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NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

Review of the Guardianship Act 1987

I note your review of the desirability of changes to the NSW Guardianship Act 1987 having regard to:

1. The relationship between it and the *NSW Trustee and Guardian Act 2009*; the *Powers of Attorney Act 2003* (NSW); the *Mental Health Act 2007* (NSW) and other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. ALRC 124 - Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

Comments

Without specifically addressing those categories, I raise a discrete matter of law and practice but one of importance within the scope of your inquiry, that is, the management of an incapacitated person's insolvency.

The two issues of capacity and bankruptcy may be connected, in that the incapacity may lead to financial loss and bankruptcy; and financial loss and bankruptcy may lead to mental incapacity. There is extensive literature on the impact of debt, bankruptcy and business failure on mental health.

I respectfully use the term "incapable person".

Issues are:

i. whether there are laws that allow an incapable person to have their financial affairs dealt with in bankruptcy;
ii. whether a creditor may pursue an incapable person into bankruptcy, or what other means should be engaged; and
iii. how a trustee in bankruptcy is to treat an incapable person who has gone bankrupt;
iv. related issues in corporate insolvency.

i. Laws that allow an incapable person to have their financial affairs dealt with in bankruptcy

That raises the question as to how an insolvent incapable person can go bankrupt, in the case of mental incapacity.

Section 16(1) of the *Trustee and Guardian Act 2009* purports to allow the NSW Trustee to *'(q) sequestrate the estate under the bankruptcy laws*'.

It may also '*(r) take proceedings to cause a company to be placed in liquidation and vote or act by proxy at meetings of creditors or shareholders, whether the company is in liquidation or not*', that is to effect the winding up of the person's company.

The words *sequestrate the estate under the bankruptcy law* do not make sense under current law; only a court can order the sequestration of an estate, under s 52 *Bankruptcy Act.* There may also be Commonwealth Constitutional issues with this State law.

Putting those issues aside, s 16 seems to allow the NSW Trustee to present a bankruptcy petition on behalf of a protected person, as a debtor under s 55 *Bankruptcy Act.* This accords with the apparent intention of s 308(c) of the *Bankruptcy Act* that a person of '*unsound mind*' may act by a person authorised or empowered by law to act for them. The question is whether this may allow such a person to be able to present a petition through another person.

However, it is not possible for a person to present a bankruptcy petition on behalf of another person (the debtor) under a power of attorney: *Orix Australia* v *McCormick* [2005] FCA 1032, 145 CLR 244, despite s 308(d) of the *Bankruptcy Act* which allows a person to act through an agent.

In light of the *Orix* decision, it is not clear that 308(c) would therefore extend to allowing the NSW Trustee to present a debtor's petition in bankruptcy, under s 55 *Bankruptcy Act.*

I am not aware if that course has ever been adopted in NSW.

Note that in old bankruptcy laws, there was a specific provision that such a person "may act by his committee or *curator bonis*": *Bankruptcy Act* 1914 (UK), s 149, *Re James* 12 QBD 332, and earlier UK laws.

WA law

A similar provision to that in NSW exists in WA where under the *Guardianship and Administration Act 1990*, the State Administrative Tribunal can appoint administrators (as financial managers) for people with mental disabilities. The Tribunal can grant one or more of the functions set out in Part A of Schedule 2. One function – number 18 – is *'To sequestrate the estate of the represented person, under the provisions of the bankruptcy laws.'*

Despite the terminology, we understand that on at least two occasions, the WA Public Trustee, as administrator of a person with a mental disability, has successfully presented a debtor's petition for bankruptcy on behalf of that person. See (2011) 23(3) A Insol J 44, *Mental Infirmity and Bankruptcy.*

An incapable person may decide themselves to go bankrupt. Issues around this arose in *Farley v Official Trustee in Bankruptcy* [2011] FMCA 10, a rather unusual case.

A debtor sued his solicitors, claiming that they ought to have taken steps to appoint a manager to look after his financial affairs, under the *Aged and Infirm Persons' Property Act 1940* (SA). He sued for damages for breach of duty of care to him in not ensuring the appointment of a manager; if that had occurred he would not have squandered his money. He then presented his debtor's petition, incorrectly thinking he could continue his claim. It transpired that the claim against his solicitors was for damages for loss of money, not for personal injury, and he was not able to continue the action himself.

