GUARDIANSHIP

A brave new world or a minefield to step through carefully?

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Robert was admitted to practice 37 years ago. He has worked as a litigation solicitor in Advocate for the whole of that period in diverse areas of work. He has been an Accredited Specialist in Advocacy since 1996 and an Accredited Specialist in Children's Law since 2003.

He has practised almost exclusively in care and care related matters for the last 20 years and has lead him to be involved in Court proceedings for either the Department, parents, children, grandparents and other interveners in the Children's Court, District Court, Supreme Court, ADT and occasionally in the Family Court.

He has prepared and presented various papers related to the care related jurisdiction and various conferences including a number of Legal Aid Care conferences. A number of his papers have been published and can be found on the Children's Law News website of the Children's Court.

'Guardianship' was introduced as a result of the amendments to the *Children and Young Person's (Care and Protection) Act* 1998 as amended. Those amendments which came into effect from 29 October 2015 made a number of changes to the Act but this paper is focused on those that dealt with the introduction of Guardianship as a legal principle and a new form of legal care.

A. The Legislation

1. The relevant pieces of the amended Act that appear to bear upon the issue of Guardianship are:

   (a) Section 10A (the new definition provision for permanent placement principles).

   (b) Section 79A to Section 79C inclusive which deal with specific issues of Guardianship Orders.

   (c) The Regulations to the *Care Act* as amended specifically:

      (i) Regulation 5.

      (ii) Regulations 23B and 23C.

      (iii) Regulation 42A.

B. Guardianship Applications

2. It is the writer's experience that Guardianship applications are not formally made. When the matter reaches the point of a Care Plan the Care Plan will identify that the Department is recommending that a Guardianship Order be made. Often it requires a careful reading of the whole of the Care Plan to divine and understand that that is the relief ultimately sought. Is this the proper way to proceed?

3. Section 79B appears to introduce the need for a formal Application to be made with a number of criteria to be met as to notice so that each relevant party that may be affected by that Application has the opportunity of understanding what is being sought and being heard in respect of it. This is complimented particularly by Regulations 23B and 23C.

4. It is suggested that the better practice would be for a formal Application so that there is clarity and certainty in respect of it and that such document should be filed no later than when the Care Plan is published so that parties are clear and certain of what is being sought and why.

5. It is further suggested that such Application should be supported by an Affidavit identifying and annexing the following relevant information required by the amending Legislation and Regulations:

   (a) The provision of a suitability statement and assessment required under Regulation 23C. It appears for reasons obscured to this author that Regulation 23D which set out in great detail the steps involved in such a suitability assessment has been rescinded. It is suggested however as a guide as to what is required it remains a useful template to understand what should be undertaken. It is not clear whether there are any practice directives within the Department that have replaced or otherwise guide the preparation of such a statement.

   (b) In accordance with Section 79B(8)(c) a copy of any report or reports dealing with issues of health, education and social wellbeing of the child. While that provision appears to provide a discretionary need to include it, it is submitted that there should be an obligation to provide it as basic information necessary to allow the parties and ultimately the Court to determine the appropriateness of the application or not.

   (c) In accordance with the obligations under Section 79B(8)(a) and Regulation 23B a form of consent complying with the Regulation where a child is over the age of 12. The import of that obligation and the construction of the obligations will be the subject of comment a little later.

   (d) Information that addresses the issues raised under Section 79C; while those provisions appear to suggest an antecedent obligation it is suggested that the provision of that information as a basis of all parties in the Court understanding the potential efficacy of the

arrangement and its financial and related implications require it to be provided before the Guardianship Order is approved.

(e) An assessment of the prospective Guardian so that the parties and the Court can ensure its compliance with Section 79A(3)(b).

(f) If the prospective Guardian is not a party to the proceedings then provision of evidence the prospective Guardian has been provided with:

(i) The Application for Guardianship.

(ii) The Affidavit and material forming part of that Application and contained within the Affidavit referred to above.

(iii) A consent document to ensure that the Court is satisfied that the prospective Guardian has had the opportunity of considering and understanding the obligations and responsibilities and implications of a Guardianship Order.

(iv) A copy of the Care Plan.

