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Protecting the Aged:

The Role of the ACT Guardianship and Management Tribunal in the Protection of the Elderly Against Crime

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It has long been recognised that certain groups in our community need special attention when it comes to protecting their rights. One of those particular groups is the aged. Like any other individual an older person has a right to live without fear of violence, abuse, and exploitation. However, due to factors beyond their control they are often in a position of vulnerability to be abused. This paper will focus on one piece of legislation that exists in the Australian Capital Territory as an attempt to protect those rights. That legislation is the *Guardianship and Management of Property Act 1991*.

What do We Mean by 'Abuse'?

Abuse can take many forms. The more commonly referred to manifestations would be:

- a. Physical — the actual infliction of pain or injury. Examples would include striking, pushing, burning, and restraining.
- b. Psychological — this is a more subtle form of abuse and can be the end result of many forms of conduct levelled at the elderly person. Classic examples would be fear as a result of threatened violence, humiliation, isolation and so on.

- c. Financial Abuse — the aged are in a vulnerable position when it comes to the improper use of their finances. This is particularly the case where an individual's judgement may be lacking as a result of advancing age.

- d. Neglect — the elderly need adequate care just like any other person. Indeed, they will often have special needs such as frequent medication. Neglect arises when a 'carer' is not providing adequate care or is preventing such care from being administered or obtained. This form of abuse should not be confused with self-neglect, that is, where the elderly person does not adequately provide for their own care.

Abuse will often have aspects of a number of the above categories, rather than a single form. It may also be ongoing as opposed to a 'one-off' incident. The other important factor to consider is the vulnerability of the aged and the reasons causing the vulnerability. Their faculties or judgment may be impaired through advanced age or illness. Illnesses which arise more commonly in aged persons, for example, Alzheimer's Disease, makes it almost impossible for a victim to look after themselves or their affairs without assistance. Other disabilities, again more predominant in the aged, make it difficult for the person to carry out the day-to-day chores and activities necessary for the provision of their primary living needs. What this highlights is the cause of problems and the problems themselves are varied. As such, any scheme which is put in place to combat the problems must have sufficient flexibility to remedy the myriad of situations which can occur.

The Australian Capital Territory Scheme

Background

Until the commencement of the Guardianship and Management of Property Act 1991 on 7 January 1992, the only avenue for the appointment of guardians was via the ACT Supreme Court exercising its authority under the archaic and inappropriately titled *Lunacy Act 1898* of New South Wales, in its application in the Territory. This old system was often expensive for an applicant or their family. The excellent work of the Supreme Court is, however, preserved in that guardianship appointments by the court which are still current, continue.

Guardianship and Management of Property Tribunal

The Guardianship and Management of Property Tribunal (the 'Tribunal') commenced its first hearings on 28 January 1992. The role of the Tribunal is to provide legal authority in the form of guardianship and management orders, to the family or friends of disabled adult persons so that the disabled person's affairs, personal or financial, may be conducted.

The tribunal comprises of a president who is either a magistrate or a person who has at least five years' experience as a legal practitioner. The president may sit alone if the need arises, but the Tribunal usually comprises a panel of a presidential member with two expert members. The Tribunal convenes after giving seven days' notice to applicants and other parties but may convene at shorter notice in urgent cases.

It has been estimated that there is a backlog of 1500 cases in the Territory of persons who require guardianship or management orders. The Tribunal, as a part-time body, is scheduled to sit for at least eighty days per annum.

Powers of the Tribunal

The Tribunal has been given various powers to assist it in the exercise of its functions. These include the following:

- a. the power to authorise the medical examination of persons subject of the inquiry (s. 39);
- b. the power to appoint experts to assist in the inquiry (s. 40);
- c. the power to obtain information and documents (s. 41);
- d. the power to retain documents and make copies (s. 42); and
- e. the power to make orders (ss. 7, 8 & 67).

Orders

There are two separate types of orders that the Tribunal is empowered to make, that is, orders relating to guardianship and management. The Tribunal is empowered to issue orders appointing a guardian to make personal decisions on behalf of a person who is incapacitated by illness, injury or intellectual disability. A guardianship order may be a plenary (full) or a limited order. In addition, the Tribunal may appoint a person to be a manager of the incapacitated person's financial affairs.

