Part will introduce the strict model of fiduciary regulation that most Australian legislatures and law reform commissions prefer. This model is based on the fiduciary duties of trustees.

#### A *The Prophylactic Theory of Trust Fiduciary Law*

The pre-*Judicature Act* English Court of Chancery laid the foundation for modern fiduciary law in Anglo-Australian jurisdictions. A seminal case is *Keech v Sandford*,<sup>44</sup> in which a trustee renewed to himself a lease held on trust for the benefit of a minor.<sup>45</sup> This was after the lessor had refused to renew the lease to the minor beneficiary. Ruling the new lease was held on trust, Lord King LC opined:

[T]hough I do not say there is a fraud in this case, yet [the trustee] should rather have let it run out, than to have had the lease to himself. ... [F]or it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to [beneficiaries].<sup>46</sup>

*Keech v Sandford* is a foundational judgment for the fiduciary duty of loyalty — that a fiduciary is to avoid an unauthorised conflict of interest or personal profit.<sup>47</sup> While not all duties owed by a fiduciary are fiduciary in nature, the duty of loyalty is peculiarly fiduciary.<sup>48</sup> Professor Matthew Conaglen's influential thesis articulates that the duty of loyalty serves a prophylactic purpose to protect the proper performance of the non-fiduciary duties that are

Butterworths, 2004) 3, 13, quoted in William Gummow, 'The 2017 Winterton Lecture: Sir Owen Dixon Today' (2018) 43(1) *University of Western Australia Law Review* 30, 34.

<sup>44</sup> (1726) Sel Cas T King 61; 25 ER 223 (*Keech v Sandford*).

<sup>45</sup> Ibid 223.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. See Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 122 (*Fiduciary Loyalty*).

<sup>48</sup> See, eg, *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16–18 (Millet LJ) (*Mothew*); *Breen v Williams* (1996) 186 CLR 71, 137 (Gummow J).

fundamental to the fiduciary's role.<sup>49</sup> In addition to compensatory remedies, profit-stripping remedies are available to sanction a breach of the duty of loyalty. These profit-stripping remedies remove the personal gain that tempted fiduciaries to place themselves in situations of conflict, where they might neglect their fundamental duties. Moreover, good faith on the part of the fiduciary does not excuse a breach of fiduciary duty.<sup>50</sup> Lord King LC in *Keech v Sandford*, for instance, '[did] not say there is a fraud in [that] case'.<sup>51</sup>

While the duty of loyalty is meant to deter and sanction misconduct,<sup>52</sup> it can also prohibit conduct that benefits both the beneficiary and the fiduciary.<sup>53</sup> To ameliorate this problem of over-deterrence, fiduciary law permits the fiduciary to seek prospective authorisation of most potential breaches of fiduciary duty. First, the fiduciary can seek the fully-informed consent of the beneficiary to pursue personal gains, and the beneficiary can condition consent on sharing some of these gains.<sup>54</sup> Safeguards against fiduciary overreach at this juncture include strict disclosure requirements,<sup>55</sup> and potentially a non-waivable core of fiduciary duty that nullifies consent for bad faith and dishonest breaches.<sup>56</sup> Second, trustees (and some other types of fiduciaries) can seek prospective authorisation from a court.<sup>57</sup> To the extent that prospective authorisation is sought, the court can scrutinise the proposed action before it is taken.

<sup>49</sup> Conaglen, *Fiduciary Loyalty* (n 47) 57, 62–3, 185–7.

<sup>50</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 143, 145 (Lord Russell), 153 (Lord Macmillan), 154 (Lord Wright), 158 (Lord Porter).

<sup>51</sup> *Keech v Sandford* (n 44) 223.

<sup>52</sup> Conaglen, *Fiduciary Loyalty* (n 47) 57, 62–3, 185–7; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 34 [78] (Gageler J) ('*Ancient Order of Foresters*'); *Murad* (n 31) [74] (Arden LJ), [107] (Jonathan Parker LJ).

<sup>53</sup> See, eg, *Boardman v Phipps* [1967] 2 AC 46. See generally John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114(5) *Yale Law Journal* 929, 944–5.

<sup>54</sup> Matthew Conaglen, 'The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms' (2011) 70(3) *Cambridge Law Journal* 548, 563–4 ('Authorisation Mechanisms').

<sup>55</sup> *Ibid* 576.

<sup>56</sup> See, eg, *Mothew* (n 48) 18–19 (Millet LJ), precluding a fiduciary to act in bad faith even with their beneficiary's fully-informed consent; *Armitage v Nurse* [1998] Ch 241, 253 (Millet LJ) ('*Armitage*'), accepting that trustees owe their beneficiaries 'an irreducible core of obligations', being the duty 'to perform the trusts honestly and in good faith for the benefit of the beneficiaries'. Cf *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 99 (Mason J) ('*Hospital Products*'), stating, in dissent, that a fiduciary relationship must 'accommodate itself to the relationship between the parties created by their contractual arrangements'; *Taheri v Vitek* (2014) 87 NSWLR 403 ('*Taheri*'), holding that a power of attorney executed by a mentally capable principal pursuant to the *Conveyancing Act 1919* (NSW) s 163B can authorise the attorney to benefit themselves, even if there is no benefit to the principal.

<sup>57</sup> See generally Conaglen, 'Authorisation Mechanisms' (n 54).

### B Application to Guardians and Attorneys

*Smith* and *Hanson* can illustrate the consequences of applying trust fiduciary law to guardians and attorneys who serve elderly incapable persons. Without prior authorisation, the wife–attorney in *Smith* breached her duty of loyalty by using her incapable husband’s money to benefit herself and her side of the family.<sup>58</sup> Similarly, the wife–guardian in *Hanson* breached her duty of loyalty by taking her incapable husband’s money.<sup>59</sup> Good faith on the part of the fiduciary is irrelevant; it did not matter that Mrs Hanson had no ‘sinister motive’,<sup>60</sup> while Mrs Smith’s conduct was ‘wilful’ and exhibited a lack of honesty and reasonableness.<sup>61</sup> Similarly, no difference turned on the fact that Mrs Smith entrusted Mr Smith’s primary care to a nursing home,<sup>62</sup> while Mrs Hanson took care of Mr Hanson in her home pursuant to their agreement; Mrs Hanson could have, but did not, seek prior judicial authorisation to benefit from that agreement.<sup>63</sup>

Holding both Mrs Smith and Mrs Hanson in breach of fiduciary duty is the likely outcome of recent law reform efforts in Australia. There is a trend towards codifying the duty of loyalty in strict and inflexible terms, modelled upon trust fiduciary law.<sup>64</sup> For example, Queensland’s guardianship and power of attorney statutes prohibit transactions ‘in which there may be conflict, or which results in conflict’ between a guardian’s or an attorney’s duty to the incapable person and their own interests or another duty.<sup>65</sup> Also prohibited is a conflict between the guardian’s or attorney’s duty to the incapable person and the interests of a person in a close personal or business relationship with the guardian or attorney.<sup>66</sup> In similarly strict terms, the Australian Capital Territory and Tasmania

<sup>58</sup> *Smith* (n 32) [434], [464]–[465] (Lindsay J).

<sup>59</sup> *Hanson* (n 38) 211.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Smith* (n 32) [464]–[465].

<sup>62</sup> *Ibid* [2], [464].

<sup>63</sup> *Hanson* (n 38) 211. Nor could Mrs Hanson successfully argue implied consent on the basis of Mr Hanson’s knowledge of their agreement, since a court which had no knowledge of such agreement had appointed Mrs Hanson as guardian.

<sup>64</sup> See, eg, Dal Pont (n 15) 45–6 [2.9]–[2.10], 233–4 [8.53]–[8.56]. This codification effort aims to clarify the law for the profession and the public: see, eg, *Queensland Guardianship Report* (n 4) 263.

<sup>65</sup> *Guardianship and Administration Act 2000* (Qld) s 37(2); *Powers of Attorney Act 1998* (Qld) s 73(2).

<sup>66</sup> *Guardianship and Administration Act 2000* (Qld) s 37(2); *Powers of Attorney Act 1998* (Qld) s 73(2).

have codified the duty of loyalty for both guardians and attorneys, while Victoria has codified the duty for attorneys.<sup>67</sup>

*MYJ (Guardianship)* is a recent example of the application of trust fiduciary law to guardians and attorneys in Victoria.<sup>68</sup> In that case, an elderly incapable woman who had dementia paid rent to live with her daughter–attorney, BFX.<sup>69</sup> BFX and her household previously lived in a three-bedroom rental property. To accommodate her incapable mother, BFX decided to move to a bigger, four-bedroom house.<sup>70</sup> The rental cost of the four-bedroom that she found was \$650 per week, and she charged her mother about \$139 per week.<sup>71</sup> MRP — another one of the incapable person’s daughters — later sued BFX on grounds including making a profit from her position.<sup>72</sup> BFX argued that she did not make a profit; she testified that she could have rented a three-bedroom for \$500 per week,<sup>73</sup> so her marginal rental cost of accommodating her mother was \$150 per week (\$650 less \$500). This was more than her mother’s \$139 per week contribution. MRP produced an expert report to the effect that a three-bedroom in the desired area would cost closer to \$550 per week,<sup>74</sup> so BFX’s marginal rental cost of accommodating her mother would be \$100 (\$650 less \$550). This would be less than her mother’s \$139-per-week contribution. The Victorian Civil and Administrative Tribunal preferred BFX’s oral testimony to the expert report,<sup>75</sup> concluding that BFX did not make a profit; thus BFX narrowly escaped liability for breach of fiduciary duty.<sup>76</sup> However, the outcome of this fiduciary claim did not turn on principle. The Tribunal clarified that if the expert report were correct, then BFX would have been found liable to pay compensation for breach of fiduciary duty.<sup>77</sup> The Tribunal’s reasoning regarding fiduciary duty thus closely resembled the reasoning by the Court in *Hanson*.<sup>78</sup>

<sup>67</sup> *Guardianship and Management of Property Act 1991 (ACT)* s 14; *Powers of Attorney Act 2006 (ACT)* s 42; *Guardianship and Administration Act 1995 (Tas)* s 32C; *Powers of Attorney Act 2000 (Tas)* s 32AC; *Powers of Attorney Act 2014 (Vic)* s 64.

<sup>68</sup> [2019] VCAT 792.

<sup>69</sup> *Ibid* [156], [175] (Senior Member Steele).

<sup>70</sup> *Ibid* [140]–[142].

<sup>71</sup> *Ibid* [143], [149].

<sup>72</sup> *Ibid* [138].

<sup>73</sup> *Ibid* [143].

<sup>74</sup> *Ibid* [144].

<sup>75</sup> *Ibid* [144]–[149].

<sup>76</sup> *Ibid* [150], [152].

<sup>77</sup> *Ibid* [152].

<sup>78</sup> *Hanson* (n 38) 211.

