

NSW CIVIL & ADMINISTRATIVE TRIBUNAL (NCAT)
GUARDIANSHIP DIVISION

TRAINING SEMINAR

8 December 2017

ROLES IN PROTECTIVE MANAGEMENT OF PERSON AND PROPERTY

by

Justice Geoff Lindsay
Probate & Protective List Judge
Equity Division
Supreme Court of NSW

INTRODUCTION

- 1 The object of this paper, addressed to members of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT), is to consider:
 - (a) the respective roles of a “guardian” and a “financial manager”(appointed by NCAT in exercise of powers under the *Guardianship Act* 1987 NSW); and
 - (b) factors to be taken into account in appointing a guardian or financial manager.

- 2 The focus for attention is not on the criteria, or pre-conditions, for the appointment of a guardian or a financial manager; but on (a) the respective roles assigned to the office of a guardian and the office of a financial manager, once appointed; and (b) criteria for selection of persons suitable for appointment to the office of a guardian, the office of a financial manager or both.

- 3 Treating guardians and financial managers as conceptually similar, because they both concern *prudential management* of the affairs of a person incapable of self-management, the paper emphasises the *protective purpose* of each office; the need to ensure that an appointee is *able and willing to perform the duties of the office* to which appointed; and a need to ensure, so far as may be practicable, that an appointee does not occupy a position of *conflict between his, her or its interests and duties to be performed*.
- 4 The powers conferred on a person by appointment as a guardian or financial manager are “fiduciary powers” (in the sense described in Meagher, Gummow & Lehane’s *Equity: Doctrines and Remedies*, 5th edition, LexisNexis Butterworths, Australia, 2015, paragraph [5-050]) in that they must be exercised only for the purpose for which they are conferred, and not for collateral purposes; particularly not for the purpose of advancing the interests of the appointee.
- 5 In appointing a person to the office of guardian or financial manager, the Tribunal, looking forward, must be satisfied that the appointee can be relied upon to exercise the powers of the office responsibly, and not for personal gain. To the extent that the future cannot be known, there is in this an element of risk management.

STATUTORY FOUNDATIONS

- 6 At the outset, recognition must be given to the primacy of legislation governing the powers, functions and duties of each of NCAT, a guardian appointed by NCAT and a financial manager appointed by NCAT. Each is a “creature of statute” in the sense that each owes existence and authority to legislation, and everything done must be done within the limits of legislative authority.
- 7 In this paper an endeavour is made to draw together *ideas that inform the operation of legislation*, administered by the Guardianship Division of NCAT, governing the offices of guardian and financial manager. A thematic approach to the legislation involves analysis not tied to particular provisions. Readers

are nevertheless reminded that, in adjudication of a particular case, there is no substitute for a process of reasoning, and an articulation of reasons, faithfully tied to the terms of applicable legislation.

CONTEXT

Introduction

- 8 Upon any review of NCAT's Guardianship Division, and its exercise of jurisdiction over guardians and financial managers, context at a number of different levels is important. A conversation about the topics addressed by this paper cannot go far without recognition of those contextual levels. Or, at least, identification of the legislative and administrative framework for decision-making.
- 9 For my part, perhaps imperfectly, I have endeavoured in a number of judgments to locate decision-making within a contemporary framework, informed by historical exposition: eg, *PB v BB* [2013] NSWSC 1223; *M v M* [2013] NSWSC 1495; *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No. 4)* [2014] NSWSC 31; *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245; *Re W and L (Parameters of protected estate management orders)* [2014] NSWSC 1106; *Re Application for partial management orders* [2014] NSWSC 1468; *CJ v AKJ* [2015] NSWSC 498; *P v NSW Trustee and Guardian* [2015] NSWSC 579; *IR v AR* [2015] NSWSC 1187; *Re AAA; Report on a protected person's attainment of the age of majority* [2016] NSWSC 805; *Re LSC and GC* [2016] NSWSC 1896; *SLC v RTJ* [2017] NSWSC 137.
- 10 These references are provided here not as a "last word" on any question; but as a contribution to an ongoing conversation that necessarily engages all participants in decision making affecting those who are, or may be, incapable of managing their own affairs.

