Replacing a financial manager

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In the first article in this series, we looked at a recent decision of the Guardianship Tribunal (as it then was) considering whether an appointment of enduring guardian was required.[1] The other main business of the new Guardianship Division of the NSW Civil and Administrative Tribunal is considering whether a financial manager is required for a person who is not able to manage their own affairs and, who otherwise, could be placed at a disadvantage and reviewing those arrangements.

If a person suffers a brain injury, they may become a protected person within the meaning of the Protected Estates Act 1983 (NSW). This often means that the NSW Trustee is appointed as the financial manager for the person.

In *Holt v the Protective Commissioner*,[2] the court found that a financial manager can be replaced if they demonstrate incompetence or impropriety. It also indicated that the financial manager could be replaced if the evidence demonstrated that this would be in the best interests of the protected person and was consistent with the principles in s 4 of the Guardianship Act 1987 (NSW). Where there are competing interests, this can be difficult to establish one way or another.

Sometimes, after the initial period where a brain injury means that they cannot act in their best interests, the person or their family may want to make the relevant financial decisions. Peter Whitehead, previously the Public Trustee and now Client Director Trustee Services at the Myer Family Company, wrote in respect of appointing a professional fiduciary:[3]

> Trustee companies are often appointed to be trustee based on their experience with discretionary decision making for people with a disability, the long term nature of the trust, the need for flexible but sound investment strategy, and to allow family members where available to focus on the personal aspects of care. This is equally relevant for appointing a financial manager.

In *M v M*,[4] a recent decision of the NSW Supreme Court, the court set out its reasons for the NSW Trustee being replaced as financial manager by the sister of the protected person. The court's jurisdiction is under the Guardianship Act 1987 (NSW) and its main focus was to determine if a replacement of the financial manager is in the best interests of the protected person.

The facts of M v M

The total amount of funds under management was $463,326. It was helpful that the NSW Trustee supported the application and did not oppose the orders sought.

The affidavits in support were filed by the newly proposed financial manager, the sister of the protected person, and two unrelated witnesses who gave evidence of the fitness of the sister, who was a 24-year-old schoolteacher, to act in the protected person's best interests. There was evidence that the proposed financial manager had taken advice from a local chartered accountant about how to best manage the protected person's estate should she be appointed the financial manager.

The primary reasons given for seeking to replace the financial manager were as follows:

- The protected person expressed frustration in dealing with the institutional management of his affairs and had requested that a family member assume the role.
- The protected person was very close to his sister, trusted her and regularly discussed his personal affairs with her for the purposes of obtaining the benefit of her guidance.
- Within the family and the broader community, the sister was recognised as having financial management skills.

In the judgment, Lindsay J adopted the following propositions as non-exhaustive "guidelines" (or a "framework of approach", or a "checklist of considerations"). His Honour developed the guidelines, criteria and evidence the court will look for in determining if a replacement of the financial manager is in the best interests of the protected person. He established 16 guidelines for any applicant seeking to appoint or replace a financial manager. Practitioners should be mindful of the following:

- The jurisdiction of the court is not a "consent jurisdiction". An order for the appointment, removal or replacement of a particular manager is not to be made merely because a party, or some other person, seeks it, consents to it or acquiesces in it.[5]