Also consistent with trust fiduciary law is the availability of prospective approval to legitimise a potential breach of fiduciary duty. The guardianship statutes in the Australian Capital Territory, Queensland, Tasmania and Victoria expressly provide for prospective approval by a court or tribunal.<sup>79</sup> The power of attorney statutes in these jurisdictions also expressly provide for prospective approval by the principal when they had (or regained) capacity.<sup>80</sup> Notwithstanding the judicial preference for prospective scrutiny,<sup>81</sup> the Victorian power of attorney statute permits retrospective validation by a tribunal (and by the principal when they had or regained capacity).<sup>82</sup> Queensland and Victoria further make available retrospective judicial approval to both guardians and attorneys.<sup>83</sup>

Efforts to adopt trust fiduciary law should be seen as part and parcel of broader reforms to tighten fiduciary regulation of guardians and attorneys. First, all Australian jurisdictions impose record keeping and reporting obligations on guardians<sup>84</sup> and attorneys.<sup>85</sup> These obligations strengthen fiduciary regulation by facilitating public and private monitoring of guardians and attorneys. In resolving doubtful questions, courts and tribunals construe any evidential deficiency arising from a failure to keep proper records against the guardian or attorney.<sup>86</sup>

<sup>79</sup> *Guardianship and Management of Property Act 1991* (ACT) s 14(1); *Guardianship and Administration Act 2000* (Qld) ss 37(1), 152; *Guardianship and Administration Act 1995* (Tas) s 32C(1); *Guardianship and Administration Act 2019* (Vic) s 58(1).

<sup>80</sup> *Powers of Attorney Act 2006* (ACT) s 42(3); *Powers of Attorney Act 1998* (Qld) s 73(1); *Powers of Attorney Act 2000* (Tas) s 32AC(1); *Powers of Attorney Act 2014* (Vic) ss 65(1), (2).

<sup>81</sup> McCullagh (n 15) 380 [19.400].

<sup>82</sup> *Powers of Attorney Act 2014* (Vic) ss 65(3), (5).

<sup>83</sup> A court can excuse a guardian or an attorney from liability for non-compliance with statutory duties if they had 'acted honestly and reasonably and ought fairly to be excused': *Guardianship and Administration Act 2000* (Qld) s 58; *Guardianship and Administration Act 2019* (Vic) s 182; *Powers of Attorney Act 1998* (Qld) s 105; *Powers of Attorney Act 2014* (Vic) s 74.

<sup>84</sup> *Guardianship and Management of Property Act 1991* (ACT) s 26; *NSW Trustee and Guardian Act 2009* (NSW) s 116; *Guardianship of Adults Act 2016* (NT) s 28; *Guardianship and Administration Act 2000* (Qld) s 49; *Guardianship and Administration Act 1993* (SA) s 44; *Guardianship and Administration Act 1995* (Tas) s 32D; *Guardianship and Administration Act 2019* (Vic) ss 59, 61; *Guardianship and Administration Act 1990* (WA) s 80.

<sup>85</sup> *Powers of Attorney Act 2006* (ACT) s 47; *Powers of Attorney Regulation 2016* (NSW) sch 2, Form 1, cl 6(b); *Powers of Attorney Act 1980* (NT) s 11; *Powers of Attorney Act 1998* (Qld) s 85; *Powers of Attorney and Agency Act 1984* (SA) s 8; *Powers of Attorney Act 2000* (Tas) s 32AD; *Powers of Attorney Act 2014* (Vic) s 66; *Guardianship and Administration Act 1990* (WA) s 107(1)(b).

<sup>86</sup> *Smith* (n 32) [448] (Lindsay J), quoted in *Ash v Ash [No 2]* [2017] VSC 569, [105] (McMillan J); *Re LQL (Guardianship)* [2018] ACAT 53 [52].

Second, a court or tribunal may require a guardian to obtain a security bond to indemnify the incapable person against any losses caused by the guardian's misconduct.<sup>87</sup> In the event of misconduct,<sup>88</sup> the bond provider can be called upon to compensate the incapable person (or their estate). The errant guardian can then face a claim from the bond provider. Thus, in addition to providing a remedy for misconduct, the security bond spares the incapable person (or their estate) of the cost and delay of suing the guardian.<sup>89</sup> Australian courts and tribunals determine whether a security bond should be required on a case-by-case basis.<sup>90</sup>

### C Narrow Exemptions

There are narrow exemptions to a guardian's or an attorney's statutory duty of loyalty. First, many statutes permit gifts out of the incapable person's property in limited circumstances. Because a gift benefits someone other than the incapable person, the guardian or attorney by making the gift can breach their duty of loyalty. Statutory gifting exemptions typically authorise gifts that (i) reflect the incapable person's known or expected wishes; and (ii) are reasonable in the light of their financial circumstances.<sup>91</sup> Some jurisdictions impose further restrictions. New South Wales and Tasmania allow attorneys to make gifts only if

<sup>87</sup> A 'security bond' is also commonly known as a 'surety bond'. For consistency, this article will use 'security bond' to refer to both.

<sup>88</sup> In England, if the guardian disputes the alleged misconduct or loss, there is a summary procedure to call in a bond before the final determination of their liability: *London Borough of Enfield v Matrix Deputies Ltd* [2018] EWCOP 22, [18]–[22] (Judge Hilder) ('*London Borough of Enfield*').

<sup>89</sup> See, eg, *ibid* [13]; *Re Meek*; *Jones v Parkin* [2014] COPLR 535, 546 [38], 547 [44] (Hodge J) ('*Re Meek*').

<sup>90</sup> *ALRC Elder Abuse Report* (n 4) 331–2. See, eg, *H v H* [2015] NSWSC 837, [56] (Lindsay J). New South Wales recently abolished its compulsory security bond scheme: *CTS v NSW Trustee and Guardian* [2017] NSWCATAD 217, [45] (Hennessy DP); KPMG, *New South Wales Department of Communities and Justice: A Review of the Surety Bond Scheme* (Report, August 2019) 35 [D.4.1]. The standard practice in England is to require guardians to obtain a security bond: *Baker v H* [2010] 1 WLR 1103, 1112–14 [54]–[65] (Judge Marshall), providing detailed guidance on setting the level of security bond; *London Borough of Enfield* (n 88) [6]; *Re PL* [2015] EWCOP 14 (Fam), [27] (Senior Judge Lush).

<sup>91</sup> *NSW Trustee and Guardian Act 2009* (NSW) s 76; *Guardianship and Administration Act 2000* (Qld) s 54; *Powers of Attorney Act 1998* (Qld) s 88; *Advance Personal Planning Act 2013* (NT) s 22(8), 32; *Guardianship of Adults Act 2016* (NT) s 30(1); *Powers of Attorney Act 2014* (Vic) s 67; *Guardianship and Administration Act 2019* (Vic) s 47.

their powers of attorney expressly authorise them to do so.<sup>92</sup> The Australian Capital Territory and Victoria, and soon, Queensland,<sup>93</sup> limit the operation of express gifting provisions in powers of attorney, so that they only authorise reasonably-valued gifts for special occasions or to charities.<sup>94</sup>

Second, some statutes expressly authorise provision out of the incapable person's property for the needs and maintenance of their dependants. By benefiting someone other than the incapable person, such provision can amount to a breach of fiduciary duty. The Australian Capital Territory, New South Wales, the Northern Territory and Queensland have enacted statutory exemptions to permit reasonable provision for the incapable person's dependants.<sup>95</sup> On the other hand, Victoria imposes various restrictions on an attorney's powers to make provision for dependants pursuant to express authority in their power of attorney.<sup>96</sup>

Third, some statutes exempt various transactions involving proprietary interests jointly held by the guardian or attorney and the incapable person. These exemptions permit the guardian or attorney to deal with joint proprietary interests without violating the statutory duty of loyalty. For both guardians and attorneys, the Australian Capital Territory and Queensland exempt dealings in relation to joint proprietary interests.<sup>97</sup> Tasmania and Victoria have a similar exemption for attorneys.<sup>98</sup>

*Hanson* illustrates the narrowness of these statutory exemptions. Mrs Hanson received payments from her husband pursuant to an agreement between them;<sup>99</sup> her case therefore would fall outside the scope of statutory exemptions

<sup>92</sup> *Powers of Attorney Act 2003* (NSW) ss 11, 12; *Powers of Attorney Act 2000* (Tas) ss 32AB, 32AC. For a discussion of the extent to which the Australian gifting provisions depart from the general law, see generally Dal Pont (n 15) 196–201 [7.15]–[7.22].

<sup>93</sup> At the time of writing, s 88 of the *Powers of Attorney Act 1998* (Qld) — the relevant gifting section — has effect as described by the text accompanying n 92. This gifting section has been amended very recently; the amended version, which will commence operation upon proclamation, will have the effect as described by the text accompanying n 94: see *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) ss 2, 70.

<sup>94</sup> *Powers of Attorney Act 2006* (ACT) ss 34, 39; *Powers of Attorney Act 2014* (Vic) s 67.

<sup>95</sup> *Guardianship and Management of Property Act 1991* (ACT) s 21; *Powers of Attorney Act 2006* (ACT) s 41; *NSW Trustee and Guardian Act 2009* (NSW) ss 59, 65, 73; *Advance Personal Planning Act 2013* (NT) s 33; *Guardianship of Adults Act 2016* (NT) s 31; *Guardianship and Administration Act 2000* (Qld) s 55; *Powers of Attorney Act 1998* (Qld) s 89.

<sup>96</sup> *Powers of Attorney Act 2014* (Vic) s 68.

<sup>97</sup> *Guardianship and Management of Property Act 1991* (ACT) s 14(2); *Powers of Attorney Act 2006* (ACT) s 42(2); *Guardianship and Administration Act 2000* (Qld) s 37(3); *Powers of Attorney Act 1998* (Qld) s 73(3).

<sup>98</sup> *Powers of Attorney Act 2014* (Vic) s 64(2)(c)(i); *Powers of Attorney Act 2000* (Tas) s 32AC(3).

<sup>99</sup> *Hanson* (n 38) 211.



for gifts or joint proprietary interests. Moreover, to include her case within the statutory exemptions for provision to dependants would require an expansive construction of the relevant statutory provision. This can be difficult. For example, in Queensland, a ‘dependant’ is defined as ‘a person who is completely or mainly dependent’ on the incapable person.<sup>100</sup> It would be a stretch to suggest that Mrs Hanson — the carer and owner of the family home — was ‘completely or mainly’ dependent on her mentally incapable husband.

#### IV THE FLEXIBLE MODEL OF FIDUCIARY REGULATION

While the strict model of fiduciary regulation finds favour among most Australian legislatures and law reform commissions, several first instance judgments from New South Wales take a different view. This Part will introduce the flexible model of fiduciary regulation that these judgments have developed.

##### A *Historical Foundations*

*Keech v Sandford* had a little twist that eventually became a source of confusion and litigation some 300 years later: the beneficiary was a minor, and her trustee was also her guardian.<sup>101</sup> A guardian is technically not a trustee, even though they both often manage property for someone else; in a trust relationship, the trustee holds the title to the managed property, but in a guardianship, the title remains with the incapable person.<sup>102</sup> The question is whether, notwithstanding that technicality, guardians should be held to the same standard of behaviour expected of trustees?

A cautious ‘no’ has been the longstanding view of courts of equity. To understand that view requires an appreciation of the historical foundations of a guardian’s duty to account. Medieval common law developed the action of account as an early form of legal regulation against abuse of power by property managers. An account at common law involved two steps: first, a judgment determining whether the defendant was accountable; second, if the defendant was accountable, a judgment for the return of the relevant property or for the

<sup>100</sup> *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3. Queensland is the only Australian jurisdiction that expressly defines a ‘dependant’ in its power of attorney statute: Dal Pont (n 15) 201 [7.24] n 118.

