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Précis Paper

Financial management of protected estates and the appointment of the Guardians (NSW) - Remuneration

Ben Beukes, Principal of Litigant, and Ben Fogarty discuss the financial management of protected estates and the roles of the Guardianship Division of the New South Wales Civil and Administrative Tribunal ('NCAT') and the Supreme Court in appointing both private managers and the New South Wales Trustee & Guardian including issues of remuneration.

Discussion Includes

- Role and qualifications of financial managers
- Grounds for making a financial management order
- Remuneration for financial managers
- Insurance for financial managers

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Financial management of protected estates and the appointment of the Guardians (NSW) - Remuneration

1. In this edition of BenchTV, Ben Beukes (Solicitor) and Ben Fogarty (Barrister) discuss the financial management of protected estates and the roles of the Guardianship Division of the New South Wales Civil and Administrative Tribunal ('NCAT') and the Supreme Court in appointing both private managers and the New South Wales Trustee & Guardian. Both Mr Beukes and Mr Fogarty have acted for clients at NCAT and in the Supreme Court in seeking the appointment of financial managers and also in decisions reviewing appointments or specific decisions of financial managers of protected persons.

What are Financial Managers and Why Would One be Appointed?

2. Financial managers have authority to make decisions about financial affairs for someone who is incapable of making these decisions themselves, often as the result of a cognitive disability. Financial affairs refers to the operation of bank accounts, paying bills, investing money, selling or buying property and includes legal affairs such as instructing a solicitor to act in a legal proceeding.

Forums for Decisions on Appointment of Financial Managers

3. Any person with a "genuine concern" (s 25I of the *Guardianship Act 1987* (NSW)) for the welfare of a person with a decision-making disability can apply to the Guardianship Division of NCAT under s 25G of the *Guardianship Act* for the appointment of a financial manager. The guardianship division is a specialist disability tribunal that exercises a protective jurisdiction (parens patriae).

SECTION 25G:

Grounds for making financial management order

The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that:

- *(a) the person is not capable of managing those affairs, and*
- *(b) there is a need for another person to manage those affairs on the person's behalf, and*
- *(c) it is in the person's best interests that the order be made.*

4. Most tribunals sit as three members – a legal member who is a solicitor or barrister of 7 years standing; a professional member who may be a doctor, psychologist, or social worker with

expertise in the treatment of adults with disabilities; and a community member who is someone with personal or familial experience with people who suffer from disabilities. Anecdotally, this three member panel often provides balance, particularly in an inquisitorial, albeit informal, setting. The Tribunal is inquisitorial in the sense that the members of the Tribunal themselves have to be convinced that the appointment of a financial manager appropriately balances the interests of autonomy and protection of the relevant person, rather than the Tribunal acting as an impartial arbiter ensuring appropriate procedures are followed, as is largely the case in our courts. Mr Fogarty notes that the nature of the Tribunal provides flexibility and expertise, and he applauds Tribunal members' healthy cynicism as to the motivations of interested parties and willingness to engage with the person about whom an order is to be made.

5. In relation to the Supreme Court, a person must have a "sufficient interest" in the financial affairs of the person with decision-making disability to apply under s 41 of the *NSW Trustee and Guardian Act* 2009 (NSW) for the appointment of a financial manager. It should also be noted that the court may also appoint a financial manager of its own motion i.e. without an application.

SECTION 41:

Orders by Supreme Court for management of affairs

(1) If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:

(a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and

(b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.

(2) The Supreme Court may make an order on its own motion or on the application of any person having a sufficient interest in the matter.

(3) For the purposes of this section:

(a) evidence of a person's capability to manage his or her own affairs may be given to the Supreme Court in any form and in accordance with any procedures that the Court thinks fit, and

(b) the Court may personally examine a person whose capability to manage his or her affairs is in question or dispense with any such examination, and

(c) the Court may otherwise inform itself as to the person's capability to manage his or her own affairs as it thinks fit.

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Considerations for the Tribunal or Court in Deciding to Appoint a Financial Manager

6. The relevant requirements which must be satisfied for the appointment of a financial manager are to be found in the provisions of the *Guardianship Act* and the NSW *Trustee and Guardian Act* extracted above. In that regard, it should be noted that it is only necessary that the person is "incapable of managing his or her affairs" for the Supreme Court to make such an order, whereas it is also necessary to show that there is "need" for the appointment and that it is in the "best interests" of the person to make a similar appointment in the Tribunal.

