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Précis Paper

Key Issues in Guardianship & Financial Management

This presentation gives a thorough overview of the guardianship and financial management process in NSW, and discusses recent developments and law reform efforts across the country.

Discussion Includes

- Applications for guardianship and financial management
- Comparison of the NSW and Queensland legislation
- The role of the Guardianship Division of the NSW Civil and Administrative Tribunal
- The role of lawyers and leave to appear
- The absence of rules of evidence
- Recent developments and gaps in the law
- Jurisdiction of the Supreme Court and the Tribunal

Précis Paper

Key Issues in Guardianship & Financial Management

1. In this edition of BenchTV, Rodney Lewis (Principal, Elder Law, Sydney) and Christopher Windeyer (Principal, L Rundle & Co, Sydney) discuss key issues in guardianship and financial management.

Overview of Guardianship and Financial Management Matters

2. In NSW, guardianship and financial management orders can be made either by the Guardianship Division of the NSW Civil and Administrative Tribunal ("Tribunal") or the Supreme Court, in its inherent jurisdiction.

3. When making an application, the first question to ask is what powers and functions need to be put in place in order to give proper effect to the orders made. It is very rare for the Tribunal or the Court to grant plenary powers, and so it is important to give careful consideration to what is needed. There is, however, an ability to apply for review of orders if circumstances change, and in any case, guardianship orders are not open-ended and will be brought back for review after a period of either one or three years. There may also be a need to review orders if the guardian or manager is no longer able to act in that role, for example if they move interstate.

4. In applications for financial management orders, the test is whether the person concerned is able to manage their own affairs. Orders of this nature may be required where an elderly person is no longer able to manage their own finances, however issues can arise where the financial manager or attorney does not act properly. Mr Lewis noted that the police are often reluctant to deal with matters of this kind, preferring to leave them to the civil jurisdiction, but this can create a lacuna in properly remedying cases of mismanagement.

5. Often the same person will be both the guardian and financial manager, but this is not necessarily the case. The transaction that is being entered into for financial reasons may have ramifications for a person's lifestyle, and a conflict may therefore arise between the guardian and financial manager. Mr Windeyer noted that it can be difficult for a person to know how to act in these circumstances, and there are often no easy answers, however where it is not clear if a transaction is in the person's best interest, they should seek outside help, including through the Tribunal's support unit or by talking to a solicitor.

6. Other issues may arise where the transaction is in the person's best interests, but may also benefit the attorney or financial manager. Mr Windeyer considered that the Queensland

Powers of Attorney Act 1998 (Qld) was of greater assistance than the NSW counterpart, particularly in relation to two provisions. First, s 73 provides that an attorney may not enter into certain transactions unless authorised by the donee. This means that the donee must have capacity and be part of the decision-making process. This provision makes clear the limitations on an attorney's power and thereby provides a useful guide for attorneys. Second, s 87 provides a presumption of undue influence. Under this section, there is a presumption that a transaction was entered into by undue influence if it benefits the attorney or their business associate or close friend. Although this provision can be rebutted, prima facie it provides strong protection for a person who has granted a power of attorney. Mr Lewis considered that the Queensland legislation is a more thorough way of dealing with some of the problems that arise with attorneys or managers.

7. It is important to note that although the avenues for formal intervention through the Tribunal or the Supreme Court are open where a person lacks capacity, often formal orders are not needed, and informal community networks or arrangements will suffice to put into place the support that a person needs in their day-to-day life. It is only when there is a lacuna or a real problem that formal intervention is necessary.

<u>The Role of the Guardianship Division of the NSW Civil and Administrative Tribunal</u>

8. The Tribunal sees its role as appointing decision makers, usually a guardian or financial manager. This ordinarily takes place when an application is made for orders of this nature. However, the Tribunal may also make orders in the context of reviewing a power of attorney, as it has the power to terminate the review and treat it as if there was an application for financial management orders on foot.

9. Mr Lewis noted that one issue that can arise is that issues regarding conflicts of interest or mismanagement go unexplored by the Tribunal, as rather than dealing with these issues directly, the Tribunal effectively transfers the role of review to an appointed financial manager.

10. The rules of evidence do not apply in the Tribunal, leaving open issues relating to procedural fairness. This can arise, in particular, when cross-examining witnesses – a lawyer must be prepared to argue that fairness requires that a particular witness be cross-examined.

11. For a lawyer to appear in proceedings before the Tribunal, leave to appear must be granted. Mr Lewis advised practitioners to consider why leave should be granted, including general arguments relating to how a lawyer can be useful to the proceedings and assist in bringing some precision. In addition, s 4 of the *Guardianship Act 1987* (NSW) sets out the

general principles which govern the Act, and those guiding principles can be used in aid of an application for leave to appear. Mr Lewis also reminded lawyers to lawyer clearly identify the legal questions in issue in the application for leave to appear, because there is no opportunity to make a second application. If leave is refused, a lawyer may still act as a McKenzie friend.