<sup>101</sup> *Keech* (n 45) 223, discussed in *Clay v Clay* (2001) 202 CLR 410, 431–2 [43] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ) (*‘Clay’*).

<sup>102</sup> For a discussion of the relevant English, American and Australian authorities, see generally *Clay* (n 101) 428–32 [37]–[42].

payment of a sum found due.<sup>103</sup> Some category of guardians was among the initial accounting parties.<sup>104</sup> In the early 17<sup>th</sup> century, the King or Queen's lunacy jurisdiction over mentally incapable persons and wardship jurisdiction over minors went to the Court of Chancery, and developed into one protective jurisdiction covering all categories of guardians.<sup>105</sup> Chancery also introduced its own accounting process to hold guardians accountable in equity.<sup>106</sup> Accounting in equity was more streamlined and effective such that it eventually supplanted its common law progenitor.<sup>107</sup>

Dr James Watson's historical analysis shows that the fiduciary duty of loyalty 'assumes the existence of the duty to account, but demands considerably more; while accounting is perfectly well adapted to effect and facilitate protection of the fiduciary one'.<sup>108</sup> Conaglen wrote that an account of profits 'seeks to nullify the temptation [to enter into a conflicted transaction] by rendering it pointless'.<sup>109</sup> Thus, although the duty of loyalty and the duty to account are not identical, the remedial consequences of a breach of the duty of loyalty depend on the rigour of the duty to account.

In this light, Sir Henry Studdy Theobald — an English judge who wrote a seminal treatise on the protective jurisdiction in the early 20<sup>th</sup> century<sup>110</sup> — described a flexible duty to account: 'It is a question depending upon the circumstances of each case whether [a guardian] ought to be required to account or not.'<sup>111</sup> In particular, the existence of a close familial relationship would ease the burden of accounting. Theobald wrote:

If [the incapable person] lives with the [guardian], and an allowance is made for [their] maintenance, *primâ facie*, the intention is that the [guardian] is not to account as long as the [incapable person] is properly maintained. The [guardian] has difficult duties to perform, and it is intended that the payment made shall be

<sup>103</sup> JA Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016) 67. See generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) 908 [26-005].

<sup>104</sup> Watson (n 103) 29, 33, 83.

<sup>105</sup> See generally *E v Eve* [1986] 2 SCR 388, 407–17 (La Forest J for the Court); *Marion's Case* (n 22) 258 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>106</sup> Watson (n 103) 130, 132–5; Heydon, Leeming and Turner (n 103) 910–11 [26-035].

<sup>107</sup> Heydon, Leeming and Turner (n 103) 908 [26-005]; Watson (n 103) 133.

<sup>108</sup> Watson (n 103) 139 [416].

<sup>109</sup> Conaglen, *Fiduciary Loyalty* (n 47) 80.

<sup>110</sup> Sir Henry Studdy Theobald, *The Law Relating to Lunacy* (Steven & Sons, 1924), discussed in Justice GC Lindsay, 'A Province of Modern Equity: Management of Life, Death and Estate Administration' (2016) 43(1) *Australian Bar Review* 9, 11.

<sup>111</sup> Theobald (n 110) 51.

as profitable as the circumstances of the case will allow. Of course, in such a case, anything like a strict account would be impossible. The [incapable person] lives as a member of the family, and it could not be ascertained exactly how much of the general outlay ought to be borne by [them].<sup>112</sup>

Thus, while beneficiaries of a trust were entitled ‘as of right’ to call upon their trustees to account,<sup>113</sup> a guardian’s duty to account was flexible.<sup>114</sup>

For example, in *Brown v Smith*,<sup>115</sup> a ten-month-old girl became entitled to an income under some testamentary trusts when her father passed away. The trustees obtained a guardianship over the girl together with an order to pay the whole income to her mother for the girl’s maintenance and education during her minority.<sup>116</sup> The order ceased to be operative when the mother remarried. Without obtaining a new court order (ie, proper prospective approval), the mother continued to receive the income until her daughter reached majority.<sup>117</sup> The daughter later sought an account, aiming to recover any amount that was not spent on her personally. Any such amount had been applied towards household expenses, which benefited the daughter and the other members of the household.<sup>118</sup> Ruling against the daughter, Jessel MR found that prospective approval would have been granted if it was sought.<sup>119</sup> The Court of Appeal affirmed that ruling.<sup>120</sup>

Informed by cases like *Brown v Smith*, Dixon J also took a flexible approach to formulating a guardian’s duty to account.<sup>121</sup> In *Countess of Bective v Federal Commissioner of Taxation* (‘*Countess of Bective*’),<sup>122</sup> Dixon J stated ‘a general rule’ that guardians ‘are not liable to account as trustees.’<sup>123</sup> ‘[T]he nature of the

<sup>112</sup> Ibid 52. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561, where Mason CJ, Brennan, Deane, Dawson and Gaudron JJ held that ‘the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff’.

<sup>113</sup> Matthew Conaglen, ‘Equitable Compensation for Breach of Trust: Off Target’ (2016) 40(1) *Melbourne University Law Review* 126, 129.

<sup>114</sup> Theobald (n 111) 52–3.

<sup>115</sup> (1878) 10 Ch D 377 (‘*Brown v Smith*’).

<sup>116</sup> Ibid 384 (Baggallay LJ).

<sup>117</sup> Ibid.

<sup>118</sup> Ibid 385.

<sup>119</sup> Ibid 382.

<sup>120</sup> Ibid 384–5 (Baggallay LJ), 386 (Brett LJ), 387 (Cotton LJ).

<sup>121</sup> (1932) 47 CLR 417, 420–3 (‘*Countess of Bective*’), approved in *Clay* (n 101) 430 [40] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

<sup>122</sup> Ibid.

<sup>123</sup> *Countess of Bective* (n 122) 420.

actual abode, the condition of the household and the state of the family of the [incapable person] or other person to be maintained' must be considered.<sup>124</sup> In agreement with Theobald, Dixon J emphasised the importance of considering the particular circumstances of the family:

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 [their] comfort, edification and amusement, and to promote [their] 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.<sup>125</sup>

However, the flexible duty to account is not so relaxed as to disregard the risk of financial abuse. In equity, a guardian owes a duty of loyalty to the incapable person. A guardianship is just 'a fiduciary relationship with particular characteristics'.<sup>126</sup> For instance, the outcome in *Brown v Smith* would have been different if the mother had '[made] up a purse' for herself with her daughter's income.<sup>127</sup> Thus, courts of equity tend to lighten, but not eliminate, the burden of accounting on a guardian.

### B *Resurgence in New South Wales*

'Times change, but relationships between family members over property raise issues that are similar from one decade or century to the next.'<sup>128</sup> In New South Wales, equity's flexible formulation of a guardian's duty to account now informs the exercise of judicial discretion *retrospectively* to exonerate guardians and attorneys from liability for breaches of fiduciary duty. The best interests of the incapable person determine whether to grant exoneration. For example, in *C v W [No 2]*, the sons of an elderly incapable woman who served as her guardians or attorneys committed various breaches of fiduciary duty.<sup>129</sup> Justice Lindsay — the current Probate and Protective List Judge of the Supreme Court of New

<sup>124</sup> *Ibid* 421.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Clay* (n 101) 430 [40]. See also Theobald (n 111) 51.

<sup>127</sup> *Brown v Smith* (n 115) 386 (Brett LJ), recently applied in *Woodward v Woodward* [2015] NSWSC 1793, [55]–[56] (White J) ('*Woodward*').

<sup>128</sup> *Crossingham v Crossingham* [2012] NSWSC 95, [33] (White J) ('*Crossingham v Crossingham*').

<sup>129</sup> [2016] NSWSC 945, [15] (Lindsay J) ('*C v W*').

South Wales<sup>130</sup> — relieved the sons of liability mainly because it was in the woman's best interests to bring an end to the litigation between her children.<sup>131</sup> Similarly, in *Ability One Financial Management Pty Ltd v JB*, Lindsay J relieved a professional guardian of any liability for potential breaches of fiduciary duty arising from receiving remuneration without proper prospective authorisation.<sup>132</sup> In so ruling, his Honour partly relied upon the finding that prospective authorisation would have been granted according to the best-interests standard if it were sought.<sup>133</sup> Such willingness to grant retrospective exoneration notwithstanding the guardian's failure to seek prospective authorisation is consistent with historical guardianship cases such as *Brown v Smith*.

Recent New South Wales decisions confirm that equity's flexible approach to regulating guardians also extends to attorneys who serve elderly incapable persons. The case for the imposition of fiduciary duty on an attorney is usually strong when they serve an incapable principal. The principal places a high level of trust on the attorney.<sup>134</sup> The extent of public monitoring and supervision of attorneys is weak compared to that of guardians.<sup>135</sup> Moreover, attorneys often undertake to comply with the terms and conditions of a prescribed form, which can include fiduciary duties.<sup>136</sup> Justice White thus held that the attorney-incapable principal relationship is 'undoubtedly' fiduciary.<sup>137</sup> However, the relationship is 'not a relationship of trustee and beneficiary and the law does not always impose an obligation on [the attorney] to account'.<sup>138</sup> Instead, Theobald's treatise and guardianship cases offer guidance on the rigour of an attorney's duty to account.<sup>139</sup>

As *Hanson* and *Smith* can illustrate, the flexible approach to fiduciary regulation tolerates some conflicts of interest within families. Unlike the strict approach, the flexible approach adopted in New South Wales would likely relieve Mrs Hanson from liability for breach of fiduciary duty. She could argue that it

<sup>130</sup> 'Equity Division', *Supreme Court of New South Wales* (Web Page) archived at <<https://perma.cc/BEK7-Y2PD>>.

<sup>131</sup> *C v W* (n 129) [48], [50].

<sup>132</sup> (2014) 11 ASTLR 155, 217 [333].

<sup>133</sup> *Ibid* 162 [12], 185 [140], 216 [328].

<sup>134</sup> *Dal Pont* (n 15) 176 [6.50], 225 [8.39].

<sup>135</sup> See, eg, *McCullagh* (n 15) 365 [19.20].

<sup>136</sup> See, eg, *Powers of Attorney Regulation 2016* (NSW) sch 2, Form 1 cl 6(c), Form 2 cl 7(d).

<sup>137</sup> *Downie v Langham* [2017] NSWSC 113, [8] ('Downie').

<sup>138</sup> *Ibid*. On the vagueness of an attorney's duty to account, see *Dal Pont* (n 15) 238 [8.64].

<sup>139</sup> Theobald (n 111) 51–2. See, eg, *Downie* (n 137) [8]–[12] (White J). For an application of guardianship cases to an attorney who enjoyed a personal benefit while living with and providing day-to-day care to his elderly, mentally *capable* father, see *Crossingham* (n 128) [18]–[25] (White J).

was in her incapable husband's best interests to live with her and be cared for by her in their habitual residence; the payments from her husband covered (in part at least) his living and care-taking expenses. The fact that Mrs Hanson enjoyed an unauthorised benefit from her position would not be fatal to her argument. On the other hand, the flexible approach would (and did) still hold Mrs Smith liable for breach of fiduciary duty.<sup>140</sup> It would be a stretch to argue that it was in Mr Smith's best interests to be left in a nursing home while Mrs Smith spent his money to enjoy luxuries with her side of the family and buy real property for herself, her daughter from a prior marriage and the daughter's husband. Mrs Smith also made some of these expenses to devalue the property that the children from Mr Smith's first marriage were entitled to inherit under his will;<sup>141</sup> his wishes regarding succession planning were therefore undermined. The point is that the flexible approach is not fixated upon conflicts of interest; it aims to pursue the best interests of the incapable person.

