

It's my money and I'll do what I want: having to make decisions about someone else's money



People make particular decisions about what to do with their money for many different reasons, some of them non-sensical to others. Yet it is a fundamental expectation of each individual that 'it's my money and I'll do what I want' with it. Focussing on the role of the Protective Commissioner, Trevor Lester discusses the often difficult issues involved in managing the finances of individuals who require assistance and support, and ensuring their rights are protected and safeguarded in the process.



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For some people, the fundamental expectation, if not fundamental right, of looking after their own finances can no longer be exercised by them because of their decision-making incapacity. When making decisions about someone else's money, the 'someone else' is the individual whom (generally) a Court or Tribunal has determined to be incapable of managing some or all of their own financial affairs, and who has been made subject to a Financial Management Order appointing another person to take on this responsibility.

In New South Wales the 'other person' can be the Protective Commissioner of New South Wales or a Private Manager.

Financial Management Orders

Under New South Wales legislation, a Financial Management Order made under the *Protected Estates Act 1983* appointing the Protective Commissioner of New South Wales as financial manager, may be made by the New South Wales Supreme Court; Guardianship Tribunal; Mental Health Review Tribunal; by Magistrates visiting psychiatric hospitals or units; or by Voluntary Request from an inpatient at an appropriate unit.

The New South Wales Supreme Court and the Guardianship Tribunal can alternatively appoint a Private Manager (such as a family member or friend, a professional financial manager or organisation providing financial or trustee services) to carry out this role and its responsibilities and obligations under the supervision of the Protective Commissioner. Such supervision includes endorsing a management plan, auditing accounts annually, and providing advice and general support. Private Managers are responsible for not only managing the person's financial affairs, but also for ensuring that funds are available to support the person in a lifestyle appropriate to their wishes, resources, previous lifestyle and other relevant considerations.

Such an Order empowers the

Protective Commissioner or Private Manager to manage all or some of the affairs of persons declared incapable of handling their own financial affairs due to impaired decision-making capacity.

The need for such Orders may arise as a consequence of the individual being no longer capable of managing his or her own financial affairs due to the insidious effects of the aging process or Alzheimer's on their cognition, or following the impact of an acquired brain injury through a motor vehicle accident, chronic drug or alcohol abuse.



Such a need may also arise as a consequence of chronic or episodic psychiatric disorders suffered by the individual, or due to an intellectual or developmental disability. In some cases, an Order may be made due to the breakdown of informal support systems (for example, the aged parent/s of an adult with a severe intellectual disability may no longer be healthy enough or otherwise now able to provide the same input and support that once was able to be provided). In other cases, a more formal mechanism for managing the individual's finances may be considered necessary due to the level of conflict between the individual and their family members or service providers about financial issues, or when the individual has been identified as possibly having been, or likely to be, at significant risk of financial exploitation or abuse.

Yet, in other cases, an Order may be precipitated by the need for some key decision or action to be taken, such as

pursuing a property settlement claim or common law damages claim, or entering into legal contracts for the purchase or sale of a major asset such as the individual's principal place of residence to finance their re-accommodation in an aged care hostel or nursing home.

Each year, approximately 960 Orders appointing the Protective Commissioner as financial manager and approximately 480 Orders appointing Private Managers are made. The Protective Commissioner currently directly manages the financial affairs of some 7,200 clients and supervises the management by Private Managers of the financial affairs of a further 1,800 individuals.

The primary causes associated with the decision-making incapacities of these 9,000 people involve:

- The effects of ageing (i.e. age-related disability inclusive of Alzheimer's) 15.6%
- Acquired Brain Injury 14.0 %
- Psychiatric/Mental Health Problems 45.1%
- Intellectual/Developmental Disability 17.4%
- Other (not specified) 7.9%

Overall there is an increasing number of people requiring more formal assistance to manage their own affairs as a result of a variety of factors, including the trend away from institutional care towards supported accommodation in the community; the ageing of the Australian population; and advances in medical science and technology which has decreased morbidity rates and correspondingly increased longevity.

Not unexpectedly, such growth has been, and no doubt will continue to be, uneven. It has been greatly influenced by, for example, the closure of some large disability services residential centres in the mid 1980s and re-location from and enhanced restrictions on access of people with psychiatric or mental health problems to psychiatric hospitals and residential centres. It has also been influenced by an increased attention to standards of care provided by boarding houses for people with

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disabilities and the re-accommodation into the community of individuals with disabilities in the next wave of change which occurred in the mid 1990s. There has also been a greater emphasis on the development and provision of community support services for aged persons and people with a range of disabilities which has endeavoured to ensure that more restrictive (of the individual) regimes of care involving nursing homes and other institutional care models are the 'last resort' option.

Agreements between levels of government such as the *Commonwealth/State Disability Agreement 1993* which sought to rationalise and standardise responsibilities for disability service provision, and the *Commonwealth/State Home and Community Agreement (1986)*, aimed to ensure that a much greater menu of essential community support services such as respite care, transport, food, home help and community nursing were made available to aged persons and people with disabilities. Other legislative changes such as the *Disability Services Act 1993 (NSW)* have enshrined into law the basic human rights shared by people with disabilities and every other member of the community, and also contributed to an increasing focus on protecting and safeguarding the rights, interests and expectations of community members who may be vulnerable to exploitation, abuse or neglect.