12. In terms of the jurisdiction of the Supreme Court and the Tribunal, it is important to note that the remedies available in the Tribunal are limited, and the Tribunal's role is essentially to appoint decision makers. In contrast, the Supreme Court has broader equitable powers to address most of the issues that arise in inter-generational disputes, such as undue influence and breaches of fiduciary duty. Mr Lewis commented that the disadvantages of proceedings in the Supreme Court include the significant financial risk involved in commencing proceedings, and the location, as accessing the Court normally requires being able to attend in Sydney.

Recent Developments and Law Reform Efforts

13. Mr Lewis and Mr Windeyer offered their views regarding the current state of the law and the need for reform. One topic that is frequently mentioned in current law reform efforts includes the difference between supported and substitute decision making. Supported decision making places a greater emphasis on the involvement of the person about whom the decision is made, whereas under substitute decision-making models, the decision maker has the ultimate say.

14. At present, the NSW system is one of substitute decision making. However, Mr Windeyer considered that perhaps the distinction between the two models is overstated. He made reference to the principles set out in s 4 of the *Guardianship Act*, which indicate that it is the duty of any substitute decision maker to consider as paramount the welfare of the person involved, as well as the freedom of the individual. This means that with informal processes in place, the person is capable of having some involvement or input, and by involving the managed person, a mutually agreeable outcome can be reached.

15. Mr Windeyer believed that extreme examples where absolute intervention is required are not common. However, the reason why the roles of guardian or financial manager are put into place is because there is some diminished ability to make decisions independently. If a person who has such diminished capacity is going to make a decision to their detriment, the substitute decision making model allows someone take the extreme steps necessary in the circumstances. This does not prevent the persons from making most decisions, but simply allows the appointed guardian or manager to step in where they may do something that causes them harm.

Gaps and Problems in the Current Law

16. Mr Windeyer referred to s 64 of the *NSW Trustee & Guardian Act 2009* (NSW), which provides that the NSW Trustee & Guardian ("NSWTG") can seek security where a person is appointed as financial manager. Mr Windeyer noted that the NSWTG will in fact require a surety bond from financial managers in most circumstances, and this has created some difficulties, particularly where the level of assets involved is in the lower range. There have been a number of applications for variation or revocation of financial management orders since the surety bonds were introduced, where the extra requirement to pay a surety bond has created a burden.

17. Mr Lewis considered that one issue in the interpretation of the law at present is in relation to the test applied by the Tribunal when making guardianship orders. When considering an application, the Tribunal asks whether the person is capable of making major or important life decisions for him or herself. However, these words are not found in the provisions of the *Guardianship Act*, which defines the Tribunal's power to make guardianship orders to apply when a person is "in need of a guardian". Section 3 of the Act defines "person in need of a guardian" as a person who, because of a disability, is totally or partially incapable of managing his or her person. Mr Lewis was therefore troubled by the Tribunal's use of the phrase "major life decisions" which does not appear anywhere in the *Guardianship Act.*

18. Mr Lewis and Mr Windeyer also noted evidentiary difficulties that can at times arise in applications. Where a person is unwilling to participate in proceedings, it may be challenging to obtain the evidence required to establish that orders should be made. In the Supreme Court, subpoenas can be issued to obtain medical evidence such as the notes of a general practitioner or the records of a nursing home, but in the Tribunal, leave is required before a summons for production of records can be issued. This means that a party must establish that the documents sought will be of relevance and importance to the matters before the Tribunal, which can be a hurdle to obtaining the necessary evidence.

19. Finally, both Mr Lewis and Mr Windeyer noted that the law requires flexibility to take into account changing circumstances, so that orders can be amended and reviewed where required. Moreover, if the status quo is sufficient to provide sufficient support to the person in need, Mr Windeyer suggested that it is preferable to let things lie without formal intervention.

BIOGRAPHY

Rodney Lewis

Principal, Elder Law, Sydney

Rodney Lewis has practised as a solicitor since 1969 and has had a historically significant career. Rodney has always focussed on human rights, starting as a trial reporter for the International Commission of Jurists in internationally notable cases. He instructed Senior Counsel in the Balibo Five Inquest and recommended that two Indonesian Special Forces members be charged with the murder of five Australians. Rodney has established a practice specialising in elder law, and published articles and books and presented seminars and lectures at Western Sydney University on the topic.

Christopher Windeyer

Principal, L Rundle & Co, Sydney

Chris Windeyer was admitted to practice in 2008. Chris is an accredited specialist in Wills and Estates Law and often presents papers and seminars in this area.

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