To be sure, not every New South Wales decision in point pronounces a flexible view on fiduciary regulation. For example, in *Cohen v Cohen*, the son-attorney of an elderly woman used his authority to transfer his mother's house to himself for \$1.<sup>142</sup> He relied on a clause in the power of attorney that broadly authorised him to benefit himself.<sup>143</sup> Justice Hallen found a breach of fiduciary duty.<sup>144</sup> In so ruling, his Honour took the view that the broad authorisation clause only circumscribed the scope of the son-attorney's power, but not the manner in which the power should be exercised.<sup>145</sup> However, *Cohen v Cohen* was an *ex tempore* judgment and the son-attorney did not make an appearance.<sup>146</sup> There was also no mention of the duty to account or the relevant decisions of White JA and Lindsay J. Thus the view expressed by these decisions (discussed above) is not undermined by *Cohen v Cohen*.

## V JUSTIFYING THE FLEXIBLE MODEL

Challenging the prevailing model of fiduciary regulation, the recent effort to apply a flexible model in New South Wales leaves important questions unanswered. As Part IV has explained, first instance decisions are primarily

<sup>140</sup> *Smith* (n 32) [464] (Lindsay J).

<sup>141</sup> *Ibid* [248]–[249].

<sup>142</sup> [2016] NSWSC 336, [17]–[18] (Hallen J) (*'Cohen v Cohen'*).

<sup>143</sup> *Ibid* [9]–[12].

<sup>144</sup> *Ibid* [66]–[67].

<sup>145</sup> *Ibid* [62]–[66].

<sup>146</sup> *Ibid* [1], [3]. See also Ryan (n 4) 200–3 for a close analysis of this case and its potential problems, including potential incompatibility with *Taheri* (n 56).

responsible for applying the best-interests standard to govern retrospective scrutiny of fiduciary conduct; whether appellate courts should take a similar view is an open question. Another open question is whether the New South Wales view should be followed in other Australian jurisdictions. This can be an open question even in jurisdictions where a guardian's or an attorney's duty of loyalty is based on statute. For example, the Victorian and the Queensland guardianship and power of attorney statutes expressly provide a discretion retrospectively to validate previously-unauthorised conflicts.<sup>147</sup> Victorian and Queensland courts and tribunals have to tackle the question whether the discretion to grant retrospective approval should be exercised in accordance with the best-interests standard.<sup>148</sup>

This Part will offer normative grounds to explain and justify the flexible model of fiduciary regulation. The primary aim here is to persuade courts and tribunals to apply the flexible model to family guardians and attorneys. Another aim is to persuade legislatures, law reformers and scholars of the merits of flexible fiduciary regulation in the protective jurisdiction.

To facilitate presentation, let the 'best-interests defence' refer to the retrospective application of the best-interests standard to exonerate a previously-unauthorised conflict of interest by a guardian or an attorney. The claim to be advanced is that the best-interests defence should be understood to have a *subjective* interpretation with logical implications:

- 1 The subjective interpretation is that the best-interests defence excuses a conflict of interest in cases where the incapable person could have and would have authorised the conflict if they were mentally capable and fully-informed;
- 2 This interpretation logically implies that if a *mentally capable* person cannot authorise a particular conflicted action or transaction, then the best-interests defence does not excuse such action or transaction.

<sup>147</sup> *Guardianship and Administration Act 2019* (Vic) s 182; *Powers of Attorney Act 2014* (Vic) s 65(5); *Guardianship and Administration Act 2000* (Qld) s 58; *Powers of Attorney Act 1998* (Qld) s 105.

<sup>148</sup> See, eg, *Re Narumon Pty Ltd* [2018] 2 Qd R 247, 251–2 [80]–[85], 274 [93] ('*Re Narumon*'), where Bowskill J followed Lindsay J's approach in *Reilly v Reilly* [2017] NSWSC 1419, [114]–[117] ('*Reilly*') and allowed an unopposed application for retrospective approval for a wife-attorney's extension of a binding death benefit nomination in respect of her husband-principal's superannuation, where such extension would benefit herself and her son upon her husband's death and was consistent with her husband's testamentary wishes expressed before he lost capacity; *Singer v Spiewak* [2018] VSC 521 [43]–[51] ('*Singer*') where Lansdowne AsJ reserved for future consideration whether to follow Lindsay J's view in *Reilly* (n 148) and *Re Narumon* (n 148) in Victoria.

The proposed subjective interpretation largely engages a ‘substituted-judgment’ analysis to respect the incapable person’s own values and preferences whenever ascertainable. Part V(A) will apply fiduciary doctrine and theory to explain and justify the proposed interpretation. Building upon Part IV, Part V(B) below will argue that the proposed interpretation correctly protects close family members who serve as guardians and/or attorneys. Part V(C) will examine the main logical implication of the proposed interpretation: the best-interests defence does not excuse conflicted actions or transactions that amount to evasion of the applicable family provision statute. Part V(D) will defend the flexible model against potential criticisms. All Parts will argue against the prevailing strict model.

### *A Approximation of a Private Individual’s Power to Authorise Departures from Strict Fiduciary Law*

#### 1 *Default Law versus Mandatory Law*

When applied to protect mentally capable persons, the strict model of fiduciary law primarily operates as *default* law that yields to party modification. The duty of loyalty can deter and sanction fiduciary conduct that actually benefits the beneficiary.<sup>149</sup> To remedy such over-deterrence, fiduciary law generally permits the fiduciary to seek the fully-informed consent of the beneficiary to pursue personal gains.<sup>150</sup> The beneficiary is usually free to authorise departures from those aspects of fiduciary law that they find undesirable. Moreover, fiduciary law generally does not ask hypothetical questions to excuse conflicts of interest;<sup>151</sup> if the fiduciary commits a breach of fiduciary duty without the beneficiary’s consent, then it is not a defence to prove that the beneficiary would have consented if consent were sought.<sup>152</sup> As Conaglen explained in another context, allowing retrospective approval would ‘[encourage] fiduciaries to “chance it”, on the basis that part of the profit they make from the infringing transaction might be able to be kept if the court is so minded.’<sup>153</sup> In other words, fiduciaries would have little incentive to obtain the actual consent of their principals if they were allowed to prove hypothetical consent at the time of adjudication.

<sup>149</sup> See above n 52 and accompanying text.

<sup>150</sup> Conaglen, ‘Authorisation Mechanisms’ (n 54) 563–4.

<sup>151</sup> *Ancient Order of Foresters* (n 52) 12 [8]–[9] (Kiefel CJ, Keane and Edelman JJ); *Murad* (n 31) [76]–[77] (Arden LJ), [105]–[107] (Jonathan Parker LJ). See generally Conaglen, ‘Authorisation Mechanisms’ (n 54) 563–4.

<sup>152</sup> *Murad* (n 31) [8], [70]–[71] (Arden LJ).

<sup>153</sup> Conaglen, ‘Authorisation Mechanisms’ (n 54) 576.



In cases concerning mentally incapable persons, however, fiduciary law tends to operate as *mandatory* law. ‘*Prima facie*, a person incapable of managing [their] affairs might reasonably be thought to be incapable of giving [their] fully informed consent to a transaction otherwise in breach of fiduciary obligations.’<sup>154</sup> To be sure, guardians tend to face more challenges than attorneys in securing fully-informed consent from incapable persons. While the appointment of a guardian requires an official finding of mental incapacity,<sup>155</sup> no such finding is needed to appoint an attorney. Thus, in rare cases, attorneys have successfully defended consent obtained from elderly principals.<sup>156</sup> For example, in *Crossingham v Crossingham*,<sup>157</sup> Kimberley served as his elderly father Ernest’s day-to-day carer and attorney. Ernest gave the PIN to his bank account to Kimberley and told him to ‘look after [himself]’.<sup>158</sup> Kimberley then withdrew moneys to pay household expenses and for his father’s care. He also withdrew moneys for his own purposes, including gambling, alcohol and playing golf.<sup>159</sup> After Ernest passed away, Kimberley’s sisters sued Kimberley to recover the moneys withdrawn.<sup>160</sup> Justice White did not require Kimberley to repay the moneys withdrawn during Ernest’s lifetime.<sup>161</sup> His Honour found that

[Ernest’s] mental capacity was not disturbed. He must have known that giving his son the PIN to the account and telling him that he could use the moneys to look after himself created a risk that the moneys might be dissipated.<sup>162</sup>

In other words, Kimberley had Ernest’s fully-informed consent to withdraw moneys for selfish purposes. It would have been harder or impossible for

<sup>154</sup> Justice Geoff Lindsay, ‘Who Guards the Guard? Incapacity in a Family Context’ (Speech, College of Law, 15 June 2018) 6 [21] archived at <<https://perma.cc/WP5D-VGC3>> (‘Incapacity in a Family Context’). See also *Hartley v Woods* [2017] NSWSC 1420, [77] (Lindsay J); *Singer* (n 148) [49] (Lansdowne AsJ); *Dal Pont* (n 15) 224–5 [8.38], 226–7 [8.41]; *McCullagh* (n 15) 375–6 [19.260], [19.290].

<sup>155</sup> See above Part II(A). See, eg, *Woodward* (n 127) [12] (White J).

<sup>156</sup> See, eg, *Birch v Birch* [2018] QSC 289, [106]–[107], [124] (Douglas J), *affd* [2020] QCA 31.

<sup>157</sup> *Crossingham v Crossingham* (n 128).

<sup>158</sup> *Ibid* [18], [40]–[41] (White J).

<sup>159</sup> *Ibid* [9].

<sup>160</sup> *Ibid* [2], [6].

<sup>161</sup> Kimberley was nonetheless required to account for the moneys withdrawn after Ernest had passed away, because such moneys belonged to the estate: *ibid* [68].

<sup>162</sup> *Ibid* [51]. See also *Re Various Lasting Powers of Attorney* [2019] EWCOP 40, [62] (‘*Re Various Lasting Powers*’), where Judge Hilder stated that ‘[principals] commonly choose their attorneys from those persons closest to them, and therefore attorneys are often in the particular group of persons other than [themselves] whom a [principal] would be most likely to want to benefit’.

Kimberley to secure such consent if a guardianship proceeding had determined that Ernest lacked mental capacity.

In typical cases, however, dementia (or a similar degenerative condition) is the reason for appointing the guardian or attorney. As the dementia progresses and worsens, it becomes harder for the guardian or attorney to argue that any consent given is fully-informed. Moreover, it can be very costly or impossible to 'litigation-proof' any consent given. The 'golden rule' counsels that a medical professional should be engaged to verify and document the quality of consent in order to reduce the likelihood of a subsequent finding of incapacity.<sup>163</sup> An alternative is to engage a solicitor with considerable experience in dealing with elderly clients.<sup>164</sup> The cost of engaging a medical professional or an experienced solicitor can be high relative to the value of the transaction. Even if the cost of engaging a medical professional or an experienced solicitor has been incurred, there is still no guarantee that any consent given will be 'litigation-proof'. Speaking extrajudicially, Justice Lindsay observed that by the time of litigation, the question of capacity commonly becomes the subject of competing medical opinions,<sup>165</sup> in part due to the pressure of adversarial debate.<sup>166</sup> At the time of assessing consent for the relevant transaction, it is also hard or impossible to anticipate all facts that will later be found to be material in litigation.<sup>167</sup> Thus, both guardians and attorneys tend to face significant challenges in securing and 'litigation-proofing' consent, even though such challenges are marginally more surmountable for attorneys.