- 11 By its nature, an exercise of protective jurisdiction must be firmly based on enduring principles, informed and tempered by empirical pragmatism. It must be responsive to the facts of a case. Practical outcomes matter. There is no escape from a need for practical wisdom in dealing with an individual case.
- 12 An increasing trend towards “privatisation” of protective management regimes (which has manifested itself in widespread deployment of enduring attorney and guardianship appointments and, especially since *Holt v Protective Commissioner* (1993) 31 NSWLR 227, a more liberal use of private financial managers) necessarily elevates the importance of recognising the fiduciary (trust-like) character of the powers of those who manage the affairs of a person incapable of self-management.

Protective Purpose

- 13 At the highest level of abstraction, NCAT and its appointees represent a means by which the State of NSW endeavours to perform the protective function of the Crown in taking care of individuals who cannot take care of themselves.
- 14 In contemporary Australia we speak of “the State”; but there remains utility – in historical exposition, at least – in personification of the protective function of the State by reference to functions of the Crown, functions delegated to agencies of “government” in the broadest sense. Each branch of government (legislative, executive and judicial) plays a role in performance of the protective function of government.
- 15 In Australia, the classic formulation of the protective function is found in the judgment of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR 218 at 258-259, elaborated by reference to the judgment of the Supreme Court of Canada in *Re Eve* [1986] SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14-21 and the judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.

- 16 Historically, as those cases demonstrate, Anglo-Australian law is founded on the proposition that the Crown, as *parens patriae* (father, or parent, of the nation), has an obligation, with commensurate power, to take care of those who are not able to take care of themselves.
- 17 An underlying assumption of the law, not to be overlooked, is that each individual has a right (and duty) to take care of himself or herself, so far as able to do so. Respect is accorded to the dignity of each person as an individual. The gold standard underlying an exercise of protective jurisdiction is the concept of an autonomous individual living, with dignity, in his or her community of choice.
- 18 The purposive character of “protective jurisdiction” looks to protection of an individual unable to take care of himself or herself: unable to manage his or her own affairs, be those affairs described in terms of “person” or “estate” (property).
- 19 Everything done or not done on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the person in need of protection: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2016] 1 Qd R 1 at 25[48].
- 20 Care needs to be taken against an ever-present risk that the interests of a person in need of protection are subordinated to the interests, or convenience, of another person, or an institution, with whom his or her life intersects. This, they cannot be.

Other Contextual Perspectives

- 21 At a lower level of abstraction, an exercise of protective jurisdiction by a NCAT (through its Guardianship Division) requires an appreciation of:
 - (a) the legislative framework within which the Guardianship Division must operate;

- (b) the institutional framework associated with material legislation;
- (c) the availability, and nature, of the inherent, *parens patriae* jurisdiction of the Supreme Court of NSW preserved by that legislation (an exposition of which can be found in Lindsay, “Children: The *Parens Patriae*, and Supervisory, Jurisdiction of the Supreme Court of NSW”, published on the Supreme Court website on or about 18 November 2017);
- (d) alternative means available for management of the affairs of a person incapable of managing his or her affairs; and
- (e) the general law principles (including equitable principles governing fiduciaries) called into play to hold to account a person who manages the affairs of another, particularly when that other is unable to take care of himself or herself.

22 It is not the purpose of this paper to dwell at length on each of these contextual topics as a central focus. Nevertheless, they must be acknowledged if the declared object of the paper is to be served; and particular note must be taken of both the fiduciary character of the office of a guardian or financial manager, and the need for such officers to be accountable for due performance of their duties.

23 The single most important feature of the offices of guardian and financial manager (and one not, in express terms, acknowledged by the text of governing legislation) is that each office is, in character, “fiduciary”; that is, in the nature of a trust for the benefit of the person in need of protection.

Legislative and Institutional Contexts

24 NCAT is a statutory tribunal, in lawyer’s language the classic “creature of statute”. It is constituted, and governed, by the *NSW Civil and Administrative Tribunal Act 2013 NSW* and cognate legislation.

