Seniors Rights Service

Guardianship Act 1987

Question Paper 3

The role of guardians and financial managers

Chapter 2 Who can be a guardian or financial manager

Question 2.1 Who can be an enduring guardian?

(1) Who should be eligible to be appointed as an enduring guardian?

A person should be eligible to be appointed as guardian if they are any person who has the capacity and skills and who the older person trusts and if they comply with the current legal requirements.

(2) Who should be ineligible to be appointed as an enduring guardian?

A person should be ineligible to be appointed if they are bankrupts, have a criminal record, or are under the age of 18 years.

Question 2.2 Who can be a tribunal – appointed guardian?

(1) What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?

A person should be considered to be appointed a during guardian where they understand their role to act in accordance with section 4 of the Guardianship Act and are motivated to act in the best interests of the older person.

(2) Who should be ineligible to act as a guardian?

A person should be ineligible to be appointed as guardian if they are bankrupts, if they are involved in the care of the person for payment, or if they have a history of criminal activity or under 18 years.

Question 2.3 When should the Public Guardian be appointed?

(1) Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?

The Public Guardian should be appointed in the event of conflict amongst the family that is unable to be resolved and / or there is no trusted person that the older person can choose to have as a guardian due to the older person's circumstances.

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(2) Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?

The Public Guardian should be a guardian of last resort. We refer to section 15(3) of the Guardianship Act 1987 which provides that the appointment of Public Guardian under a continuing guardianship order shall not be made in circumstances in which such an order can be made appointing some other person as guardian of the person. We support this legislative requirement as it benefits the older person to have a friend family member or carer with intimate knowledge of their circumstances where this is possible.

Question 2.4 Should community volunteers be able to act as guardians?

(1) What could be the benefits and disadvantages of a community guardianship program?

It is preferable that family members and close friends of the principal be appointed as the Guardian. The community volunteers might be considered if they fulfilled the criteria that should be applied for appointing a Guardian. SRS has not formed a view about the community guardianship program.

(2) Should NSW introduce a community guardianship program?

We refer to Question 2.4 (1) above.

(3) If NSW does introduce a community guardianship program:

(a) Who should be able to be a community guardian?

We refer to Question 2.4(1) above.

(b) How should community guardians be appointed?

We refer to Question 2.4(1) above.

(c) Who should recruit, train and supervise the community guardians?

We refer to Question 2.4(1) above.

Question 2.5 Who can be a private manager?

(1) What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?

SRS are of the view that where private managers are considered, the test should be sufficiently directive of the type of person, including their skills and background, and the capacity to reduce the risk of maladministration or malfeasance.

(2) Should the Guardianship Act include detailed eligibility criteria for private managers or is the current suitable person test sufficient?

We support that the legislation include a list of those considerations as developed by recent case – law in relation to the appointment of private managers and set out at page 13 of the Question Paper.

(3) Should the same eligibility criteria apply to private guardians and private managers? If so, what should these common criteria be?

We agree with this proposal and refer to question (2) above.

(4) What are the benefits and disadvantages of appointing private corporations to act as financial managers?

The disadvantage of appointed private corporations to act as financial managers is directly related to the potential for the need to make a profit influencing the decisions that the corporation takes, which might not necessarily be in the best interests of the principal.

(5) Should the Tribunal be able to appoint a corporation to be a private manager? If so under what circumstances should this occur?

We would submit that preference be given to a private individual to manage the affairs of the older person under the supervision of the NSW Trustee and Guardian for the reasons referred to in (4) above.

Question 2.6 Should the NSW Trustee be appointed only as a last resort?

(1) Should the Guardianship Act state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?

We agree that the NSW Trustee and Guardian be an appointment of last resort and that family, friends and carers take preference for assessment as suitable private managers under the supervision of NSW Trustee and Guardian. This has the benefit of ensuring the older person is managed by someone in regular contact with them, and has an intimate relationship with them.