Some law reformers argue that the incapable person could authorise departures from fiduciary law before losing mental capacity.<sup>168</sup> For example, principals who are only in the early stages of dementia often can make most decisions about their lives;<sup>169</sup> they can authorise departures in the power of attorney before they experience significant memory loss, cognitive difficulties, or other

<sup>163</sup> For wills, see *Banks v Goodfellow* (1870) LR 5 QB 549. For wills and contracts, see Justice Geoff Lindsay, 'Render unto Caesar: Medicine and Law in Assessments of (In)capacity' (Speech, Blue Mountains Law Society Succession Law Conference, 14 September 2019) 2 [5] archived at <<https://perma.cc/4T46-S98Q>> ('Assessment of (In)capacity').

<sup>164</sup> See, eg, *Drivas v Jakopovic* (2019) 100 NSWLR 505, 517 [52] (Macfarlan JA).

<sup>165</sup> Lindsay, 'Assessment of (In)capacity' (n 163) 3 [9], 4 [15].

<sup>166</sup> *Ibid* 2 [7].

<sup>167</sup> *Ibid* 8 [26].

<sup>168</sup> See, eg, *ALRC Equality Report* (n 16) 47 [2.52].

<sup>169</sup> For a discussion of the uses of powers of attorney in early stages of dementia, see, eg, Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (Cambridge University Press, 2017) ch 4 ('Duties to Care').

symptoms that tend to appear in the later stages of dementia.<sup>170</sup> This argument overestimates a person's ability to anticipate future contingencies. Empirical research in behavioural economics and psychology consistently reveals that individuals tend to make systematic errors when making inferences about the future.<sup>171</sup> The cost of documenting all anticipated contingencies would also be prohibitively high. In fact, the need to respond to new circumstances as they arise is often the very reason for engaging a fiduciary.<sup>172</sup> This is especially true when a guardian or an attorney is appointed to serve an elderly person; life expectancy is now higher than any generation before,<sup>173</sup> thus the length of time for property management services is also prolonged. Moreover, courts and tribunals may narrowly construe a conflicting-authorising clause even when it is broadly drafted.<sup>174</sup>

Textbook writers also tend to emphasise the availability of prospective authorisation by a court or tribunal.<sup>175</sup> Yet there are practical challenges for relying on this mechanism as the only (or the main) solution to the problem of over-deterrence arising from strict fiduciary law. First, widespread ignorance of fiduciary law within the community<sup>176</sup> implies that most lay guardians and attorneys are unlikely to know of the availability of court or tribunal approval, let alone the importance of seeking approval prospectively rather than retrospectively. Second, disputed cases often involve relatives of the elderly incapable person fighting over their expected inheritance. The adversarial nature of these disputes can generate high legal costs. In particular, inheritance disputes involving children from different marriages or cohabitation relationships are

<sup>170</sup> See generally 'Symptoms and Memory in the Later Stages of Dementia', *Alzheimer's Society* (Web Page) <<https://www.alzheimers.org.uk/about-dementia/symptoms-and-diagnosis/how-dementia-progresses/symptoms-memory#content-start>>, archived at <<https://perma.cc/HHW3-YDEU>>.

<sup>171</sup> Daniel Kahneman, 'Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice' (Prize Lecture, Stockholm University, 8 December 2002) <<https://www.nobelprize.org/prizes/economic-sciences/2002/kahneman/lecture/>>, archived at <<https://perma.cc/9QP7-6LFX>> and see the literature surveyed therein, especially Kahneman's co-authored works with Amos Tversky. See also Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011) 129–36, 146–65.

<sup>172</sup> Sitkoff (n 31) 1040–1; Scott and Scott, 'Parents as Fiduciaries' (n 31) 2419–21.

<sup>173</sup> *WHO Ageing Report* (n 20) 3.

<sup>174</sup> See, eg, *Cohen* (n 142), discussed above at nn 142–6 and accompanying text.

<sup>175</sup> See, eg, McCullagh (n 15) 380 [19.400].

<sup>176</sup> See, eg, *ALRC Elder Abuse Report* (n 4) 173 nn 62–4 and accompanying text; Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney* (Final Report No 352, August 2010) 175.

common;<sup>177</sup> animosity between these litigants can drive them to incur unnecessary legal expenses with the goal of harming the other side. Moreover, limited funding, heavy caseloads and shortages in staffing can further undermine the effectiveness of the process for obtaining prospective court or tribunal authorisation.

## 2 A Solution to the Problem of Over-Deterrence

Focusing on cases concerning mentally incapable persons, Part V(A)(1) above shows the ineffectiveness of the usual mechanisms for solving the problem of over-deterrence. It may be argued that two of these mechanisms also tend to be ineffective in respect of mentally capable persons: powers of attorney granted by principals who never lose mental capacity may not account for all future contingencies, and the process for obtaining prospective court or tribunal approval may fail mentally capable persons as well. Yet one mechanism tends to be ineffective only in respect of incapable persons: a private individual's power to authorise departures from those aspects of strict fiduciary law that they subjectively find undesirable. In this light, the main function of the best-interests defence becomes apparent: it approximates the decision that the incapable person would have reached in a state of capacity if their fully-informed consent was sought by their guardian or attorney. This is the proposed subjective interpretation of the best-interests defence.

The best-interests defence tends to excuse a conflict of interest in cases where the incapable person would have permitted the conflict if they had capacity. This is partly because the best-interests standard has long been predominantly a subjective concept in cases concerning administration of property.<sup>178</sup> In the 19<sup>th</sup> century, the English Court of Chancery began to effectuate the incapable person's own wishes in the administration of their property.<sup>179</sup> The perspective of the incapable person was 'central', although not conclusive.<sup>180</sup> After the *Judicature Act* reforms, courts exercising protective jurisdiction continued to consider what the incapable person would have wanted if they had

<sup>177</sup> See generally O'Neill and Peisah (n 15) [2.3.2]; Prue Vines, *Bleak House Revisited?: Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011) 32.

<sup>178</sup> On the other hand, when applied in cases concerning medical decision-making, the best-interests standard tends to be an objective concept: see generally Louise Harmon, 'Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100(1) *Yale Law Journal* 1; Mary Donnelly, 'Changing Values and Growing Expectations: The Evolution of Capacity Law' (2017) 70(1) *Current Legal Problems* 305.

<sup>179</sup> *Ex parte Whitbread* (1816) 2 Mer 99; 35 ER 878, 879 (Lord Eldon LC). See also *W v H* [2014] NSWSC 1696, [39]–[40] (Lindsay J) ('*W v H*').

<sup>180</sup> *W v H* (n 179) [45].

capacity.<sup>181</sup> Recent applications of the best-interests standard in New South Wales focus on the elderly incapable person's subjective wishes.<sup>182</sup> Moreover, the hypothetical question regarding the incapable person's wishes in a state of capacity assumes that the person is fully-informed of the relevant conflict of interest.<sup>183</sup>

Evidence of an elderly incapable person's past conduct, relational norms and wishes tends to support inferences regarding what they would have wanted if they had capacity. The person may have expressed their wishes in succession planning instruments, and even if not, they have had a lifetime to leave a "memory trail" ... in the minds of family and friends.<sup>184</sup> For instance, past gifting patterns can reveal whether the person would make a particular gift if they had capacity.<sup>185</sup> The person's will and wish letters can also reveal their gifting intentions.<sup>186</sup>

*Hanson* can illustrate how the best-interests defence can address the problem of over-deterrence. The proposed subjective interpretation would direct a court to ask whether, if he had capacity, Mr Hanson would have authorised Mrs Hanson to receive payments from him according to their pre-existing agreement. It was likely beneficial for Mr Hanson to live with and receive care from Mrs Hanson in their habitual residence, and the payments to Mrs Hanson eased her financial burden of continuing that living and caring arrangement rather than moving him to a nursing home.<sup>187</sup> Mrs Hanson could also rely on the evidence that before Mr Hanson lost mental capacity, he had consented to the agreement with Mrs Hanson as well as 'family financial management in the family's accustomed manner'.<sup>188</sup> Moreover, there was an analogous Chancery decision concerning a married couple who had an arrangement to share household expenses before the wife became incapable. The Court made provision out of the wife's property to carry out the arrangement, because the evidence

<sup>181</sup> Ibid [44], discussing *Re Darling (A Person of Unsound Mind)* (1888) 39 Ch D 208. See also *RL v NSW Trustee and Guardian* (2012) 84 NSWLR 263, 292–306 [125]–[187] (Campbell JA, Young JA agreeing at 306–7 [188]–[196]); Theobald (n 111) 462.

<sup>182</sup> See, eg, *W v H* (n 179) [39]–[40]. See generally O'Neill and Peisah (n 15) [8.3.4.1]–[8.3.4.2].

<sup>183</sup> See, eg, *Re Meek* (n 89) 553 [74] (Hodge J).

<sup>184</sup> Carney (n 28) 5–6.

<sup>185</sup> See, eg, *Re PP; BB v PP* [2015] EWCOP 93, [101], [110] (Batten DJ).

<sup>186</sup> See, eg, *ibid* [105], [119]; *Re HH; TH v JH* [2018] EWCOP 13, [76] (HHJ Vincent).

<sup>187</sup> See also *Smith* (n 32) [452], where Lindsay J held that different accounting standards may apply to a guardian who lives with and provides day-to-day care to the incapable person and a guardian who places the incapable person in a nursing home.

<sup>188</sup> *Hanson* (n 38) 211.

revealed that she would have done the same if she had capacity.<sup>189</sup> Supported by precedent, Mrs Hanson would likely succeed in establishing the best-interests defence. This outcome solves the problem of over-deterrence; Mrs Hanson would likely be protected from liability for breach of fiduciary duty because her conduct was subjectively beneficial to Mr Hanson.

In cases where evidence of what the incapable person would have wanted is deficient, the best-interests defence does *not* excuse a conflict of interest. A common criticism of subjective interpretations of best interests is that when documentary evidence is unavailable, there is a risk of overreliance on '[r]ecollections of past conversations, scattered remarks and comments', which can be unreliable.<sup>190</sup> There is also the risk that the decision-maker may follow their own preferences rather than the incapable person's.<sup>191</sup> To minimise these risks, when evidence of what the incapable person would have wanted is deficient, the best-interests defence should not (and does not) excuse previously-unauthorised conflicts.

The proposed subjective interpretation of the best-interests defence does not clash with objective formulations of best interests in guardianship statutes.<sup>192</sup> For example, the guardianship statute in the Australian Capital Territory defines an incapable person's 'interests' as including financial security, protection from physical or mental harm, and other objective factors.<sup>193</sup> When the person's own wishes are likely to significantly harm such 'interests', decision-makers who exercise functions under that statute are to prioritise such 'interests'.<sup>194</sup> This, and similar objective formulations of best interests, may present statutory interpretation challenges for those who prefer a purely subjective interpretation of best interests. Yet, in cases involving breach of fiduciary duty, such statutory interpretation challenges do not rise if the errant guardian or attorney seeks to invoke the equitable jurisdiction to grant retrospective exoneration,<sup>195</sup> rather than any provision in the relevant guardianship statute.