- The governing purpose of that jurisdiction is *protection* of the welfare and interests of the particular protected person concerned.[6]
- Any decision made affecting the welfare or interests of a protected person must be made in a manner, and for a purpose, calculated to be in the best interests, and for the benefit, of the protected person.[7]
- Care needs to be taken in all decision-making affecting a protected person to focus on the *facts* of the particular case, preferably with due consultation with the protected person, his or her family and carers who may be well placed to inform the court of the protected person's particular circumstances.[8]
- In the choice of a manager, the welfare and interests of a protected person may favour appointment of a member of his or her family over the appointment of an institutional manager.[9]
- Decisions need to be made in the context of a prudential management regime that can be administered, without strife in the simplest and least expensive way, in the interests of the protected person.[10]
- Regard needs to be had to the value and nature of the property comprising a protected person's estate in deciding upon the identity of a manager or an appropriate management plan.[11]
- Recognition needs to be given to the status and obligations of a manager of a protected estate as the holder of a fiduciary office. The court, managers and other affected persons need to be alive to the importance of avoiding, or at least minimising, exposure of a protected person to dangers associated with a manager having a conflict between a duty owed to the protected person and the manager's personal interests.[12]
- In conformity with fiduciary law, the office of a manager of a protected estate must generally be regarded as a gratuitous one unless, by an order of the court or by legislation, a special arrangement to the contrary is made.[13]
- In deciding whether, when and on what terms a manager of a protected estate is to be allowed remuneration out of the estate, care needs to be taken not to shift the focus of decision-making from what is in the best interests, and for the benefit, of the protected person to a perceived "right" on the part of any, or any prospective, manager to remuneration. If a manager is to be allowed remuneration, a decision to that effect must be driven by the perspective of the protected person, not the perspective of the manager.
- The primacy given to the protective purpose of the court's jurisdiction carries with it, as a correlative, the absence in any manager (public or private) of a legal *entitlement* to be, or to remain, manager of a particular protected estate.[14]
- A decision about whether a manager should be replaced may need to be approached differently from one made about the identity of an appointment as an initial manager because of a perceived need to identify an acceptable reason for change. Depending on the facts of the particular case this may, but will not necessarily, involve recognition that an applicant for change bears, at least, a forensic onus to establish a case for change.[15]
- A manager, or prospective manager, of a protected estate needs to have given thoughtful attention (in the case of a private manager, in consultation with the NSW Trustee and, in the context of the Corporations Act 2001 (Cth), the Australian Securities and Investments Commission) to the development, and operation, of a plan for management of the protected person's estate.[16]
- Although disputes about the management of a protected estate may at times need to be determined in an adversarial setting, an exercise of protective jurisdiction is not inherently, or necessarily, adversarial in nature. That reality finds expression in the court's approach to orders for costs in protective list proceedings. The court ordinarily exercises its discretion not by reference to a rule that costs follow the event, but having regard to what, in all the circumstances, seems proper.[17]
- Part of the role of the court in its exercise of protective jurisdiction is to give consideration to the manner and form of a decision-making process calculated to ensure that the protective purpose of the jurisdiction is duly served.
- In the context of the current legislative and administrative regime for management of protected estates, the court will ordinarily require that *any* substantial decision it may be called upon to make affecting a protected estate, beyond the routine, is made on notice to the NSW Trustee, allowing the NSW Trustee to be heard in an appropriate case and inviting its assistance where necessary.

Conclusion

Sometimes, recipients of compensation (or their family members), while initially admitting to a brain injury, subsequently think that they are better able to make financial decisions relating to the capital. While people may sometimes misunderstand the role of trustees, the

benefits of professional advice around financial decisions should be stressed to clients. Practitioners are often given one side only of the story. The above checklist may help us to better play our part in this *parens patriae* jurisdiction.

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Note: Due to interest from our readership, the substituted decision making series has been extended to include more articles this year.

Footnotes

1. D Griffin "Substituted decision making: Pt 1 — When are restraints off the rails?" (2014) 17(2) *Retirement & Estate Planning* 29.
2. *Holt v Protective Commissioner* (1993) 31 NSWLR 227.
3. P Whitehead "Catalysts for clients choosing a professional trustee" State Legal Conference on Elder Law 2014.
4. *M v M* [2013] NSWSC 1495.
5. *JJK v APK* (1986) Aust Torts Reports 80-042 at 67, 881 (first guideline); *JMK v RDC; PTO v WDO* [2013] NSWSC 1362 at [60]–[62].
6. Above, n 2, at 238B–C, 241A–B and 241F–G.
7. Above, n 2, at 238D–F and 241G–242A.
8. Above, n 2, at 238C–239B, 240D, 241B–F and 243E–F; *Re L* [2000] NSWSC 721 at [10].
9. Above, n 2, at 238G–239B.
10. H S Theobald *The Law Relating to Lunacy* (Stevens and Sons, London 1924) pp 380 and 382.
11. Above, n 2, at 242E and 243D–F. The writer notes that often there are conflicts of interest in families, such as if the manager is a residuary beneficiary under a will of the protected person, but these conflicts are often more apparent than real and need to be managed. The case of *GDR v EKR* [2012] NSWSC 1543 included a review of the basis for remuneration arrangements by non-family financial managers.
12. Above, n 2, at 239B and 242B–C; Above, n 8, *Re L* at [12].
13. *Gell v Gell* [2005] 63 NSWLR 547 at 553–54; [2005] NSWSC 566 at [21]–[23]; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 93.
14. Above, n 2, at 237F–238F.
15. Above, n 2, at 237F, 238B–F, 239C–G and 242A–B.
16. Above, n 8, *Re L* at [11]–[12]; *Re McL* [2001] NSWSC 280 at [3]–[5].
17. *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640.