Examples of when guardianship or management orders may be necessary include those family situations where a child who has a mental or intellectual disability has reached eighteen years of age and one or both parents seek formal appointment as a guardian or manager (or dual appointments). Sometimes a person is incapacitated as a result of a road or other accident and is no longer able to make rational decisions. Likewise, the ageing process may render a spouse, parent or friend incapable of decision-making. In these cases another person has to make personal or lifestyle decisions and handle property matters.

Before making a guardianship or management order the Tribunal must be satisfied, firstly, that the person is suffering from a physical, mental, psychological or intellectual condition. This will generally be evident from medical reports or professional carers reports.

Section 5 of the *Guardianship and Management of Property Act 1991* lists factors not to be considered as indicating a relevant condition. The factors are that the person:

- a. is eccentric;
- b. does or does not express a particular political or religious opinion;
- c. is of a particular sexual orientation or expresses a particular sexual preference;
- d. engages or has engaged in illegal or immoral conduct: or
- e. takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).

Secondly, if a guardian is to be appointed, the Tribunal has to be satisfied that the person is, because of that condition unable to make reasonable judgements or to do all that is necessary for his or her welfare or health and his or her health is substantially at risk.

Or, if a manager is to be appointed, the Tribunal has to be satisfied that as a consequence of the condition suffered the person is legally incompetent to enter into a transaction relating to that person's property and it is likely that a transaction with property will arise or it is in the interests of the represented person, to preserve the property by preventing any disposition.

A formal order will then be written and it will specify the types of powers available to the guardian or manager.

Decision Making by the Tribunal

The decision-making role on behalf of another person is an important responsibility and gives rise to fundamental legal relationships. For this reason, the authorisation for such powers must come from an independent and experienced body such as a statutory tribunal.

Whether making guardianship or management orders the Tribunal must observe an important set of Principles which apply to all actions taken under the legislation. In making any decision the Tribunal must observe the principles set out in section 3 . These are:

- a. that the person's views and wishes, so far as they can be ascertained, should receive paramount consideration;
- b. that the decisions made about the person should be, as nearly as possible, the decisions that he or she would have made if not affected by the condition concerned;
- c. that the person's welfare should not be interfered with except to the least extent necessary;
- d. that the person's life should not be interfered with except to the least extent necessary;
- e. that the person should be encouraged to look after himself or herself;

- f. that, as far as possible, the person should live in the general community and join in community activities.

One of those principles is that the represented person's life should not be interfered with except to the least extent necessary. This means that where a person is living in a caring environment, it may only be necessary to obtain a guardianship order for limited purposes, for example, for specialist medical treatment.

Review of orders

Orders made by the Tribunal are subject to regular review (at least every three years). The president of the Tribunal has indicated a preference for earlier reviews of twelve months. Depending on the particular case, a review may be carried out at any time within the three year mandatory review period.

Conduct of Inquiry

The Tribunal is not a Court. As is the case in other jurisdictions, the Tribunal operates with the minimum of formality. Under its enabling legislation the Tribunal must operate informally and with as little regard to legal technicalities as is just. In practical terms this means that an applicant, the represented person and family or friends encounter a hearing room where there is no raised bench for the President and members. No one wears judicial gowns and the parties face each other across a table.

The inquiries are open to the public unless the tribunal otherwise orders, which, of course, can result from a request for privacy from the applicant, represented person, family or friends. It is not necessary for the represented person to have legal representation, and if necessary the community advocate, as a public official, can appear for the represented person.

While legal technicalities may be ignored to a degree, the legislation stipulates that the rules of natural justice must be observed. The Victorian case of *Moore v. Guardianship and Administration*

Board and Another (1990) VR 902 illustrates the importance of observing the rules of natural justice.