- 25 The expression “cognate legislation” can be taken as a reference to the *Guardianship Act 1987 NSW*; the *NSW Trustee and Guardian Act 2009 NSW*; and the *Powers of Attorney Act 2003 NSW*.
- 26 Insofar as the work of NCAT intersects with the work of licensed trustee companies as financial managers, reference might also be made to the *Corporations Act 2001 Cth*, chapters 5D and 7, and the *Trustee Companies Act 1964 NSW*. Licensed trustee companies are regulated by ASIC and monitored in their performance of protected estate work by the NSW Trustee.
- 27 The powers, functions and duties of the Guardianship Division of NCAT are governed, specifically, by Schedule 6 of the *NSW Civil and Administrative Tribunal Act 2013*.
- 28 Passing notice should be taken of the (alternative) avenues of appeal from a decision of the Guardianship Division of NCAT; namely:
- (a) an appeal to an Appeal Panel of NCAT; or
 - (b) an appeal to the Supreme Court of NSW.
- 29 In passing, also, notice should be taken of the fact that nothing in the *Civil and Administrative Tribunal Act*, the *Guardianship Act*, the *Powers of Attorney Act*, or the *NSW Trustee and Guardian Act* displaces the jurisdiction of the Supreme Court of NSW described variously as “inherent jurisdiction”, “*parens patriae* jurisdiction” or “protective jurisdiction”.
- 30 That jurisdiction, however described, has its historical foundations in the *parens patriae* function of the Crown delegated to the English Lord Chancellor, by reference to whose office the jurisdiction of the Supreme Court was defined upon its establishment in the 1820s (and since preserved by section 22 of the *Supreme Court Act 1970 NSW*), reinforced by section 23 of the *Supreme Court Act 1970*.

- 31 The legislative framework within which the Guardianship Division of NCAT operates underpins an institutional framework that assigns complementary roles to:
- (a) NCAT itself;
 - (b) the Supreme Court of NSW, not limited to the Court's inherent jurisdiction;
 - (c) the Mental Health Review Tribunal;
 - (d) the NSW Trustee;
 - (e) the Public Guardian;
 - (f) licensed trustee companies; and
 - (g) appointees to the office of "enduring attorney" (governed by the *Powers of Attorney Act*) and "enduring guardian" (governed by the *Guardianship Act*).

Comparative Advantages and Disadvantages of Tribunal and Court Proceedings

- 32 In addressing the Guardianship Division of NCAT as the Protective List Judge of the Supreme Court, I am aware of a need to acknowledge comparative advantages, and disadvantages, of protective proceedings in one forum or the other.
- 33 I am also aware of the practical constraints within which members of the Tribunal and officers of the Court must operate. Everybody must work within the limits of available resources.
- 34 NCAT has institutional features not routinely shared by the Supreme Court. They include: first, administrative arrangements designed to facilitate procedural informality in the conduct of hearings, and routine reviews of

guardianship decisions; secondly, shared decision-making procedures involving lawyers, medical experts and community representation; and, thirdly, procedures which enable access to justice which is, on the whole, likely to be cheaper for members of the community than more formal procedures pursued in the Court.

35 On the other hand, there are particular types of case which must be dealt with by the Court, or which might be better dealt with by the Court than by the Tribunal. Such cases include:

- (a) a protracted dispute involving competing claims to control of a large or complex estate, a need for discovery or substantial questions of law.
- (b) a case in which a person (or an estate) in need of protection is located outside New South Wales or is proposed to be removed from the jurisdiction: *eg, IR v AR* [2015] NSWSC 1187.
- (c) a case in which there is a proposal that a private manager for reward (not being a licensed trustee company) be appointed as a financial manager: see, generally, *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245.
- (d) a case in which consideration may need to be given to:
 - (i) a claim for an *ex gratia* allowance out of a protected estate: *eg, JPT v DST* [2014] NSWSC 1735.
 - (ii) a prospective application for a “statutory will” (that is, a will made, for a person lacking testamentary capacity, by an order of the Court) under the *Succession Act 2006* NSW. See sections 18, 19, 21 and 23; *GAU v GAV* [2014] QCA 308; [2016] Qd R 1; *Secretary, Department of*

Family and Community Services v K [2014] NSWSC 1065; *W v H* [2014] NSWSC 1696.

- (iii) whether any (and, if so, what) relief should be granted to an enduring attorney or guardian who is, or may be, held liable to account for a breach of fiduciary obligations: eg, *C v W (No. 2)* [2016] NSWSC 945 at [22]-[47]; *SLJ v RTJ* [2017] NSWSC 137 at [32].

36 Both in preservation of its own jurisdiction, and in aid of the jurisdiction exercised by the Guardianship Division of NCAT, the Court endeavours to channel routine guardianship work through NCAT mindful of a need to maintain the integrity of available statutory procedures: *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [116].