(2) If so, how should this principle be expressed in the Act?

The Act should require the Tribunal to assess whether there is a suitable person for appointment of private manager in accordance with the principles referred to above and in the persons best interests. If there is no suitable person and / or extensive family conflict the Tribunal may appoint the NSW Trustee and Guardian as a financial manager of last resort.

Question 2.7 Should the Act include a succession planning mechanism?

(1) Should the Guardianship Act allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?

The principles vies should be taken into account when deciding who should be a Guardian or Financial Manager. The principal should also be asked who else could put forward the view in relation to future needs and that should be taken into consideration as well.

(2) What could be the benefits and disadvantages of such a succession planning mechanism?

The benefit is that the Tribunal gains an insight into the views of persons closest to the older person as to the considerations that they feel are important. The disadvantage is that they could misrepresent the position to meet own motives. Tribunal would need to consider the information in all the circumstances.

(3) When deciding who to appoint, should the Tribunal be required to give effect to the wishes expressed in the succession planning statement?

We refer to our comments in 2.7(1).

Chapter 3

3.1 What powers and functions should enduring guardians have?

(1) Should the Guardianship Act contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?

We believe the current situation is appropriate. However, we would suggest that a guardian not be granted authority to determine who has access to the older person unless there is a specific need to do so.

Should the Guardianship Act contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so what should be included on this list?

There are already some functions and decisions that a guardian cannot perform. We are of the view that the current situation is appropriate.

3.2 Should the Tribunal be able to make plenary orders?

(1) What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?

SRS are of the view that plenary orders do not offer any assistance to the guardian. In terms of helping them understand what their powers and functions are. Therefore we believe more detailed functions would assist better decision making on behalf of the guardian.

We refer to the United Nations Convention Article 12 which provides that all persons be granted "the support they may require in exercising their legal capacity". Consistent with this principal a limited guardianship order with specific functions is preferred.

(2) Should the Guardianship Act:

(a) continue to enable the Tribunal to make plenary orders

(b) require the Tribunal to specify the guardian's powers and functions in each guardianship order, or

(c) include some other arrangement for granting powers?

We refer to our comments in Question 3.2(1) above.

Question 3.3 What powers and functions should tribunal appointed guardians have?

(1) Should the Guardianship Act list the powers and functions that the Tribunal can grant to a guardian? If so what should be included on this list?

We support the current functions that are set out in the Guardianship Act. We would also submit that some further examples of functions set out in the Act would be useful to assist guardians in decision making and help them to understand their role.

(2) Should such a list:

(a) Set out all the powers that a guardian can exercise, or

We refer to our comments in Question 3.3 (1) above.

(b) Should it simply contain examples?

We refer to our comments in Question 3.3 (1) above.

Question 3.4 Are there any powers and functions that guardians should not be able to have?

(1) Should the Guardianship Act contain a list of powers and functions that the Tribunal cannot grant to a guardian?

We are of the view the current situation is appropriate.

(2) If so what should be included on this list?

We are of the view the current situation is appropriate.

Question 3.5 What powers and functions should financial managers have?

(1) What powers and functions should be available to a private manager?

We are of the view that private managers should be required to submit returns at least annually including details as to the financial records of the principal and any other decisions that have been undertaken (such as sale of a home).

(2) What powers and functions should the NSW Trustee have when acting as a financial manager?

We are of the view the current situation is appropriate.

(3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?

We are of the view current situation is appropriate.

(4) Should the legislation list the powers that a financial manager cannot exercise? If so what should be on this list?

We are of the view the current situation is appropriate.

Question 3.6 Should the roles of guardians and financial managers remain separate?

(1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate?

The advantage of keeping them separate is that they represent different skilled areas of decision making and a person can be appointed who has the requisite skills.

(2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?

The benefit would be that there would be one person to make decisions in relation to both areas of decision making thereby simplifying the process, provided the person had satisfied the criteria for both roles.