In that case a report was made to the Board by an inquiry officer which was of a highly prejudicial effect to the plaintiff (the represented person) and the person assisting her at her hearing. The Board had indicated to the parties at the commencement of the hearing that the report existed and that the parties could view it if they wished. No party requested to view the report. It was held that the report was of such possible significance that if it was to be used at all by the Board, it should have been actually provided, desirably before the hearing, or at least in such a way as to afford the relevant persons a meaningful opportunity of evaluating and responding to the report. By not doing so, the Board had denied the plaintiff natural justice.

The Board had also refused to contact a potential witness in the course of the hearing. The witness was prepared to give evidence by telephone. This was also considered to be a denial of natural justice.

Therefore it must be borne in mind that parties must be given adequate notice and an opportunity to be heard.

Secrecy

Members of the Tribunal are under a statutory obligation not to make records of, or directly or indirectly divulge or communicate, information gained through being a member. Such protected information may only be disclosed through the exercise of Tribunal functions or with the consent of the person concerned.

Members are not required to divulge or produce a document containing protected information to a court except where it is necessary to do so for the purpose of a guardianship or management of property matter.

Costs

Hearings before the Tribunal are free of charge. A small filing fee of \$20 is applicable and may be waived in cases of hardship. The cost of legal representation, where that is provided by choice of an applicant, will be a matter for the applicant.

The Community Advocate

The Community Advocate is a statutory officer who protects the interests of a person who needs, or is subject to, an order of the Guardianship and Management of Property Tribunal. The Community Advocate may represent the person before the Tribunal and will monitor how the order of the Tribunal is carried out by a guardian or manager. The Community Advocate performs an Ombudsman-type role and, if necessary, may apply to the Tribunal to have an order reviewed, varied or revoked by the Tribunal. In guardianship matters the Community Advocate operates in much the same way as the Public Advocate in Victoria.

The Community Advocate's office is proactive and is publicised as an advocate for the protection of disadvantaged and disabled persons in our community including the aged and infirm. The functions and powers of the Community Advocate are extensive and varied.

Functions of the Community Advocate

- 13 (1) The Community Advocate has the following functions:
- (a) to foster the provision of services and facilities for persons who have a disability;
 - (b) to support the establishment of organisations which support such persons;
 - (c) to encourage the development of programs that benefit such persons (including advocacy programs, educational programs and programs to encourage persons to act as guardians and managers);
 - (d) to promote the protection of such persons from abuse and exploitation;
 - (e) to protect the rights of such persons;
 - (f) to represent such persons at inquiries before the Tribunal;

- (g) to deal, on behalf of such persons, with persons or bodies providing services;
- (h) to investigate, report and make recommendations to the Minister on any matter relating to the operation of the Act referred to the Advocate by the Minister;
- (j) to act as a guardian or manager when so appointed by the Tribunal;
- (k) to disseminate information concerning:
 - (i) the functions of the Advocate;
 - (ii) the operation of this Act; and (iii) the functions of the Tribunal;
- (m) to represent forensic patients before the Tribunal or any court;
- (n) any other function assigned to the Advocate by a law of the Territory.

- (2) The Advocate has power to do all things necessary or convenient to be done in connection with the performance of his or her functions.

Investigations

- 14 (1) The Community Advocate may investigate complaints and allegations concerning:
 - (a) the administration of this Act; or
 - (b) the actions of a guardian or manager or a person acting or purporting to act under an enduring power of attorney.
- (2) If requested to do so by the Tribunal, the Advocate shall report to the Tribunal in relation to a matter the subject of an inquiry before the Tribunal.

Guardian etc., of last resort

- 15 Where the Community Advocate is appointed as a guardian or manager under the *Guardianship and Management of Property Act 1991*, the Advocate shall:
 - (a) endeavour to find a suitable person to be appointed as the guardian or manager; and
 - (b) if such a person is found — apply to the Tribunal for the appointment of that person as guardian or manager.

Engagement of legal practitioner

16 The Community Advocate may engage a legal practitioner to appear before the Tribunal or a court in relation to the performance of the Community Advocate's functions under this Act.