Annulment of a bankruptcy based on a claim that the debtor's petition '*ought not to have been presented*' under s 153B of the *Bankruptcy Act* is used by debtors saying they went bankrupt under some misapprehension, though such a claim does not often succeed. His annulment was refused.

Nevertheless, presentation of a debtor's petition without capacity may well be a ground for annulment under s 153B.

ii. Whether a creditor may pursue an infirm person into bankruptcy, or what other means should be engaged

A creditor may secure a sequestration order under s 52 *Bankruptcy Act* from a court against their debtor. This order can be made in default of the debtor's appearance if service is proved. *Vaucluse Hospital Pty Ltd v Phillips* [2006] FMCA 44 involved a sequestration order based on a $5,000 hospital bill where the bankrupt, who was in hospital, was unable to properly manage his own affairs.

Some instances have arisen where the debtor is mentally incapable. That brings into question whether the sequestration order should have been made in the context of a later application for an annulment of the bankruptcy, often on behalf of the person.

In *Owners – Strata Plan No. 23007 v Cross* [2006] FCA 900, a petition was served personally on a mentally disabled debtor and a sequestration order made in her absence.[1] The court took into account matters relevant to determining whether a person is, owing to mental illness, incapable of managing their affairs in respect of the proceedings. It held that she was mentally incapable at the time of personal service of the bankruptcy petition. This constituted a breach of the rules and a defect in the proceedings. Although the sequestration order was effective, it was set aside.

iii. How a trustee in bankruptcy is to treat an incapacitated person who has gone bankrupt

If there is no annulment of the bankruptcy, it is then a matter for the trustee to deal with the person, ideally through their representative. One decision suggests that a trustee may in some cases need to apply for a litigation or other guardian to be appointed if it is apparent

[1] "1. On 9 August 2004 Ms Isabell Jean Cross was bankrupted in her absence on the first return date of a creditor's petition. At the time she was worth more than half a million dollars and had at least $100,000 in her bank account. She owed the applicant, who was her only creditor, little more than $2,000. Now Ms Cross' tutor, a Deputy Protective Commissioner of New South Wales, asks the Court to set aside the sequestration order which made Ms Cross bankrupt".

the bankrupt is incapable, and the person has no-one assisting them: *The Owners of Strata Plan 58041 v Temelkovski* [2014] FCCA 2962.

Also, there may be a lack of co-operation by the bankrupt, and other difficulties in dealing with them, with which the trustee has to deal. A bankrupt has serious obligations to assist the trustee which can be enforced: see for example s 77 *Bankruptcy Act*. However, compliance with those obligations has to be dealt with sensitively and s 77 refers to a bankrupt's "illness or other sufficient cause" as being a reason for non-compliance.

It is sometimes a feature of such bankruptcies that the debtor is in fact solvent; they may have ignored the bankruptcy processes, either willfully, because of some antagonism to the creditor, or unknowingly. Strata plan disputes can lead to these situations.

iv. Corporate insolvency

I do not address issues here in any detail beyond noting the power of the NSW Trustee to '(r) take proceedings to cause a company to be placed in liquidation and vote or act by proxy at meetings of creditors or shareholders, whether the company is in liquidation or not'.

UE & UD v NSW Trustee and Guardian & Guardian [2011] NSWADT 150 involved an incapable person as a company shareholder but we have not located case law as to the incapacity of directors. I would say that similar issues exist to those in personal insolvency, in particular in the case of one director companies. I would anticipate that para (r) would be more effective in the context of the Trustee acting on behalf of a director, where the legal "personal" issues that exist in bankruptcy are less. I also note that some defences in corporate insolvency, for example to insolvent trading under s 588G, are based on "illness or some other good reason": s 588H(4); see also s 588FGB (5) *Corporations Act* 2001.

Contact

As I understand your invitation, it was to alert you to issues that may be relevant to your inquiry. If you would like further information or clarification, please contact me.

Yours sincerely

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Lawyer