FUNCTIONAL COMPARISONS

37 Historically, with continuing contemporary significance, there is a close, functional equivalence between:

- (a) the offices of “guardian” and “financial manager” appointed by NCAT under the *Guardianship Act*, and (respectively)
- (b) the offices of a “committee of the person” and a “committee of the estate” appointed upon an exercise of the Supreme Court’s inherent jurisdiction.

38 In the realm of estate management, a committee of the estate is not the closest parallel with a financial manager appointed by NCAT. Closer still, is an exercise of the Supreme Court’s jurisdiction under sections 40-41 of the *NSW Trustee and Guardian Act* to appoint a protected estate manager. What distinguishes a “financial manager” and a “protected estate manager” from a “committee of the estate” is the engagement of statutory managers with the administrative structure (including oversight of the NSW Trustee, subject to

review by the Court or NCAT) for which the *NSW Trustee and Guardian Act* provides.

- 39 An order for the appointment of a financial manager by NCAT does not require, and is not accompanied by, a prescription of functions similar to that which routinely accompanies NCAT's appointment of a guardian. An order for the appointment of a financial manager is routinely accompanied by an order that the estate of the protected person "be subject to management" under the *NSW Trustee and Guardian Act*. That permits the NSW Trustee to give directions for the management of a protected estate by a private manager. Administrative directions can be adapted to the nature of a particular estate, and varied, with greater flexibility than is generally available in court or tribunal proceedings.
- 40 Guardianship orders made by NCAT offer a contrast because, conformably with the *Guardianship Act*, they are generally limited by reference to particular functions assigned to a guardian by the Tribunal. Assigned functions are generally defined by reference to decisions about the accommodation of the person under guardianship; access to him or her; and the provision of medical, dental or other services to him or her. By guardianship orders limited to particular functions, in duration, and by susceptibility to review, the Tribunal supervises guardians at closer quarters than is generally possible with financial managers.
- 41 The distinctive roles of a "financial manager" and a "guardian" are often, in practice, interdependent. Questions of accommodation may depend, for example, upon the availability of property and cooperation between a financial manager and a guardian.
- 42 There is no absolute bar against one person, or institution, serving as both a financial manager and a guardian. However, there is utility in recognising a difference between the two types of office. A necessity for property management does not necessarily carry with it a necessity for management of the person. Civil liberties are generally best preserved by only a slow

embrace of coercive powers over the person. Property managers generally do not have an interest in, or aptitude for, management of the person even if (as is increasingly recognised) their management of property must be responsive to the needs of the person whose affairs are under management. A separation of powers is often consistent with, and a safeguard of, both good management and the preservation of personal liberties.

43 Conceptually, it remains true (adapting the classic text by HS Theobald, *The Law Relating to Lunacy*, London, 1924, page 41) that, subject to regulatory oversight:

- (a) the manager of a protected estate generally has committed to it the custody, regulation, occupation, disposition and receipt of property; and
- (b) a guardian has custody of the person, and regulation of government of the person, under guardianship.

44 *Theobald* is an antiquated text, not one that requires every day attention; but it has often been consulted by Australian courts called upon to expound the law or to solve particular problems: *W v H* [2014] NSWSC 1696 at [30]. Its influence can readily be discerned on a reading of *Re Eve*, approved by the High Court of Australia in *Marion's Case*. It provides a convenient summary of principles developed by, or in the time of, Lord Eldon. Those principles inform modern law and practice.

FUNCTIONAL SIMILARITIES

45 Although terminology is important, one needs at times to rise above it. In some contexts, financial management is treated as an incident of “guardianship”. The expression “guardianship” is capable of embracing both guardians and financial managers. Context is important.