7. That said, reg. 57.5 of the *Uniform Civil Procedure Rules 2005* (NSW) applies to Supreme Court actions under s 41 of the *NSW Trustee and Guardian Act*, and it requires evidence to be lead in relation to the particular financial manager's suitability in light of their qualifications and the size/complexity of the estate:

REGULATION 57.5

Evidence in support of application under section 41 or 54

(1) The evidence in support of an application under section 41 or 54 of the NSW Trustee and Guardian Act 2009 must include the following:

(a) an affidavit or affidavits setting out:

(i) the conduct and conversation or conversations claimed to establish that the defendant is incapable of managing his or her affairs, and

(ii) the nature and amount of the property of the defendant, and

(iii) the names of the defendant's nearest relatives, so far as they are known, and the attitude of each of them to the application, and

(iv) the name of, and reason for selecting, the proposed manager,

(b) the affidavits of at least 2 medical practitioners or other persons qualified to give an expert opinion on the defendant's condition, each of whom must set out:

(i) his or her formal qualifications, the extent of his or her experience in practice and his or her special qualifications in regard to questions relating to the defendant's condition, and

(ii) his or her diagnosis of the defendant's condition, explained in his or her own words and set out in his or her own handwriting, and

(iii) that, in his or her opinion, the defendant is incapable of managing his or her affairs, and

(iv) the reasons for that opinion or the tests on which that opinion is based, set out in his or her own words and handwriting,

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8. Evidence detailing the complexity of an estate and the degree to which the estate is at risk of exploitation will also be necessary in Tribunal proceedings. During, the course of the

presentation Mr Fogarty recounted a matter in which these considerations were particularly important. In the matter, a man had been the subject of a Supreme Court order for many years and was now seeking to have the order revoked. His estate sits at the sum of $4-5million, and accrued as a result of a negligence award in the 1980s. Mr Fogarty explained that it was necessary for the applicant to lead evidence from his doctor and psychologist, not only in relation to his cognitive capacity but also in relation to whether there was a risk that he might be exploited. This was particularly important in light of evidence that his family exploited him in the past and used his money for their own ends. Interestingly, the applicant was open to contending that he would not be able to manage the money on his own and would instead leave the money with a private manager. Mr Fogarty explains that this sort of balanced approach, with such a strong concession, makes a claim much more likely to be successful, especially in circumstances where the applicant had only ever managed around $2000 a week and a complete revocation would have involved managing several million.

9. In relation to the need to show the manager's suitability which is mirrored in Tribunal jurisdiction under s 25M of the *Guardianship Act*, it is likely that a financial manager will require an accounting background, with expertise in wealth management necessary for some of the larger estates. For smaller estates, it is possible that an appointment will be ratified with substantially lesser qualifications. Further in relation to suitability, it will be necessary to show that there will not exist any conflicts of interest between the proposed manager and the protected person. Conflicts are likely to occur between family members in circumstances where they are seeking to be financial managers but are also beneficiaries under the person's will. Additionally, conflicts of interest may arise in relation to the issue of manager remuneration (with more on this to be discussed below).

Orders Available to the Tribunal or Court

10. The guardianship division of NCAT and the Supreme Court can appoint either a Private Financial Manager (who might be a family member or friend of person with a decision-making disability over the age of 18 years) or the NSW Trustee and Guardian (which is a public official). Private Financial Managers are supervised in the performance of their functions by the NSW Trustee and Guardian.

11. A financial manager may be appointed to manage all of a person's financial affairs, or particular parts of their estate. For example, a person may be viewed as capable of managing their day-to-day financial affairs but as incapable of managing a large share or property portfolio they have received under an inheritance.

Important Cases in the Protective List of the Supreme Court

12. The two cases of *Holt v Protective Commissioner* (1993) 31 NSWLR 227 and *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 have been significant in developing the process of appointing a financial manager.

13. In *Holt* at [238], Kirby P noted that both ss 25M and 41(1) of the respective Acts provided first that a "suitable person" should be appointed as manager of the estate of a person the subject of a financial management order and only secondly that the management of that estate should be committed to the NSW Trustee. His Honour relied on this construction to say that private managers should primarily be appointed in favour of the public trustee, a result which he described as a sensible hierarchy. It had previously been thought that a public trustee from the NSW Trustee & Guardian should be preferred such that this was considered to be a significant, liberalizing moment.

14. The presenters both note that it is sometimes the case that the NSW Trustee & Guardian does not have the resources it requires to fulfill its statutory role and further, that funding will continue to diminish in the coming years. This only serves to reiterate the importance of a more liberal approach to the use of private managers, particularly in light of the continued oversight of private trustees that is performed by the public body. However, wherever a concern arises as to whether a private trustee will act in the best interests of the protected person, the default course is for the NSW Trustee & Guardian to be appointed as a consequence of the court exercising its protective jurisdiction. In fact, in order to prevent the neglect of a protected person, the Supreme Court will require a private manager to provide their Australian Financial Services Licence and proof of current insurance.

15. The decision of Lindsay J in *Ability One* primarily concerned the remuneration of financial managers but it is also informative in disclosing the manner in which the courts consider questions relating to financial managers. In particular, regard was had to s 4 of the *Guardianship Act* which sets out the relevant general principles underpinning the Act:

SECTION 4:

General principles

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- *(a) the welfare and interests of such persons should be given paramount consideration,*
- *(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,*

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles.