In sum, the strict prohibition of conflicts of interest can give rise to the problem of over-deterrence. A fiduciary who serves a mentally capable beneficiary can solve that problem by obtaining the beneficiary's fully-informed consent, but a guardian or an attorney who serves a mentally incapable person typically

<sup>189</sup> *Re Hewson* (1852) 21 LJ Ch 825, cited in Theobald (n 111) 463.

<sup>190</sup> Danuta Mendelson, 'Substituted Consent: From Lunatics to Corpses' (2007) 14(4) *Journal of Law and Medicine* 449, 457.

<sup>191</sup> *Ibid* 458.

<sup>192</sup> See generally above n 24 and accompanying text.

<sup>193</sup> *Guardianship and Management of Property Act 1991* (ACT) s 5A.

<sup>194</sup> *Ibid* s 4(2)(a).

<sup>195</sup> See, eg, *C v W* (n 129) [21]–[26] (Lindsay J).

struggles to take advantage of that mechanism. The best-interests defence responds to the resulting problem of over-deterrence in cases concerning incapable persons. Under the proposed subjective interpretation, the best-interests defence aims to approximate, as closely as possible in the circumstances, for incapable persons the outcome that capable persons can obtain by giving fully-informed consent: departures from those aspects of strict fiduciary law that are subjectively undesirable. So understood, the best-interests defence merely functions to equalise the degree of protection for capable and incapable persons.

### B *Close Families in the Protective Jurisdiction*

This Part will argue that fiduciary regulation of guardians and attorneys ought to accommodate '[families] of affection and dependence', to use Professor Lawrence Friedman's expression.<sup>196</sup> Such a family may or may not be based on formal marriage or bloodline.<sup>197</sup> As a shorthand, all discussions of 'close families' refer to families of affection and dependence. It will be argued that qualifying strict fiduciary duty with the best-interests defence appropriately accommodates the interests of guardians and attorneys who are in a close familial relationship with the elderly incapable person.

#### 1 *Cost-Effective Regulation by Intrinsic Bonds and Informal Norms*

Intrinsic bonds and informal norms in close families tend to be strong, and can often cost-effectively deter misconduct. In relation to close parent–minor child relationships, Professors Elizabeth Scott and Robert Scott argued that extra-legal mechanisms in the forms of biological and affective bonds, as well as social and moral norms, have a dominating effect in incentivising parents to fulfil their caretaking role.<sup>198</sup> Limited legal regulation of close parent–child relationships recognises that extra-legal mechanisms can cost-effectively deter parental misconduct.<sup>199</sup> More recently, Elizabeth Scott and I have argued that extra-legal mechanisms can also partially deter misconduct when a spouse/partner or an

<sup>196</sup> Lawrence M Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford University Press, 2009) 11 (emphasis in original). See generally Elizabeth S Scott and Robert E Scott, 'From Contract to Status: Collaboration and the Evolution of Novel Family Relationships' (2015) 115(2) *Columbia Law Review* 293, 305–6, defining contemporary families based on adult relationships as those that exhibit the 'core qualities [of] ... a demonstrated, long-term commitment and the assumption of mutual care and financial responsibility'.

<sup>197</sup> Friedman (n 196) 11; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2019) 50–1 [2.16], 97–9 [2.46]–[2.47].

<sup>198</sup> Scott and Scott, 'Parents as Fiduciaries' (n 31) 2430, 2433.

<sup>199</sup> *Ibid* 2404, 2430–9.

adult child serves as guardian to an elderly incapable person.<sup>200</sup> For this reason, and on other behavioural economics grounds, I criticised prevailing American fiduciary law for over-regulating family guardians and attorneys.<sup>201</sup>

The available empirical evidence reveals the critical role of extra-legal mechanisms in close families. The Australian Bureau of Statistics recently reported that more than 2.6 million Australians provided *unpaid* care to older people (aged 65 years and over) or people with disabilities.<sup>202</sup> The largest group of primary carers were spouses/partners of the care-recipient (36.6%), followed by parents (27.1%) and children (26.2%).<sup>203</sup> Almost 80% of these primary carers resided with the care-recipient.<sup>204</sup> Aside from not getting paid, these primary carers incurred substantial opportunity costs: '[t]he time taken to care for someone can impact on the carer's ability to remain engaged in the community, participate in the workforce and stay healthy'.<sup>205</sup> The most common reasons for taking on the care-taking role were 'a sense of family responsibility' (70%), a 'sense of emotional obligation' (46.6%) and 'a feeling they could provide better care than anybody else' (46.2%).<sup>206</sup> Moreover, adult children who provided primary care to their aged parents were mainly driven by 'the responsibility of a family member to provide the care' (78.6%).<sup>207</sup>

In light of the prevalence of family carers, empirical findings regarding elder abuse therefore must be cautiously interpreted. Surveys from Australian jurisdictions consistently report that most alleged perpetrators of elder abuse are related to the victim. While the exact figures vary, adult children and spouses/partners are typically reported as the largest groups of alleged perpetrators.<sup>208</sup> Yet these findings should not be interpreted to suggest that family members are prone to commit elder abuse. Saying elder abusers are likely to be

<sup>200</sup> Elizabeth S Scott and Ben Chen, 'Fiduciary Principles in Family Law' in Evan J Criddle, Paul B Miller and Robert H Sitkoff (eds), *Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) 227.

<sup>201</sup> Ben Chen, 'Elder Financial Abuse: Fiduciary Law and Economics' (2020) 34 *Notre Dame Journal of Law, Ethics, and Public Policy* (forthcoming).

<sup>202</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Catalogue No 4430.0, 24 October 2019) Table 29.1 ('*Disability, Ageing and Carers*').

<sup>203</sup> *Ibid* Table 34.3.

<sup>204</sup> *Ibid* Table 35.1.

<sup>205</sup> Australian Bureau of Statistics, 'Carers', 4430.0 — *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Web Page, 18 October 2016) archived at <<https://perma.cc/4YG5-5LMC>>.

<sup>206</sup> *Disability, Ageing and Carers* (n 202) Table 39.1.

<sup>207</sup> *Ibid*.

<sup>208</sup> For a survey of empirical studies of elder abuse, see generally Kaspiew, Carson and Rhoades (n 1) 8–11.



family members is not the same as saying family members are likely to be elder abusers. That family members are well-represented in elder abuse statistics may well be driven by the prevalence and frequency of dealings between the elderly and their family members. What would support strict fiduciary regulation is any empirical finding suggesting a strong tendency of family members to commit elder abuse. I am unaware of any such finding.

Both theoretical considerations and empirical evidence thus show that '[f]amily and other caregivers are the cornerstone and default safety net system within the contemporary long-term-care system.'<sup>209</sup> There is then much to be said for the moderate view that fiduciary law should not inflexibly discount those family guardians and attorneys who provide valuable services *notwithstanding* their financial conflicts.

## 2 Ubiquity of Harmless Conflicts

Another justification for flexible fiduciary regulation is the ubiquity of conflicts of interest within close families. Unless complex property management is required, courts and tribunals typically prefer to appoint close family members as guardians, and private individuals also tend to appoint their close family members as durable attorneys.<sup>210</sup> Empirical research reveals widespread conflicts of interest within families.<sup>211</sup> The sources of conflict include psychological involvements and intertwined financial interests. In particular, financial conflicts in close familial relationships often arise from joint property ownership, shared residence, and inheritance expectations.<sup>212</sup> The English Court of Protection thus held that '[c]onflicts of interest are ubiquitous in any mental capacity jurisdiction and it would be unrealistic, if not impossible, to eradicate them entirely.'<sup>213</sup> The following will add that fiduciary law may affect whether well-intended family members would be willing to provide valuable property management services.

Generating high compliance costs, the strict model of fiduciary regulation can discourage well-intended family members from taking on a fiduciary office. First, financial conflicts are ubiquitous in close families, yet compliance with

<sup>209</sup> Ann M Soden, 'Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer, 2012) 99, 118.

<sup>210</sup> See, eg, Carney (n 28) 9; Harding, *Duties to Care* (n 169) 184.

<sup>211</sup> See generally *ACT Guardianship Report* (n 16) 85, 95, 98, 108.

<sup>212</sup> See, eg, *Queensland Guardianship Report* (n 4) 239–41.

<sup>213</sup> *Re JW*; *GGW v East Sussex County Council* [2016] COPLR 36, 45 [31] (Senior Judge Lush) ('*Re JW*'). See also *Re Various Lasting Powers* (n 162) [62]; Lindsay, 'Incapacity in a Family Context' (n 154) 9 [37]–[38].

the sole-interest duty of loyalty can require close family members to remove their conflicts. The costs of removing conflicts can deter close family members from serving as guardian or attorney. Second, in the strict model, the process for appointing a guardian can also deter close family members from seeking appointment as guardian. Most Australian jurisdictions have enacted statutory provisions that disfavour the appointment of persons affected by a conflict of interest as guardian.<sup>214</sup> The guardianship statute in the Australian Capital Territory disfavors conflicts of interest in general, but makes a narrow exception to accommodate conflicts between spouses.<sup>215</sup>

On the other hand, applying the best-interests defence partially to lift the prohibition against conflicts of interest, the flexible model recognises that close family members should not be discouraged from serving as guardian or attorney.<sup>216</sup> More precisely, the proposed subjective interpretation recognises that family members can benefit from their position to the extent consistent with what the incapable person would have wanted if they had capacity. Moreover, in New South Wales, the mere existence of a conflict of interest is often not a factor against appointment as guardian; the guardianship statute there recognises that conflicts are permissible unless they are ‘undue’.<sup>217</sup> The New South Wales Law Reform Commission recently rejected a proposal to exclude appointment of persons with conflicts of interest as guardian.<sup>218</sup>

Australian courts recognise that fiduciary law can affect a family member’s incentive to take on a fiduciary office. In *Countess of Bective*, Dixon J was lenient to family guardians in part to give them ‘some inducement’ for taking on their role.<sup>219</sup> His Honour stated that ‘[c]ourts of equity have not disguised the fact that the [flexible duty to account] gives to a parent or guardian ... an

<sup>214</sup> *Guardianship of Adults Act 2016* (NT) s 15(2)(h); *Guardianship and Administration Act 2000* (Qld) s 15(1)(c); *Guardianship and Administration Act 1993* (SA) s 50(1)(e); *Guardianship and Administration Act 1995* (Tas) ss 21(1)(b), 54(1)(d)(ii); *Guardianship and Administration Act 2019* (Vic) ss 32(1)(b), 32(2)(b), 32(5)(a); *Guardianship and Administration Act 1990* (WA) s 44(1)(b).

<sup>215</sup> *Guardianship and Management of Property Act 1991* (ACT) ss 10(4)(g), (5).

<sup>216</sup> See also Jonathan Herring, *Older People in Law and Society* (Oxford University Press, 2009) ch 4, arguing that promoting the best interests of an elderly incapable person requires taking into account the interests of their carer); Sloan (n 14) 218–19, 238, arguing that various areas of private law should encourage and reward caretaking.