- 46 For some purposes, financial management and guardianship can be treated as a single generic class. An example of that is found in the seminal High Court judgment of Dixon J in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423, where the accountability of guardians, financial managers and others for property entrusted to them is expounded in terms that emphasise the need to ensure that “a guardian” discharges his, her or its duty to take care of the person in need of protection.
- 47 Upon analysis of the respective roles of a “guardian” and a “financial manager”, common denominators commonly encountered are the following:
- (a) jointly and severally, the offices of a guardian and a financial manager are concerned with *prudential management* of the affairs of a person incapable of self-management and, to that extent, in need of assistance.
 - (b) each office is *fiduciary* in character because a guardian or financial manager is called upon to manage the affairs of another in the interests, and for the benefit, of the other (in circumstances in which that other is, or may be, vulnerable to exploitation)
 - (c) all appointments of a guardian or a financial manager are governed by *a duty to observe general principles* prescribed by legislation (the *Guardianship Act*, section 4; the *NSW Trustee and Guardian Act*, section 39) *which give primacy to the welfare and interests of a person in need of protection, and by considerations of utility.*
 - (d) *all appointments require an assessment of what is required to manage present and future risks, informed by due consideration of the particular circumstances and views of a particular individual, his or her significant others and his or her carers.*

THE SIGNIFICANCE AND IMPLICATIONS OF CHARACTERISATION OF AN OFFICE, OR RELATIONSHIP, AS “FIDUCIARY”

- 48 To describe the offices of a “guardian” and a “financial manager” as “fiduciary” is simply to recognise that, particularly *vis a vis* dealings with property, an office holder is amenable to orders made by the Supreme Court, upon an exercise of equitable jurisdiction, designed to maintain standards that require “the fiduciary”:
- (a) not to take, receive or retain an unauthorised profit or gain from his, her or its office; and
 - (b) not to place himself, herself or itself in a position of conflict between his, her or its duty to the person in need of protection and his, her or its own interests.
- 49 Characterisation of the office of a guardian or financial manager as “fiduciary” carries with it, as an incident of these standards, the proposition that those offices are *prima facie* gratuitous. As a general proposition, a financial manager or guardian (of an incapacitated person) who seeks payment for his, her or its services requires an order of the Supreme Court authorising remuneration: *Ability One Financial Management Pty Limited and Another v JB by his tutor AB* [2014] NSWSC 245.
- 50 Lying at the heart of *the roles* of a guardian and a financial manager, and *any process for selection* of a person or persons to occupy such an office, are the following concepts, which require constant emphasis:
- (a) the purposive character of all decision making, designed to protect the interests of, and to operate beneficially for, a person in need of protection because unable to take care of himself or herself.

- (b) the duty of an office holder to act only in the interests, and for the benefit, of the person in need of protection.
- (c) a duty on the part of a fiduciary not to profit from the fiduciary office, and not to occupy a position of conflict between duty and personal interest, without due authority

51 In the realm of protective jurisdiction, particularly because a guardian or financial manager might live in close proximity with the person under protection, an allowance might need to be made for the possibility that, whilst generally conforming to the fiduciary ideal, an office holder might obtain a personal benefit *incidental* to performance of the protective role.

52 That is recognised in *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423 by allowing that enforcement of a guardian's or a financial manager's obligation to account for the expenditure of funds entrusted to them might be relaxed if the Court is satisfied that any enjoyment by the guardian or manager of a personal benefit has been no more than incidental to due performance of the duty to serve the interests, and to act for the benefit, of the person under protection.

53 A recent example of the nature and complexity of problems of accountability that arise in the context of family members managing the affairs of family members (particularly, pursuant to an appointment as an enduring attorney, unsupervised by the administrative arrangements that attend appointment of a financial manager) is *Smith v Smith* [2017] NSWSC 408. Left to their own devices, family members often do not recognise the existence of, or potential problems arising from, conflicts of interest. Not uncommonly, even professional advisors (erroneously) assume that no conflicts of interest arise, or need to be guarded against, in a family setting: eg, *Reilly v Reilly* [2017] NSWSC 1419.