As public awareness is raised, the Community Advocate's office has tended to become the reception point for the reception of information concerning disadvantaged persons including the aged who are at risk or exposed to the risk of criminal conduct. The Tribunal itself has held a number of public seminars throughout the ACT community to raise public awareness of its existence and the role it can play in the protection of the elderly.

Emergency Appointments

The Tribunal is given the flexibility of making emergency appointments at short notice without holding an inquiry where there are special circumstances of urgency that make it proper to do so. In those circumstances the community advocate can be appointed guardian or manager of the person's property and the public trustee can be appointed manager. This flexibility is important and would enable quick and swift action to protect the elderly against crime or exploitation.

The power given to the Tribunal to make specific directions to managers or guardians would enable special orders to be made appropriate to the individual circumstances of each case. This specific power would enable the Tribunal to act swiftly to guard the rights of an aged person in danger of being a victim of crime or being the subject of exploitation.

An obstacle to the use of the guardianship and management technique in protecting the elderly against crime is that there is a significant gateway to the use of the powers of the Guardianship and Management of Property Tribunal. Before orders can be made the Tribunal has to be satisfied that the person is incapable of making reasonable judgments concerning persons, person, circumstances or estate. There will obviously be cases where an aged person is exposed to the risk of being a victim of crime or the subject of exploitation where that gateway would not be open. The person

would not be so disabled as to fall into that category. I would recommend that Guardianship and Management of Property Tribunals or Boards be given power to act in special circumstances where an aged person is likely to be the victim of a crime or the subject of exploitation. This power could be created for limited periods but without having to establish the gateway of the person being unable to make reasonable judgments concerning person, circumstances or estate. This simple additional power would enable a more effective protection of the elderly against crime and exploitation. The wishes and consent of the person the subject of the orders would obviously be a prerequisite for the exercise of this new proposed power.

Conclusion

My view is that the technique of guardianship and management of property orders should be looked to in a more realistic way as providing an additional effective way of protecting the elderly against crime and exploitation. The extension of the usual guardianship and management of property powers to include consent orders concerning the elderly who may not be normally the subject of such orders, would be an additional flexible technique to assist in the protection of the elderly in our community.

CASE SUMMARIES

GT 1 of 1992

An application was made by a son for the appointment of a guardian and manager in respect of his elderly mother, Mrs A. The application was contested by Mrs A's grandson (GT 5 of 1992) and the two applications were heard together. All parties agreed that, based on extensive medical evidence, Mrs A was suffering from Alzheimer's disease, cerebrovascular disease or both. As a result she had difficulties making reasonable judgments concerning her health and welfare. She was obviously incompetent to enter into transactions concerning property. Conflict existed as to who should be appointed as guardian and manager. The Tribunal, having ascertained a need for the appointment of a guardian and manager, appointed the primary carer with whom Mrs A had resided for some time

as guardian and an independent third party as manager. The orders to be reviewed in six and twelve months respectively.

GT 4 of 1992/1

Mrs D was an elderly woman suffering from Alzheimer's disease. Her daughters jointly brought an application for their appointment as guardians and managers as Mrs D was no longer adequately looking after herself. The Tribunal heard evidence that Mrs D was not eating properly and had been wandering. Mrs D had been placed in a nursing home, but the fees had not been paid as Mrs D refused to withdraw money from her bank accounts. The bank would not permit anyone else to access the monies. The Tribunal considered it appropriate that the daughters be appointed joint guardians and managers in this case. The order to be reviewed in twelve months.

GT 6 of 1992

Mrs E was a seventy-four year old widow who was initially assessed by a police psychologist as suffering from a psychological disorder, possibly a mild-moderate dementia. Evidence of the Australian Federal Police was such as to indicate that Mrs E was the victim of an alleged fraud. It was alleged that neighbours had befriended Mrs E and extracted from her a substantial sum of money in the form of loans and gifts. Mrs E seemed convinced that the loans would be repaid. However, despite a loan agreement little repayments had been made. The applicant, a friend, was appointed manager for the period of twelve months in order to maintain Mrs E's remaining estate in her interest.