The need to maintain the usual affairs of the person, to preserve family ties and cultural practices, and to ensure the wants and desires of the person are heard, are considered to be overriding subjects for consideration in an application for the appointment of a manager. His Honour provided a "framework" of the approach that should be taken in the court and tribunals in relation to these principles at [35]. The emphasis placed on these matters speaks to the need for practitioners to ensure they provide evidence in relation to each one of these matters where applicable.

Review of the Appointment of a Financial Manager

16. The guardianship division of NCAT can require, at the time it makes a Financial Management Order, that the Order be subject to review at some time in the future under ss 25N(1) and (3) of the *Guardianship Act*, but it does not have to do so. Reviews can also be sought under s 25N(4)(a) by further application to NCAT or the Supreme Court to change or cancel an order e.g. where you are now capable of managing your affairs. Mr Fogarty has been involved in a matter where a client was seeking a review of a particular transaction that a financial manager was seeking to carry out rather than reviewing the financial management order entirely.

17. Similar powers of review are available in the Supreme Court jurisdiction though there is controversy over whether the court is exercising powers under the *NSW Trustee and Guardian Act* or its inherent jurisdiction in revoking orders or removing managers: Porter, B and Robinson, M, *Protected Persons and their Property in New South Wales*, Sydney, Law Book Company, 1987, 57-58.

Remuneration of Financial Managers

18. Sections 64 and 115 of the *NSW Trustee and Guardian Act* provides powers to the court for making orders providing for the remuneration of financial managers:

SECTION 64:

Orders by Supreme Court and NSW Trustee as to management of estates

(1) The Supreme Court or the NSW Trustee may make such orders as it thinks fit in relation to the administration and management of the estates of managed persons.

(2) The Supreme Court or the NSW Trustee may also make such orders as it thinks fit in connection with authorising, directing and enforcing the exercise of the functions of managers under this Act.

(3) The Supreme Court may also make such orders as it thinks fit in connection with supervising the exercise of the functions of managers under this Act.

(4) An order by the NSW Trustee is subject to the regulations or to any direction by the Supreme Court or to any order of the Civil and Administrative Tribunal (in the case of a person under guardianship).

SECTION 115:

Supreme Court or NSW Trustee may order certain costs to be paid out of managed estate

(1) The Supreme Court or the NSW Trustee may order that the following costs be paid, in accordance with the order, from the estate of a managed person:

(a) costs with respect to actions taken for the purposes of complying with any order or direction under this Act, or any transfer or conveyance under Chapter 4,

(b) remuneration, of a specified amount, to the manager of the estate.

(2) The NSW Trustee may make an order under this section only in relation to costs arising from an order or direction given by the NSW Trustee under Chapter 4 or work carried out by the manager of an estate of a managed person in connection with any such order or direction.

19. The NSW Trustee and Guardian will always charge a fee to be your financial manager.

20. In relation to private managers of protected estates, they hold a fiduciary office which requires them to act in the best interests of the protected person. Hence, it is ordinarily the case that private managers act gratuitously (and this is unsurprising, particular where it is a family member who acts as the manager). Where a private manager is seeking monetary remuneration it will be necessary that they make this clear very early on and further, satisfy the court that it would be in the best interests of the protected person that this remuneration was provided: *Ability One*. By reference to the general principles referred to in s 39 of the *NSW Trustee and Guardian Act* and s 4 of the *Guardianship Act*, such an order for remuneration might be granted were it argued that it represents an inducement for the financial manager to assume the role and acts as a further encouragement thereafter for them to perform their role properly. It should also be said that managers often simply seek

for their overheard to be covered and any application for remuneration is also subject to a report of the NSW Trustee & Guardian which provides its view in relationship to what is reasonable.

21. Lay people may consider that the remuneration of private managers is unconscionable in circumstances where a person has been forced to surrender the management of their financial affairs and then is being forced to pay for it. On the other hand, the presenters reflect on the substantial amount of work that managers need to undertake in performing their role and that some regard should be had to the going market rate for wealth management in deciding on reasonable remuneration.

BIOGRAPHY

Ben Fogarty

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Ben was Senior Solicitor at the Homeless Persons' Legal Service in Sydney before he was called to the Bar in 2011. His practice areas include Discrimination Law, Employment, Work Health and Safety, Guardianship, Mental Health, Human Rights Law, Inquests, Tribunals and Administrative Law. He has written chapters and booklets for the community legal sector on guardianship and financial management law and disability rights.

Ben Beukes

Commercial Litigation Lawyer at Litigant, Sydney.

Ben was at the NSW Bar between 2004-2009 before leaving to work as a Senior Lawyer and Special Counsel in various litigation firms. In September 2015 he founded Litigant, a litigation firm that works mainly with small businesses, families and individuals involved in commercial disputes.

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