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Appointing a private trustee: *Have you considered it?*

When it becomes apparent that the plaintiff you are acting for in a personal injuries case may be seen as having impaired capacity[1] you must consider whether any judgment or settlement needs to be sanctioned. You may also need to consider whether a protection order is required, or a guardian or administrator appointed.

On 1 July 2000 the *Guardianship and Administration Act* 2000 ('the GAA') commenced. This Act created a new and comprehensive regime for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity.[2]

The GAA brings together under one Act the provisions that had been distributed among the *Public Trustee Act* 1978 ('the PTA'), the *Mental Health Act* 1974 and the *Intellectually Disabled Citizens Act* 1985.

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Under the PTA, the court or public trustee[3] must sanction any settlement of a claim for money or damages for a person under a legal disability. The Act also provides under division 2 of part 6 that a protection order can be made appointing the public trustee manager to take possession of, and to control and manage all or parts as the court directs, the estate of that person.

In a number of decisions that involve consideration of the terms of the PTA, it became apparent that prior to 1 July 2000, if an adult wanted to settle a personal injury claim and the matter required a protection order under division 2 of part 6 of the Act, then an order could not be made without the settlement being sanctioned under section 59.[4]

In *H v Nominal Defendant*[5], Justice Lee indicated that when considering the provisions of the PTA a protection order and a sanction may not be necessary 'where a person is of normal mental capacity...but due only to severe physical infirmity, is unable to manage his [or her] affairs'.

The situation has now been made clearer since the enactment of the GAA. The GAA had the effect of amending parts of the PTA so that a protection order is no longer available to people 18 years of age or older.

The GAA provides no provision however, in relation to a matter being sanctioned. If the settlement is to be sanctioned it must still be done relating to the terms of s59 of the PTA.

A sanction is required for a person under a legal disability, meaning a child or a person with impaired capacity. The term 'impaired capacity' is defined under schedule 4 of the GAA and means a person who does not have capacity for

the matter. Capacity is also defined as:

- understanding the nature and affect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.

Under chapter 3 of the GAA there is a right to appoint a guardian for a personal matter or an administrator for a financial matter, on behalf of an adult, or an individual who is 17-and-a-half years of age or older. This can be done provided that the person:

- has impaired capacity and there is a need for a decision in relation to the matter; or
- is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the persons health, welfare or property and without an appointment the adult's needs and interests will not be adequately met or protected.

Such appointment can be made by the guardianship and administrative tribunal which is established pursuant to chapter 6 of the Act, or alternatively by order of the court pursuant to s245.

In *Welland v Payne*[6], Justice Mullins, when considering the terms of the Act indicated 'if the applicant does have impaired capacity for a financial matter within the meaning of the GAA, it does not necessarily follow that the settlement of his action needs to be sanctioned under s59 of the PTA. That is because the impaired capacity relevant to s59 of the PTA is with respect to a particular financial matter, namely the legal matter of settling a claim.'

In this case there was expert psychiatric evidence that indicated that the applicant was capable of giving instructions and the judge thought that there was no basis for concluding that the applicant had impaired capacity for the legal matter of settling his claim.

However, the judge thought that an appointment may be required under the GAA, based on the psychiatric evidence, and the matter may be one that should be referred to the tribunal constituted under the GAA. The matter was adjourned allowing the applicant to consider his position and determine what course he wished to take.

A guardian is appointed for a personal matter defined under schedule 2 as including such matters as the adult's health, welfare, education and day-to-day issues. A financial matter is also defined under schedule 2 and principally relates to the control of the individual's financial, property or legal matters. Section 15 of the Act details appropriate considerations that should be taken into account prior to an appointment of a guardian or administrator.

In the landmark decision of *Goode v Thompson*[7], Justice Ambrose made an order that Perpetual Trustees Australia Limited be appointed trustee for an injured plaintiff. This was the first time in Queensland that a private trustee company had been appointed trustee, administrator or guardian of a settlement sum on behalf of an injured person.

The judge said that:

'. . . it is in the interests of the plaintiff that the balance of his judgment, after paying part of it to his next friend for past care and the payment of special damages, be invested with Perpetual Trustees an authorised Trustee company which is listed on the Australian Stock Exchange and manages over $80 billion in funds for persons needing services and management skills of the sort needed by the plaintiff.'

In this case the plaintiff was a 12-year-old pedestrian injured when struck by a vehicle travelling at 50 to 55 kilometres per hour. The plaintiff suffered catastrophic injuries including a severe head injury. He was left with limited mobility and balance and now requires full-time care and attention for the rest of his life.

Judgment was handed down in the matter for a total sum of $3,837,058.48. From this sum an amount was to be paid directly to the next friend, the plaintiff's mother, Tracey Ann Goode. This was reimbursement for special damages paid on behalf of the plaintiff and for the past gratuitous care she gave to her son with the assistance of her family. The balance sum of $3,590,565.63 was ordered to be paid by the defendant to Perpetual Trustees Australia Limited.

In arriving at this decision the judge considered a number of relevant factors. Evidence from the Public Trustee provided that based on current long-term forecasts of the major asset classes, a conservative estimate return is 5.2 per cent (being 3.53 per cent income and 1.67 per cent capital growth). This estimate assumes a conservative balance investment policy, which may change in accordance with a particular strategy arising out of the financial planning process.