CONSIDERATION OF DUTY AND INTEREST

- 54 Emphasis on considerations of “duty” is often accompanied by a warning that a guardian or financial manager is appointed to serve the interests of, and to be beneficial for, the person in need of protection *and nobody else*: *Re Eve* [1986] 2 SCR 388 at 427-429-430 and 434; (1986) 31 DLR (4th) 1 at 29, 31 and 34; *M v M* [1981] 2 NSWLR 334.
- 55 Decision making governed by a need to serve the interests, and to act for the benefit, of a person in need of protection often implicitly requires a hard headed assessment of whether what is proposed to be done is driven by ulterior motives of others, particularly (human nature being what it is) those, including family and carers, who surround the person in need of protection. This requires close attention to the existence, in fact and potentiality, of interests in competition with those of the person in need of protection.
- 56 Translated into the vernacular, this requires one to ask questions like: What is in this arrangement for the benefit of the person in need of protection? At what cost? And what is in this for other people (particularly, promoters of the arrangement, family and carers)?
- 57 Answers to these questions might require critical inquiries be made about past, present and prospective family, business, care and succession arrangements.
- 58 An absence of clear answers to critical questioning might necessitate an appointment of an independent guardian or financial manager (generally the Public Guardian or the NSW Trustee) on terms designed to facilitate administrative inquiries being made, and a report being provided, to inform further decision-making.
- 59 In the Supreme Court this might be done in estate management cases by the appointment of a receiver (usually the NSW Trustee): *JMK v RDC and PTO v WDO* [2013] NSWSC 1362. Interim management orders to the same practical effect can be, and are, made by NCAT.

APPROACHES TO SELECTION OF A GUARDIAN OR FINANCIAL MANAGER

- 60 As the seminal judgment of the Court of Appeal in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 illustrates (and as has been explored in a succession of recent judgments, including *M v M* [2013] NSWSC 1495 and *Re LSC and GC* [2016] NSWSC 1896) the selection of a person suitable for appointment as a financial manager or guardian needs to be sensitive to the particular, subjective circumstances of the person in need of protection.
- 61 That said, the process of selection must also be informed by a hard headed appreciation of (a) the primacy of duty and (b) risks associated with competing personal interests.
- 62 These types of consideration find reflection in the *Guardianship Act*, for example, in section 17(1). So far as is material, that subsection provides that “[a] person shall not be appointed as [a guardian] unless the Tribunal is satisfied that:
- (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship;
 - (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship; and
 - (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.”
- 63 In *SAB v SEM & Ors* [2013] NSWSC 253 White J dealt with a submission that, before the Guardianship Tribunal (the statutory predecessor of the Guardianship Division of NCAT) could find that a guardianship order was required by reason of a conflict of financial interests between an enduring guardian and a person in need of protection, it would have to find that the conflict was “undue”.

64 At [60] - [62] his Honour rejected counsel's submission in the following terms (with emphasis added):

"[60] ... Section 17(1)(b) precludes the Tribunal from appointing *a person* as guardian unless it is satisfied that no undue conflict of interests between the proposed guardian and the affected person exists.

[61] I accept that it follows that the Tribunal is not precluded from appointing *a person* as guardian if it considers that, although a conflict exists, the conflict is not "*undue*". But the question of whether the Tribunal is precluded from appointing *a person* as guardian is not the same as the question whether the Tribunal considers that a guardianship *order* should be made.

[62] In my view, the Tribunal is entitled to have regard to a conflict, whether undue or not, between the interests of the protected person and a person who is acting in the role of guardian in deciding whether a guardianship *order* should be made."

65 His Honour accordingly concluded that there was no inconsistency between the requirements of section 17 and a determination by the Tribunal that there was a need for a guardianship order, in the circumstances of the particular case, because there was a clear conflict of financial interests between an enduring guardian and the person in need of protection.

66 The same language as is found in section 17 is not deployed by *Guardianship Act* provisions governing the appointment of a financial manager; but substantially the same concepts are at play *via* the fiduciary obligations of a financial manager as a manager, or prospective manager, of property. Fiduciary obligations, and fiduciary relationships, are sometimes more readily discernible in the context of dealings with property than they are in dealings with "the person". It may be, for that reason, that the Act is more explicit in its articulation of the qualities required of a guardian.

67 Upon consideration of an application (under the *Protected Estates Act* 1983 NSW, legislation antecedent to the *NSW Trustee and Guardian Act* 2009 NSW, section 41) for the appointment of private managers to the estate of a person incapable of managing her affairs, Young J made the following observations in *Re L* [2000] NSWSC 721 at [11-12]:

“[11] ... [Both] in the interests of the incapable person and in the interests of minimising later supervision, the Court needs to be satisfied that the managers are able to provide for the incapable person the service she needs. [12] In the case of a relative, the Court must look to see that there are minimal conflicts of interest, or, if conflicts of interest cannot be avoided, that they are properly dealt with. In the case of a private manager who purports to have financial expertise, the Court needs to be satisfied not only of that person’s good fame and character and of his or her ability generally to manage funds, but also that that person has a good conception as to what is required of a fund manager.”