6. Lest it be thought that confidential information is being provided to a non-party inappropriately under the proposal that I have suggested, it seems to me that publication of information is a necessary matter for any informed consent to be given by the prospective Guardian. It is suggested that it is not embargoed by the *Care Act* itself (see section 105) as it is information provided not to the public at large but to an individual for one reason or another. See: *KF v Parramatta Children's Court and Ors* (2008) NSWSC1131.

See the purposive interpretation by way of analogy applied by Johnstone P in Re: *DFaCS (NSW) and the Coli Children* (2013) NSW CHC5 dealing with Section 104B.

7. It is hoped that the days where a carer had no knowledge or information about what they were taking on and their ability to obtain informed and affective legal and other advice as to its implications have now long ended. Regrettably the writer's experience is that the Department

appears to be loath to publish material to a non-party even though they are directly affected by the proceedings and are invited to give informed consent to a certain course of action including Guardianship. Perhaps it may be a matter which should be the subject of particular practice direction or note by the Court itself to overcome any residual concern or apprehension as to the inappropriateness or legality of providing that information to the prospective Guardian.

8. In terms of obtaining an informed consent and the provision of a document to record it I attach a document that I have prepared and require to be returned to me by caseworkers where I act for the Department. It of course has to be personalised to the case at hand. Whilst wider than dealing with Guardianship in my view a document in like kind dealing with the prospective Guardian's informed consent and understanding is a necessary ingredient of the information that needs to be before the Court before it can approve the order sought from it.

C. Consent of the child or children to the Guardianship Order

9. Section 79A(3)(d) and Regulation 23B along with the form created under it, (Form 45) require the informed consent and agreement by any child over 12 or older capable of giving consent of the provision of the consent to the proposed Guardianship Order. The requirement to give consent in the form of the Legislation raises a number of questions for legal representatives that act for the child or children whose consent is sought. The provisions appear to require the following to occur:

(a) Not less than 14 days before any consent to Guardianship is executed in accordance with Form 45 that the Child or Young Person has had explained the nature and effect of the Guardianship order in language and in manner that the Child or Young Person can understand.

(b) The requirement that there is some evidence that the Child or Young Person is capable of giving consent. The basis for such evidence is not identified under the Act or Regulations.

(c) The provision of the information does not have to be provided by a legal representative at arm's length to the Department or the agency which may be supporting the carer (or not) in seeking the Guardianship Order, indeed there is an encouragement that that relationship forms a necessary basis for providing such advice (See Regulation 23B(2)(a)).

(d) That the form is executed by the child and the person that provided the advice in accordance with Regulation 23B(1)(c).

10. On its face there is no obligation that the Child or Young Person seeks and obtains advice from their direct legal representative who would have been appointed at an earlier stage in the proceedings in accordance with Sections 99, 99A, 99C & 99D.

11. Regulation 23B(1)(c)(iii) provides an entitlement of the child to obtain independent legal advice but no requirement that such advice is obtained as a precursor to any informed consent being given.

12. Therefore prima facia the direct legal representative may play no role at all in regard to the provision of certification of or ultimately approval of the child to the Guardianship Order.

13. Both the section itself and the Regulation promulgated to support it also includes a requirement that there be an assessment of the capacity of informed consent to be given by the Child or Young Person. It is not clear whether this represents a new test to be applied or should be seen in light of the provision of Section 99C. The difficulty with utilising that provision as a presumption in favour of capacity is that it is focused on the legal representative's assessment of capacity not a third party. If the legal representative has no part to play in respect of the provision of advice and the certification of consent, it would appear that that presumption does not apply and that independent evidence may be required.

14. One would have thought it would have been simpler to incorporate the presumptions under Section 99C and to require the provision of independent legal advice to come from the legal representative not from

some third party. The certification could then be given by the legal representative (if that person felt comfortable) and the Court would have greater confidence that the consent is an informed one based not only on general information provided by a relevant officer of the Department or agency invested with case management but independently by the representative appointed by the Court to act for the Child or Young Person.