On the other hand Perpetual Trustees, based upon past returns, expects to produce a current net return after fees (at least in the second year of the investment of funds) at a rate of 5.92 per cent.

The interest payable on common funds invested with the Public Trustee, which at the date of the judgment was noted as being 2.8 per cent, had over the last five years fallen from 8.25 per cent to as low as 2.25 per cent. The judge noted that the interest had not exceeded 3 per cent per annum since 1998. Evidence from Perpetual Trustees indicated that after all establishments and management expenses had been paid, the interest is about 5.925 per cent on the funds held. The judge noted that this return is nearly double the return that is being paid on common funds managed by the Public Trustee over the last three years.

The investment plan to be implemented by Perpetual Trustees is designed to produce annually, for the next 60 years, a payment from income/capital of approximately $220,000 to $260,000. This is more than double that forecast for the Public Trustee fund that is designed to produce approximately $111,000 to $117,000 per annum.

At the time of the trial, the plaintiff had received substantial past care and assistance from his parents. There was therefore concern that the plaintiff's parents would have difficulty due to their ▶

own health problems and the substantial care required to maintain this level of support. Evidence was led that the cost of satisfying the plaintiff's commercial care needs as required was $150,000 per year, and the judge conceded that this need could arise at any time depending upon the capacity of the plaintiff's parents and family to provide current gratuitous support.

It was concluded that the services offered by Perpetual Trustees would provide the plaintiff with annual payments from income/capital that would be sufficient to satisfy his need of commercial care should that become necessary within a relatively short period of time. The judge also noted that there would even be a safety margin to accommodate any increase in the cost of such care over the next 60 years. Even allowing for the payment of income tax and capital gains tax, which undoubtedly may reduce the annual amount available to the plaintiff, there would still be sufficient funds to meet the forecasted needs.

"... there is no strict requirement for the public trustee to be appointed."

Therefore, taking into account the sum that was to be invested, the proposed investment plan and the needs and requirements of the plaintiff, the judge thought it was in the plaintiff's interest for the money to be invested with Perpetual Trustees, even though a higher management fee is payable.

In arriving at this decision, Justice Ambrose formed the view that a private trustee company can be appointed to act as trustee under the terms of the PTA, and that there is no strict requirement for the public trustee to be appointed.

There are further provisions within the GAA for one or more persons to be appointed as joint guardians or administrators. In the case of an appointment of two or more, then the Act provides that they must exercise their powers jointly and unanimously. If it is impractical for this to occur then one or more of them may apply for directions to the tribunal or court. Similarly, if there is a disagreement about certain matters then there is a right to refer the matter to the tribunal or court for determination.

Section 33 of the GAA outlines the powers of the guardian and administrator.

The tribunal created under the GAA must review each appointment at least every five years and the guardian or administrator is to keep the tribunal informed with regular updates as required.[8] The Act also provides under s260 that any previous appointments made under the PTA are subject to the terms of the GAA in relation to reporting.

In short the position, in relation to the settlement of claims for persons with impaired capacity, is as follows:

- For individuals under 17-and-a-half years of age, the settlement or judgment needs to be sanctioned under s59 of the PTA and a protection order can be made relating to the terms of division 2 part 6 of that Act.
- For individuals 17-and-a-half to 18 years of age, a sanction is required under s59 of the PTA and then a protection order may be made as outlined above. Alternatively, an advance appointment can be made appointing a guardian or administrator under the terms of s13 of the GAA.
- For persons 18 years of age or older, if the individual is deemed to have impaired capacity in relation to the ability to provide instructions to settle the claim then a sanction is required under s59. Alternatively, if the applicant is of sufficient capacity to provide instructions but has an impaired capacity for a financial or personal matter then a sanction may not be required, however an appointment would be made under the GAA.
- In circumstances where a protection order or a guardian or administrator should be appointed, a person's legal representatives should examine the appropriate considerations set out in s15 of the GAA relating to who would be an appropriate person to be appointed. This should be determined given the person's individual circumstances, the amount of funds that are involved, and the person's ongoing needs both in the short and long term.

There have been a number of recent decisions where a court or tribunal has appointed a joint administration involving a member of the applicant's family to manage the person's affairs on a day-to-day basis, and a trustee company to manage their affairs in the long term.

It seems appropriate then that prior to any order being made a person's legal representatives should investigate suitably qualified trustee companies, such as Perpetual Trustees, that may be able to potentially fulfil such a role.

Companies such as Perpetual Trustees often welcome such inquiries and are prepared to provide initial advices on their suitability without charging a fee. PL

Footnotes:

1 As per Schedule 4 of the *Guardianship and Administration Act* 2000.

2 *Welland v Payne* [2000] QSC 431.

3 Section 59 of the PTA.

4 See *H v Nominal Defendant* [1977] QSC 233, Lee J; *Cocchi v Coochi* [1989] 1QDR 226 Ambrose J; *Morris v Mills* (Unreported) SC (Qld) (20 August 1999), Helman J.

5 [1977] QSC 233.

6 [2000] QSC 431.

7 (Unreported) SC (Qld) (2 August 2001), Ambrose J.

8 Sections 28 and 30 of the GAA.