GT 7 of 1992/1

An emergency application for temporary appointment as guardian was made by the Community Advocate in respect of Mr F, a man with an intellectual disability in his thirties. Mr F needed assistance with making lifestyle decisions and with the organisation of his finances. Threats had been made by the father of Mr F to remove him from his present surroundings to be placed in an interstate institution. The brother of Mr F approached the Tribunal and was subsequently referred to the Community Advocate. An emergency order was made for the period of seven days.

GT 7 of 1992/2

The brother of Mr F made an application to the Tribunal seeking the appointment of a guardian and manager in respect of Mr F. Mr F expressed a desire to live with his brother, the applicant. No objection was voiced by the parents or siblings of the applicant and Mr F. The Tribunal made orders for plenary* guardianship in favour of the applicant and his spouse and management in favour of the applicant to be reviewed in twelve months.

At a later date the appointed manager applied for directions in respect of the finances of Mr F. It appeared that the finances were not as they had been expected and the manager was concerned as to whether he should pursue investigations. Given that the best interests of Mr F would be served by investigating the matter the Tribunal directed that the manager should do so in cooperation with the Community Advocate and the public trustee.

GT 11 of 1992

Mrs J was an elderly resident of a Canberra nursing home, with no known relative, suffering from Alzheimer's disease with severe memory loss and confusion and disorientation. The difficulty in this case was that whilst Mrs J was a resident of the nursing home and her pension was being expended on nursing home expenses, her possessions were still in a government house and as a result rent arrears were accumulating. As medical evidence indicated that Mrs J's condition was not likely to improve the Tribunal considered that it was in the best interest of Mrs J that a guardian and manager be appointed to rectify the immediate difficulties faced by Mrs J, and to look after her future needs. The Tribunal appointed the Community Advocate and applicant as joint guardians and the Public Trustee as manager. The order is to be reviewed in twelve months.

GT 17 of 1992

A professional carer made an application for the appointment of a guardian and manager in respect of a patient suffering from a psychiatric condition. Evidence before the Tribunal indicated that Mr P failed to care for his health, being a sufferer of diabetes and hypertension he did not take the necessary medication regularly, and that he mismanaged his finances and so accrued debts. The Tribunal found that in the circumstances the Community Advocate should be appointed limited guardian and the public trustee limited manager and that the order should be reviewed within four months.

GT 19 of 1992/1

An application for guardianship and management was made by the daughter of Mrs R. Mrs R was a middle-aged woman suffering from Alzheimer's disease and requiring permanent nursing home care. The Tribunal found that Mrs R was in need of a guardian and manager. Conflict existed between the spouse who made a contesting application (GT 27 of 1992) and the adult children of Mrs R as to who would be the most suitable person for appointment as guardian and manager. The Tribunal ordered that the Community Advocate and public trustee be appointed in those roles for a period of two months during which time the family was to try to resolve its difficulties.

GT 21 of 1992/1

The Community Advocate made an emergency application to the Tribunal to be appointed guardian of Mrs T, an elderly woman suffering from dementia on the basis of Alzheimer's disease or cerebrovascular disease or both. The daughter and grandchildren of Mrs T had been denied information as to her whereabouts and medical condition by her primary carer and neighbours. The primary carer had himself suffered from a medical condition which prevented him from attending to Mrs T. The family held concerns as to the well being of Mrs T. The Community Advocate sought appointment as guardian in order to seek information as to the medical condition of Mrs T. The Tribunal made the order sought for a period of seven days.

GT 26 of 1992

An application for the appointment of the Public Trustee as manager in respect of Mrs W, an elderly resident of a Canberra nursing home, was made by the Director of the nursing home. The resident was accumulating significant hospital and nursing home debts as she was unable to access her bank account and unable to sign an authority for payment of the fees owed. The Tribunal found that Mrs W was in need of a guardian and manager and appointed the Community Advocate and Public Trustee for a period of three months to regularise Mrs W's circumstances, the son of Mrs W having indicated that he would make an application in that time for appointment to the positions.

***Plenary** — Where plenary guardianship or management has been ordered, the power of the guardian or manager extends without limits to include all powers vested in a guardian or manager under the *Guardianship and Management of Property Act 1991*.