15. Whilst specific provision is made for children over 12 to be informed, consulted and give consent, there appears to be no reflection of consultation or response for children under 12. As those familiar with this jurisdiction would be aware chronological age does not necessarily spell insight, understanding and capacity to reflect the consequences of decisions. Many 10 or 11 year olds may display a greater understanding and insight about their circumstances and deserve to be consulted. Certainly Section 10 reminds us all of a principle of participation with the qualifications contained within that provision. It would seem therefore imperative that children under 12 who may not be required to give their consent should be consulted and their views expressed on the issue of guardianship and its consequence. This should be an aspect that is traversed in the Affidavit in Support.

D. <u>What other orders can be made with a Guardianship Order</u>

16. By the amending Legislation that came into force on 29 October, a number of provisions of the Act have been qualified as not applying to guardianship orders. Those orders so affected include:

(a) Section 73, undertakings required to be given by any party including the prospective Guardian.

(b) Section 74.

(c) Section 76.

(d) Section 82.

17. One provision that has not been affected by that change is contact orders under Section 86. Both in its terms and by explicit acknowledgement

under Section 79B 9(b) the power of the Court to make a contact order at the same time as a Guardianship Order is retained.

18. However the amending Legislation have limited the capacity for the orders to be made at least initially to a period of 12 months (see Section 86(12). It would appear however that the capacity to seek variation of contact orders by agreement pursuant to Section 86A remains a viable mechanism for varying or extending any agreement in respect of such contact orders or indeed by a party utilising the general provisions under Section 86. That provides now a standalone basis for an application to seek a longer period of time where the earlier contact order has expired (see Section 86(7)).

19. Regrettably the amending legislation did not seek to address the deficiencies under the pre-existing Legislation of the Court having no power, except by way of granting leave under Section 90, to revisit the issues of contact orders if there has been a failure to comply by the party exercising parental responsibility. Nevertheless the standalone effect of Section 86 may encourage parties to consider seeking a minimum contact order notwithstanding their limitations (see Re: *Liam* (2005) NSWSC75 and the potential limiting effect on the develop and growth of contact. However the existence of an order which can be reviewed by way of further application on a standalone basis and otherwise be the subject of a Section 90 Application clearly suggests that the formulation of a contact arrangement on the basis of minimum contact may be a matter that should be seriously considered on behalf of a parent or indeed on behalf of a child.

20. Any Guardianship Orders will be captured and form part of a Care Plan to be approved by the Court which will contain the minimum expectations as to how contact will be affected and reviewed. It is apparent that a failure to comply with that Care Plan in a material way can form a basis for relief under Section 90.

E. Review of Guardianship Orders

21. A party dissatisfied with the decision of the Children's Court in making a Guardianship Order retains the right to seek an appeal to the District Court of such a decision under Section 91.

22. This is explicitly acknowledged under Section 79A(6). In that regard attention is drawn to the provisions of Regulation 5(d). This appears to suggest that if there has been a material failure under the Guardianship Order as encapsulated in the Care Plan to provide contact to a parent or other substantive figure that prima facia this would represent a basis for a significant change in itself.

F. Consequences for the prospective Guardian if Order made

23. The making of a Guardianship Order subject to the qualifications referred to above significantly empowers the Guardian without many of the limiting or reviewing factors under other provisions of the Legislation that otherwise apply to the exercise of parental responsibility.

24. The antithesis of that empowerment is it removes by way of support for the Guardian a number of the features and benefits arising from the Woods Special Commission Inquiry. These, inter alia, have recently been rolled out with the provision of NGOs to provide case management for children and support for parties including those who would now be captured by a Guardianship Order. It is apparent that upon such an event occurring the provision of case management either through an NGO or otherwise is to be removed (See Regulation 42A). This is further encapsulated in various documents published by the Department of Family and Community Services on its website as to the meaning and effect of Guardianship Orders and as to the removal of what can be significant and substantial supports.

25. While nothing has been formally published it is apparent that there is a strong policy basis for the Department to now as a matter of practice to provide to any party seeking to litigate on matters under a Guardianship Order leave under Section 69ZK to do so. Once that leave has been given a party is at liberty to go to the Family Court to seek to register the order and to otherwise seek relief for, inter alia, ultimately to contact. In

doing that the Department has made it clear it will rarely intervene and rarely if ever provide support to the Guardian.