68 In *IR v AR* [2015] NSWSC 1187 at [29]-[35] I made the following observations, drawing on the judgment of White J in *SAB v SEM* and that of Young J in *Re L*:

[32] Section 17(1)(b) provides formal recognition of the fundamental principle, applicable under both the Guardianship Act and the general law, that the office of a guardian is that of a fiduciary whose obligations must be measured against the protective purpose of the appointment of a guardian in the particular case: *The Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423; *Clay v Clay* (2001) 202 CLR 410 at 428[37] - 433[49].

[33] The expression "no undue conflict" reflects the reality that, in a particular case, discharge of the obligations of a guardian (e.g. by a member of family living within the same household as the person under guardianship) might necessitate a sharing of resources devoted to the welfare of a person under guardianship, not a complete separation of the lives of guardian and ward....

[35] A ‘conflict of interest’ is ‘undue’ within the meaning of section 17(1)(b) 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.”

69 As earlier mentioned, the powers exercised by the guardian or a financial manager are “fiduciary powers” in the sense that they must be exercised only for the purpose for which they are conferred, and not for collateral purposes (particularly not for the purpose of advancing the interests of the office holder).

70 The nature of the work performed by a guardian (more so than the nature of the work required to be performed by a financial manager) generally requires a degree of physical *proximity with the person in need of protection*. Each case must, of course, be considered on its own facts. Especially is this so in a social environment in which the community enjoys sophisticated systems of

communication, and the Australian social welfare system routinely involves placement of vulnerable people under professional nursing care: eg, *HS v AS* [2014] NSWSC 1498.

- 71 As illustrated by *IR v AR* [2015] NSWSC 118, care needs to be taken not to allow a person (or estate) in need of protection to be moved beyond the jurisdiction without regulatory safeguards (including, if appropriate, orders for the appointment of a committee of the estate and/or a committee of the person so as to engage the contempt jurisdiction of the Supreme Court in the event of interference with a guardian or financial manager).
- 72 Because the offices of a guardian and a financial manager are fiduciary in character, no appointment by NCAT of a private person to such an office (other than a licensed trustee company, authorised and regulated by legislation) can carry an expectation of reward without the authority of a Supreme Court order.
- 73 If, as sometimes happens, a private manager for reward (not being a licensed trustee company) is appointed by NCAT, it should be on the express basis that an application will be made by the manager, on notice to the NSW Trustee, to the Supreme Court for authorisation to claim an allowance for remuneration.
- 74 *Ability One Financial Management Pty Limited and another v JB by his tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383 outline procedures, including the preparation of a report to the Court by the NSW Trustee, which are designed to enable claims for remuneration to be dealt with in an orderly way.
- 75 The availability of the NSW Trustee and the Public Guardian as appointees “of the last resort”, and (in effect) as executive arms of the Court and NCAT, requires specific notice. One should be mindful of the assistance they give to decision-making, sometimes merely by their availability as an alternative form of appointment.

76 A person in need of protection may *require* the services they provide. Feuding families sometimes (but not always) may be brought to realise the need for cooperative engagement with regulatory authorities when confronted by the *possibility* of an appointment of the NSW Trustee and/or the Public Guardian rather than a partisan private appointee. Sometimes, an appointment of the Public Guardian or the NSW Trustee as an independent manager of the affairs of a person who is, or may be, incapable of self-management is the only practical way to facilitate an inquiry, and report, essential to service of the protective purpose of the jurisdiction to be exercised in a “guardianship” case (using that expression, in its broadest sense, to contemplate both guardians and financial managers).

CONCLUSION

77 A proper appreciation of the respective roles of a “guardian” and a “financial manager”, and factors to be taken into account in the appointment of a person to one or both of those offices, requires an understanding of both the text, and the context, of legislation governing an exercise of protective jurisdiction. One without the other (text and context) is but half a story.

78 Of critical significance to an understanding of the full story is an understanding that the offices of guardian and financial manager are essentially fiduciary in character; with a consequence that the holder of such an office is duty-bound (in positive terms) to serve only the protective purpose for which he, she or it was appointed to the office, and (expressed proscriptively) not to allow collateral purposes or personal interests to intrude upon the performance of that primary duty.

GCL

8 December 2017