<sup>217</sup> *Guardianship Act 1987* (NSW) s 17(1)(b). See also *IR v AR* [2015] NSWSC 1187, [35], where Lindsay J stated that a “conflict of interest” is “undue” ... if it is reasonably likely, to an unacceptable degree, to impede the proposed guardian’s performance of the duties of a guardian in the particular case’. For a survey of appointment cases that tolerated some degree of intrafamilial or personal conflict, see Ryan (n 4) 205–6.

<sup>218</sup> *NSW Guardianship Report* (n 16) 99 [8.26].

<sup>219</sup> *Countess of Bective* (n 122) 422.

opportunity of gaining *incidental benefits*.<sup>220</sup> Such incidental benefits must be ‘small’ and ‘incidental to the incapable person’s enjoyment of [their] own property’, as Lindsay J clarified.<sup>221</sup> Moreover, the Supreme Court of New South Wales has been willing, retrospectively, to authorise good faith guardians and attorneys to receive remuneration for providing their services.<sup>222</sup> This responds to the fact that guardians and attorneys are typically relatives who do not seek prospective authorisation to receive remuneration.<sup>223</sup>

### C Recognition of Inheritance Expectations

The proposed subjective interpretation of the best-interests defence logically implies that if a mentally capable person cannot authorise a particular conflicted action or transaction, then the best-interests defence does not excuse such action or transaction. For example, the best-interests defence does not excuse a guardian or an attorney from non-compliance with any non-waivable core of fiduciary duty, which core prohibits bad faith and dishonesty;<sup>224</sup> capable persons have no power to authorise their fiduciaries to depart from any such non-waivable core, so the best-interests defence does not generate such a power for incapable persons. Similarly, in cases concerning transfers of property at or near death, the applicable family provision statute imposes outer limits on judicial willingness to respect subjective will and preferences. As these outer limits of testamentary freedom apply to *capable* persons, the best-interests defence does not generate a power to exceed such outer limits for incapable persons. This Part will argue that this logical implication is a virtue: it makes explicit the role of inheritance expectations whenever present, and partially mitigates the perverse incentives that may arise from any such inheritance expectations.

In theory, guardians and attorneys owe fiduciary duties only to the elderly incapable persons they serve. In reality, near the end of an incapable person’s life, the conduct of their guardian or attorney, and how fiduciary law regulates such conduct, may affect the interests of persons who expect to inherit from the incapable person. The size and composition of the incapable person’s estate at death depend on the outcome of any fiduciary claim against their guardian or attorney. A successful claim tends to enlarge the estate, and thereby benefits some persons who expect to inherit. Moreover, if the incapable person has

<sup>220</sup> Ibid 421 (emphasis added).

<sup>221</sup> *Smith* (n 32) [103] (emphasis omitted). See also *Finn* (n 13) 54 [103]–[104]; *Reilly* (n 148) [116] (Lindsay J), quoted with approval in *Re Narumon* (n 148) [80] (Bowskill J).

<sup>222</sup> See, eg, *Downie* (n 137) [12] (White J).

<sup>223</sup> See generally *Queensland Guardianship Report* (n 4) 245–6, 413.

<sup>224</sup> See, eg, *Armitage* (n 56) 253–4 (Millet LJ).

passed away by the time of adjudication, then the fruits of a successful fiduciary claim exclusively accrue to persons who expect to inherit. For example, a fiduciary claim can be made at the same time as, or in anticipation of, an application for family provision relief.<sup>225</sup> In this scenario, a successful fiduciary claim enlarges the estate of the deceased incapable person. The estate will then be shared among those who are entitled to inherit, including by way of family provision relief.

It is submitted that a defect of the strict model of fiduciary regulation is its tendency to ignore the possibility of conflicts between an elderly incapable person and claimants who expect to inherit from them. The elderly person may wish to benefit their guardian or attorney at the expense of others who have inheritance expectations. Yet claims to avoid conflicted transactions can succeed without regard to the incapable person's own wishes. The 'real' beneficiaries of strict fiduciary regulation may well be claimants with inheritance expectations.

To be sure, the active involvement of independent public regulators and professional or institutional guardians and attorneys can partially, but not completely, mitigate the perverse effects of inheritance expectations. However, public regulators tend not to have sufficient resources completely to take over supervisory and enforcement functions from private individuals. Moreover, only a small proportion of guardians and attorneys are independent professionals or institutions rather than relatives or friends of the incapable person.<sup>226</sup> Finally, compared with relatives and friends, independent professionals and institutions tend to be less familiar with, and empathetic of, the incapable person's own will and preferences.<sup>227</sup> For example, in *EBG (Guardianship)*, the mother of the incapable person died leaving a will that gave one-third of the (mother's) estate to the incapable person and two-thirds to the incapable person's sister.<sup>228</sup> The incapable person's institutional guardian applied for family provision relief on her behalf, aiming to advance her financial position.<sup>229</sup> The incapable person

<sup>225</sup> See, eg, *Smith* (n 32) [12], [132]; *Reilly* (n 148), with its appeal allowed in part on other grounds: *McFee v Reilly* [2018] NSWCA 322. See also *Alcazar-Stevens v Stevens* [2017] ACTCA 12, [8]–[9], [52] (Murrell CJ, Elkaim and Rangiah JJ) where the deceased's son brought a breach of fiduciary claim against the deceased's daughter–attorney as a prequel to his challenge against the validity of the deceased's will and his application for family provision relief from the deceased's estate.

<sup>226</sup> See above Part II(A).

<sup>227</sup> Alison Barnes, 'The Virtues of Corporate and Professional Guardians' (2002) 31(3) *Stetson Law Review* 941, 954–5; Linda S Whitton and Lawrence A Frolik, 'Surrogate Decision-Making Standards for Guardians: Theory and Reality' [2012] (3) *Utah Law Review* 1491, 1508.

<sup>228</sup> [2019] VCAT 760, [11] (Senior Member Hoysted).

<sup>229</sup> *Ibid* [2], [19], [29].

herself had objected to the making of the application and was aware that her uneven treatment under her mother's will reflected her receipt of lifetime benefits from her mother and her sister.<sup>230</sup> The Victorian Civil and Administrative Tribunal had to order the institutional guardian to withdraw the family provision application.<sup>231</sup>

By introducing the best-interests defence, the flexible model of fiduciary regulation can recognise and balance potential conflicts between an elderly incapable person and claimants who expect to inherit from them. Australian succession law and policy favour a *qualified* freedom of testation: a person's freedom of testation is qualified by a moral duty to provide for their family, the exact contour of which duty is defined by the applicable family provision statute.<sup>232</sup> In a similar vein, the flexible model of fiduciary regulation

takes a large and liberal view of what 'benefit' is, and it will do on behalf of [the incapable person] not only what may directly benefit him or her, but what, if he or she were capable of managing their own affairs, he or she would as a *right-minded and honourable* person desire to do ...<sup>233</sup>

The proposed subjective interpretation of the best-interests defence thus advances the incapable person's freedom of testation, while the logical implications of that interpretation mark the outer limits of that freedom. More precisely, inheritance expectations *legitimately* qualify the testamentary freedom of incapable persons to the extent that capable persons are subject to the *same* qualifications. Part V(D)(2) below will address the relationship between such equal restrictions of testamentary freedom and the *CRPD*.

It should be clarified that the outer limits of testamentary freedom are not uniform across Australian jurisdictions. For instance, the family provision statute in New South Wales has complex anti-evasion provisions.<sup>234</sup> Imposing restrictions on testamentary freedom, these anti-evasion provisions aim to nullify certain transactions, including lifetime dispositions of property, that the deceased made with the intention of defeating applications for family provision relief. When applied in New South Wales, the best-interests defence would not

<sup>230</sup> Ibid [37], [40]–[42].

<sup>231</sup> Ibid [63].

<sup>232</sup> See generally *Re Allardice*; *Allardice v Allardice* [1910] 29 NZLR 959, 972–3 (Edwards J), affd *Allardice v Allardice* [1911] AC 730; *Vigolo v Bostin* (2005) 211 CLR 191, 200 [15], 204 [25] (Gleeson CJ), 218 [73] (Gummow and Hayne JJ), 230–1 [121]–[122] (Callinan and Heydon JJ).

<sup>233</sup> *W v H* (n 179) [47] (emphasis added), citing Theobald (n 111) 380. See also *Protective Commissioner (NSW) v D* (2004) 60 NSWLR 513, 540 [150] (McColl JA), quoting Theobald (n 111) 380.

<sup>234</sup> *Succession Act 2006* (NSW) ch 3, pt 3.3, discussed in GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2017) 709–20 [20.58]–[20.78].

excuse guardians and attorneys from assisting incapable persons to make transactions that are captured by the applicable anti-evasion provisions. However, the best-interests defence would operate differently in jurisdictions that do not have similar anti-evasion provisions.<sup>235</sup> Thus, in general, the logical implications of the best-interests defence vary with the applicable family provision statute.

#### D Common Criticisms

Best-interests standards are commonly subject to two criticisms: indeterminacy, and discrimination against people with disabilities. This Part will argue that these criticisms should not lead to rejection of the flexible model of fiduciary regulation, and that the strict model can also be criticised on the same grounds.

##### 1 Indeterminacy

Scholars have criticised best-interests standards for their indeterminacy.<sup>236</sup> These standards tend to grant a broad judicial discretion to consider a range of incommensurable factors without provision of any guidance on how to weigh or rank them.<sup>237</sup> Family life is also largely private; outsiders, such as courts and tribunals, often have no access to much of the information needed to apply many best-interest factors.<sup>238</sup> The breadth of judicial discretion and the resulting indeterminacy can impose substantial adjudication costs on courts. Such indeterminacy can make it more difficult and costly for private individuals to comply with their duties and resolve their disputes.<sup>239</sup>

I do not deny that adoption of the best-interests defence adds indeterminacy to the resolution of breach of fiduciary duty claims. Instead, it is submitted that such additional indeterminacy is typically negligible. First, New South Wales

<sup>235</sup> At the time of writing, New South Wales is the only Australian jurisdiction that has anti-evasion provisions, but there are calls for adoption of such provisions elsewhere: Dal Pont and Mackie (n 234) 710 [20.59].

<sup>236</sup> See, eg, Whitton and Frolik (n 227) 1510; Rosie Harding, 'The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance' (2015) 78(6) *Modern Law Review* 945, 965 ('The Rise of Statutory Wills').

<sup>237</sup> Elizabeth S Scott and Robert E Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard' (2014) 77(1) *Law and Contemporary Problems* 69, 75. For a discussion of formulations of best-interests standards in Australian guardianship statutes, see generally O'Neill and Peisah (n 15) [8.11.7]–[8.11.8].

<sup>238</sup> Scott and Emery (n 237) 74.

<sup>239</sup> See generally Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42(3) *Duke Law Journal* 557.

case law now requires that predominance be given to one best-interest factor: what the incapable person would have wanted if they had capacity. This view reduces the range of best-interest factors to be considered and the costs of considering them. It also reduces the degree of indeterminacy.

Second, the proposed subjective interpretation of the best-interests defence primarily protects guardians and attorneys who are in a close familial or personal relationship with the incapable person. These guardians and attorneys have a strong case for family provision relief from the incapable person's estate,<sup>240</sup> regardless of whether the best-interests defence is available. Family provision law is already indeterminate. When a dispute is viewed as a whole, introducing the best-interests defence adds little to the degree of indeterminacy already arising from the potential availability of family provision relief.