26. The practical consequences of Guardianship Orders that need to be fully thought through both by the Department in seeking it and a Guardian in accepting it is its consequences. Often the orders are sought in circumstances where the Guardian is a grandparent or relative.

27. It is the experience of those that work in this jurisdiction that the arrangements for carers particularly familiar carers, is often in a circumstance where they have to make a decision to support the child and not the parent. This can have its own bitter and ongoing consequences. In those circumstances one would query the appropriateness and utility of a Guardianship Order with its consequent requirement to deal and meet with the parent in respect of arrangements for contact and related issues without any intervening buffer support from case management by way of NGO or ultimately the Department. This is normally done pursuant to orders made as to the aspects of parental responsibility either time limited or until 18 being held jointly or singularly by the Minister such as contact.

28. My own recent experience is that there does not appear to be a thought out considered position as to the consequences of seeking a Guardianship Order both by the Department which I think bears the greater onus in ensuring it is an order that can work. Often the Guardian either because they take an optimistic view about the future and a hope that the current difficulties will be resolved and/or do not receive appropriate independent legal advice prior to consenting or agreeing to those orders, simply agree.

29. One way of providing a bridge in respect of dealing with those issues before the Guardian is fully exposed to having to deal with a parent is thought to be allocating parental responsibility in the usual way to the Minister and prospective Guardian under an order under Section 79 with a Guardianship Order to follow at the expiration of that order. However, it is suggested that that is not an order that can be made given that it is in conflict with the legislative imperative under Section 79 that such an order

cannot be made if a Guardianship Order is made. It is arguable that an order for Guardianship to take effect in the future is not affected by such provisions. The legislative framework appears to suggest that a Guardianship Order once made whether now or prospectively in the future cannot be impeded or affected by allocations of parental responsibility or other consequent orders under the Act prior to it taking affect.

30. This is an area that remains unclear and probably will have to be attested in the Supreme Court at some time in the future.

G. Conclusions

31. The topic of this discussion raises alternate propositions. Perhaps the answer is that it is a combination of each. It is a both a brave new world but one littered with dangers unless properly considered and worked through. It is for that reason that it is suggested that Guardianship Orders should be the subject of a formal Application and supported as such and that the other matters that I have raised should be attended to to ensure that a thought out considered position is adopted by all parties before the order is made. The consequences for children in exposing carers to undue pressure and the breakdown of the placement as a consequence is something that all should try and seek to avoid.

CHILDREN & YOUNG PERSONS (CARE AND PROTECTION) ACT 1998

CHILDREN'S COURT RULE

IN CHILDREN'S COURT
AT

NO.

IN THE MATTER OF AN APPLICATION TO MAKE AN ORDER UNDER S 71 OF CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998

IN THE MATTER OF:

Child

AND

Child

CARER'S AGREEMENT TO CARE PLAN

I/we are the carers for **(child's name and DOB)**. I/we have been provided by officers of the Department of Family and Community Services with a draft of the Care Plans which I/we understand are to be filed and placed before the Children's Court as to their recommendations as to the long term care arrangements for the child/children.

Prior to receiving it I/we had the opportunity of discussing the general plan and proposal with officers of the Department. Having received the document we were advised that I/we should do the following, which I/we have done:-

1. That I/we should read and carefully consider the contents of proposals within the plans.

2. That I/we understand and agree to the obligations and responsibilities placed upon us set out in the Care Plan.

3. That I/we indicate our position is either to agree or not agree to the proposed allocation of parental responsibility during the period in which the child/children are in my/our care.

4. That I/we was/were advised and indeed encouraged to seek our own independent legal advice on all of the forgoing matters so that we could properly reflect my/our position both to the Department and if necessary to the Court.

5. That I/we was/were advised that I/we have a right if so minded to express my/our views and wishes if they are contrary to the Care Plan and the views of the Department either in writing and/or in person by attending the Children's Court when the matter is next before the Court and have been told by the Department of that date.

6. Having received all of that information and been given the opportunities to obtain my/our own independent legal advice I/we are satisfied with the Care Plan and are happy to accept the obligations and responsibilities that are placed upon me/us under it. I am/we are happy to act in accordance with the allocation of parental responsibility and to provide the long term care for the child/children as proposed under it.

Dated:

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