(3) Should the roles of tribunal- appointed guardians and financial managers remain separate?

We support the current situation. We do not believe that the roles should be combined. We see no objection to the same person having both functions provided that person satisfies the criteria for both roles.

Chapter 4: What decision-making principles should guardians and financial managers observe?

4.1 What principles should guardians and financial managers observe when they make decisions on behalf of another person?

We believe the scope of the fiduciary duty to principal's should be observed. We note that private managers who have been appointed by the principal do not always understand the scope of those principles and the requirements of the role and as a consequence we believe that some sort of education for newly appointed managers should be required.

4.2 Should guardians and financial managers be required to give effect to a persons "will and preferences"?

(1) What are the advantages and disadvantages of the current emphasis on "welfare and interests" in the Guardianship Act's general principles?

We are of the view that alternative decision makers should be required to take the principal's will and preferences into account in making decisions, and that this should not be the only consideration that the decision maker takes into account. For example, where the principal lacks insight into their own condition, their will and preference may not be in their best interest.

Should "welfare and interests" continue to be the paramount consideration for guardians and financial managers?

We refer to our comments in 4.2 (1) above.

(3) What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person's will and preferences?

We refer to our comments in 4.2(1) above.

The advantage of giving effect to will and preference is that it provides for greater autonomy of the older person. The disadvantage is that sometimes will and preference may be difficult to ascertain.

(4) Should guardians and financial managers be required to give effect to a person's will and preferences?

We refer to our comments in 4.2(1) above.

Question 4.3 Should NSW adopt a "substituted judgment" model?

(1) What could be the benefits and disadvantages of a "substituted judgment" approach to decision-making?

We support the structure of "substituted judgment" as set out by the Victorian Law Reform Commission and set out in pages 45 and 46 of the Question Paper.

The advantage of a "substituted judgment" model is that it provides for greater autonomy of the older person by seeking to implement a decision the older person would have wanted based on evidence of what they wanted when they had capacity and current wishes and circumstances. It also provides the protection that the older persons personal and social well being ultimately be protected.

The disadvantage is that sometimes there are barriers to ascertaining an older person's current wishes and barriers to gathering evidence about what the older person wanted when they had capacity. This can be particularly so when relying on evidence of close family members and friends and carers of the older person who are in conflict at the time these factors are sought to be ascertained by a Tribunal.

(2) Should the Guardianship Act require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is "substituted judgment" approach)?

We refer to our comments in 4.3(1).

(3) If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?

We refer to the steps set out by the Victorian Law Reform Commission on page 46 of the Question Paper as to the considerations that should be taken into account when making a decision under a "substituted judgment" model.

Question 4.4 : Should NSW adopt a "structured will and preferences" model?

(1) What could be the benefits and disadvantages of a "structured will and preferences" approach to decision-making?

The advantage is that a person's actual will and preference at the present time could be implemented to the extent that this could be ascertained. The disadvantage is that there can be barriers to determining will and preference as set out in the Question Paper at pg 42 para 4.27.

(2) Should guardians and financial managers be required to make decisions based upon a person's will and preferences?

A guardian and financial manager agency such as Public Guardian or NSW Trustee and Guardian could conduct a trial as to practical aspects of ascertaining the will and preference of a person and how barriers to ascertaining will and preference can be managed.

(3) If so, how would guardians and financial managers work out a persons will and preferences? Should the legislation set out the steps they should take?

Guidelines could be developed based outcomes of a trial conducted as referred to in Question 4.4(2).

(4) What should a guardian or financial manager be required to do if they cannot determine a person's will and preferences?

We are of the view the safety and welfare of an older person should ultimately be the paramount consideration.

(5) Should a guardian or financial manager ever be able to override a person's will and preferences? If so, when should they be allowed to do this?

The guardian and financial manager should be able to override will and preference if the older person's will and preference puts the older person at risk of harm be it either physical emotional psychological or financial.