Third, the strict model of fiduciary regulation is not necessarily more determinate than the flexible model. While a statutory duty of loyalty predictably prohibits conflicts of interest, the availability of vague statutory exemptions generates indeterminacy. The typical gifting exemption, for instance, permits gifts that reflect the incapable person's wishes and are 'reasonable' in the light of their financial circumstances.<sup>241</sup> Similarly, the typical exemption for provision to dependants requires such provision to be 'reasonable', and fails to delineate the degree of 'dependency' required.<sup>242</sup> Undermined by these vague exemptions, the strict model is also exposed to the indeterminacy criticism. Thus, indeterminacy alone cannot explain or justify preferring the strict model over the flexible model.

## 2 Discrimination

Critical Legal Scholars have criticised best-interests standards as an extreme form of paternalism. The very notion of legal incapacity is said to facilitate the paternalistic imposition of dominant societal values on people with disabilities, and thereby deprive them of their autonomy and dignity.<sup>243</sup> Recent efforts to promote the rights of people with disabilities culminated in the *CRPD*,<sup>244</sup> which Australia has ratified but with a reservation to preserve guardianship and other

<sup>240</sup> See generally Croucher and Vines (n 197) 97–8 [2.46].

<sup>241</sup> See generally above Part III(C).

<sup>242</sup> *Ibid.*

<sup>243</sup> See, eg, Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41(4) *Maryland Law Review* 563, 633, 641–4; George J Alexander and Thomas S Szasz, 'From Contract to Status via Psychiatry' (1973) 13(3) *Santa Clara Lawyer* 537.

<sup>244</sup> *CRPD* (n 10) art 1.

substitute decision-making arrangements.<sup>245</sup> The *CRPD* marks a shift away from the ‘medical’ model of disability law and policy — in which people with disabilities are the subject of protection — towards a ‘social’ model that enshrines dignity, autonomy and equality before the law. This Part will argue that adoption of the flexible model brings fiduciary law closer to meeting the ideals of the *CRPD*.

The claim to be advanced is *not* that the flexible model *perfectly* complies with the *CRPD*, but that the flexible model fares better than the strict model. This clarification matters because both the strict model and the flexible model assume the continuing existence of guardianships and powers of attorney. While *CRPD*-minded scholars and law reformers tend to accept powers of attorney,<sup>246</sup> they tend to reject guardianships (except perhaps as a last resort).<sup>247</sup> Similarly, both models of fiduciary regulation retain some concept of incapacity, which may sit uncomfortably with art 12(2) of the *CRPD* and the *General Comment* on that article (‘*GC No 1*’).<sup>248</sup> Thus, it is possible that both the strict model and the flexible model fail to comply with the *CRPD*. It is beyond the scope of this article to explore that possibility because it advances a comparative rather than absolute claim.

The text of the *CRPD* tolerates both the strict model and the flexible model. Article 12(4) requires States Parties to ensure that safeguarding ‘measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are *free of conflict of interest* and undue influence.’<sup>249</sup> The very same article also requires safeguarding measures to be ‘*proportional and tailored to*

<sup>245</sup> ‘Convention on the Rights of Persons with Disabilities’, *United Nations Treaty Collection* (Web Page) archived at <<https://perma.cc/R9BQ-CNBW>>.

<sup>246</sup> See, eg, Anna Arstein-Kerslake and Eilionóir Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law’ (2016) 20(4) *International Journal of Human Rights* 471, 475–6; Harding, *Duties to Care* (n 169) 91.

<sup>247</sup> A large literature has developed to consider the extent to which guardianships are consistent with the *CRPD* (n 10): see, eg, Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75(5) *Modern Law Review* 752, 758–68; Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 429; Eilionóir Flynn and Anna Arstein-Kerslake, ‘The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?’ (2014) 32(1) *Berkeley Journal of International Law* 124; Mary Donnelly, ‘Best Interests in the Mental Capacity Act: Time to Say Goodbye?’ (2016) 24(3) *Medical Law Review* 318; Mary Donnelly, ‘Deciding in Dementia: The Possibilities and Limits of Supported Decision-Making’ (2019) 66 (September–October) *International Journal of Law and Psychiatry* 1.

<sup>248</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (19 May 2014) 3 [13] (‘*GC No 1*’).

<sup>249</sup> *CRPD* (n 10) art 12(4) (emphasis added).



the person's circumstances' and 'proportional to the degree to which such measures affect the person's rights and interests.'<sup>250</sup> Preamble para x further recognises that 'the family is the natural and fundamental group unit of society', and envisages the contribution of families 'towards the full and equal enjoyment of the rights of persons with disabilities.' At the same time, the *CRPD* recognises that families could also be a source of abuse. Article 16(1) in particular requires States Parties to take 'appropriate' measures to 'protect persons with disabilities, both *within* and outside *the home*, from all forms of exploitation, violence and abuse.'<sup>251</sup> Such textual ambiguity permits both the strict model and the flexible model.<sup>252</sup>

Moreover, little guidance regarding fiduciary duty comes from the distinction between supported and substituted decision-making. *GC No 1* rejects systems of substituted decision-making under which a substituted decision-maker makes decisions based on *objective* best interests rather than subjective will and preferences.<sup>253</sup> Neither the strict model nor the flexible model permits the guardian or attorney to advance objective best interests in deciding whether to expose themselves to a conflict of interest. The strict model prohibits unauthorised conflicts of interest without regard to the incapable person's objective best interests or subjective will and preferences. This article understands the flexible model to adopt a *subjective* interpretation of best interests, which interpretation respects the incapable person's own will and preferences whenever ascertainable. Thus, insofar as regulating conflicts of interest is concerned, neither model facilitates impermissible substituted decision-making as defined by *GC No 1*.

In addition, the flexible model and the strict model neither promote nor stultify efforts to provide supported decision-making systems as required by art 14(3) of the *CRPD*.<sup>254</sup> Both models lead to the same outcome in cases where what the incapable person would have wanted cannot be ascertained. In these cases, the guardian or attorney cannot successfully establish the (subjectively interpreted) best-interests defence. Thus, just like the strict model, the flexible model does not excuse unauthorised conflicts of interest. At the same time,

<sup>250</sup> Ibid (emphasis added). For other articles of the *CRPD* (n 10) concerning safeguards, see generally Arstein-Kerslake and Flynn (n 246) 479–81.

<sup>251</sup> *CRPD* (n 10) art 16(1) (emphasis added).

<sup>252</sup> For instance, as a result of such textual ambiguity, the English Court of Protection has used the *CRPD* (n 10) to justify strict regulation of intrafamilial conflicts in some cases and flexible regulation in other cases. For an example of strict regulation, see *Re CJ; Public Guardian v MP* [2015] EWCOP 21, [41]–[42] (Senior Judge Lush). For examples of flexible regulation, see *Re JW* (n 213) [30]–[31] (Senior Judge Lush); *Re Various Lasting Powers of Attorney* (n 162) [62] (Judge Hilder).

<sup>253</sup> *GC No 1* (n 248) 6 [27]. See generally Arstein-Kerslake and Flynn (n 246) 475–6.

<sup>254</sup> See generally Flynn and Arstein-Kerslake (n 247).

neither model precludes the guardian or attorney from seeking prospective judicial authorisation or, in rare cases, fully-informed consent from the incapable person. Both models thus equally leave room for the development of supported decision-making systems that may assist the incapable person to give the required consent on their own.

However, in cases involving sufficient evidence of what the incapable person would have wanted if they had capacity, the flexible model is less paternalistic than the strict model. The strict model largely disregards such evidence while the flexible model respects it.<sup>255</sup> In sufficient evidence cases, the flexible model essentially facilitates a ‘substituted-judgment’ analysis that accords with the *CRPD*,<sup>256</sup> while the strict model paternalistically prohibits conflicts of interests even if the incapable person would have permitted such conflicts.

Empirical studies nonetheless have shown that those who make a best-interests decision on behalf of an incapable person frequently pay insufficient attention to the person’s subjective values and wishes notwithstanding a legal obligation to do so.<sup>257</sup> Formal law thus seems to diverge from practical ‘reality’. Yet any such divergence should not justify rejection of the flexible model in favour of the strict model. Focusing on health and social care matters, empirical studies tend to collect at most a small sample of property and financial matters.<sup>258</sup> Empirical claims regarding property and financial matters are thus not statistically significant. Moreover, to the extent that formal law influences ‘real’ decision-making in property and financial matters, subjective values and wishes are more likely to be respected if their consideration is permitted rather than prohibited by formal law. The flexible model encourages consideration of subjective values and wishes while the strict model prohibits such consideration to a great extent.<sup>259</sup>

The logical implications arising from the proposed subjective interpretation do not run afoul of the *CRPD*. ‘Equality is the key’ to achieving the ideals and aspirations of the *CRPD*.<sup>260</sup> As Associate Professor Anna Arstein-Kerslake and Dr Eilionóir Flynn explain, legal restrictions upon a person’s decisions to self-harm or harm others must apply ‘equally to persons with and without disabilities’.<sup>261</sup> Within the space of fiduciary regulation, the logical implications of the

<sup>255</sup> See above Part V(A).

<sup>256</sup> See generally Arstein-Kerslake and Flynn (n 246) 477–8.

<sup>257</sup> See, eg, Williams et al (n 12) 9. See also Mendelson (n 190) 458.

<sup>258</sup> See, eg, Williams et al (n 12) 5, 13, 45.

<sup>259</sup> See above Part III.

<sup>260</sup> Arstein-Kerslake and Flynn (n 246) 485.

<sup>261</sup> Ibid 483.

subjectively interpreted best-interests defence do exactly that. These implications impose outer limits on the range of excusable conflicts of interest only to sanction those kinds of conflicts that *mentally capable* persons would not have been permitted to authorise. Thus, for instance, the flexible model would impose the same outer limits on the testamentary freedom of incapable persons and capable persons.<sup>262</sup> Such equalisation of the outer limits of testamentary freedom is consistent with the requirement under art 12(5) of the *CRPD* that States Parties are to ‘ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs’, and to ‘ensure that persons with disabilities are not arbitrarily deprived of their property’. If the outer limits of testamentary freedom themselves discriminate against incapable persons, then it is the law of succession rather than fiduciary law that should be the subject of criticism.<sup>263</sup>

To recapitulate, in cases where there is sufficient evidence to ascertain what the incapable person would have wanted if they had capacity, the flexible model better achieves the ideals and aspirations of the *CRPD* than does the strict model. In other cases, both models fare equally with regard to the *CRPD*.

## VI CONCLUSION

Contradicting the prevailing view among Australian legislatures and law reform commissions, this article reaches the conclusion that strict fiduciary regulation is not the solution to the problem of financial abuse against the elderly. Such strict regulation inflexibly prohibits harmless conflicts with little regard for the elderly incapable person’s own wishes and familial bonds. That inflexibility, I argue, tends to ‘convert equity into an instrument of hardship and injustice in individual cases.’<sup>264</sup>

<sup>262</sup> See above Part V(C).

<sup>263</sup> See, eg, Harding, ‘The Rise of Statutory Wills’ (n 236), arguing that the English law governing statutory wills contradicts the *CRPD* (n 10) in cases where the incapable person is unable or unwilling to express their testamentary preferences.

<sup>264</sup> *Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J).