An Overview of the Role of the Protective Commissioner

It should be recognised that issues of person and property for any individual are often inseparable, with welfare and lifestyle interests closely tied to economic security and financial management. Traditionally however, a financial manager when making decisions would effectively separate them and give emphasis to one or more of the following obligations and approaches:¹

- to preserve the assets of the person and protect that person's property (from the risk of theft, exploitation,

inadvertent loss, destruction or waste to the extent that a personal disability prevents them from protecting themselves against those risks);

- to accumulate and increase the person's assets and/or income;
- to ensure that the person's assets and income are used to enable the person to live a lifestyle appropriate to their need for comfort, nutrition and safety;
- to ensure that the person's assets and income are preserved for the benefit of their beneficiaries;
- to enable the person to use their excess assets and income in whatever way that person chooses, (provided that sufficient is preserved to ensure the safety, accommodation, health and other essential needs and it should be added, to ensure that the needs of the person's dependants are met); and

- to act as a reasonable person would in the management of their own affairs (without negligence, recklessness and according to the standards of a reasonably competent manager, without taking into account the circumstances of the represented person).

“... there is an increasing number of people requiring more formal assistance to manage their own affairs ...”

The search for least restrictive or intrusive alternatives for a person whose financial affairs are being managed would, to all intents and purposes, be negated if such obligations and approaches were today given highest priority as the objective of financial

management.

Thankfully the law has moved on from the traditional principles, duties and task descriptions it had created over the centuries for financial managers. Today's laws and practices are much more person-centred (rather than asset and income-centred).

The primary aim of the Protective Commissioner is to maximise each of its client's financial security by managing their estates, balancing their immediate and long-term needs and protecting them from financial exploitation. This is achieved by consulting with the clients, their families and other interested parties, and by drawing on a wide range of advice and recommendations from disability, legal, financial planning, taxation, property and other specialists, and by taking on a broader advocacy role concerning support services and public policy

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initiatives that will benefit such persons.

The Office of the Protective Commissioner (OPC) invests in and operates a range of managed funds – comprising client funds held in trust – which are able to maximise returns to clients consistent with legislative security requirements. The OPC operates on a commercial basis with operating costs being met from fees and commissions charged for services.

Although the legislative terminology is now somewhat dated, for those individuals whose financial affairs are directly managed by the Protective Commissioner, the substitute decision-making powers provided under the *Protected Estates Act 1983 (NSW)* (‘the Act’) are both substantial yet specific.

What they effectively means in real terms for the person subject to the financial management order, is that the services provided by the OPC (which are provided on a competitive fee basis) include for example:

- protecting the person’s assets and legal rights (including the bringing or defending of actions);
- facilitating the buying and selling of a home;
- organising an adequate cash flow for day-to-day needs;
- dealing with financial and legal institutions;
- managing a business;
- making investments; and

“Substitute decision-makers must not impose their own personal values and beliefs ...”

- monitoring the person’s quality of life.

All of the above are far-reaching powers and their exercise is principally only ameliorated through the context within which such substitute decision-making takes place, and the implicit and explicit control mechanisms which guide their exercise. Such control mechanisms are thankfully significant in terms of both current and future transparency, accountability and decision review mechanisms.

The OPC uses a range of legal, financial, specialist disability and other specialist resources to meet each client’s financial needs. Financial management decisions are made through consultation with clients and their family or carers, with the aim of maintaining a good quality of life for the person and their

dependents, commensurate with the person’s financial resources, expectations and other relevant factors.

The fundamental philosophy of the OPC is to manage the financial affairs of the person in the person’s overall best interests, having regard to all aspects of their life, especially to their immediate and long-term needs, available assets, previous lifestyle, family and other commitments. When making substitute decisions the views of the person are closely considered and given effect if at all possible and appropriate. The views of other stakeholders (for example, family, friends, case-workers) are also considered to a greater or lesser extent depending on the individual circumstances.

In New South Wales the vast majority of financial management orders

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appointing the Protective Commissioner as financial manager are made by the Guardianship Tribunal established under the *Guardianship Act 1987* (NSW). The principles in this Act have been supplemented by additional decision making guidelines issued by the Protective Commissioner. Further, Section 9(1) of the *Disability Services Act 1993* requires a public authority such as the Office of the Protective Commissioner to further the *Principles and Applications of Principles* in its service provision (such as financial management) to people with a disability.

Conclusion

The task of anyone making substitute decisions for any other person is not an easy one. This may particularly be the case when money is involved as it can allegedly bring the 'best' and the 'worst' out of people.

Some decisions will be simple to make and some decisions will be extremely complex and will require advice and recommendations from a range of experts such as disability specialists; financial planners; property, taxation and legal experts to ensure that the decision taken is a fully informed and considered one, as well as one which meets the requirements of a range of applicable legislative provisions.

No significant decision should ever be made by a substitute decision-maker who doesn't know the person on behalf of whom they are making the decision. This means such a decision-maker needs to identify, through direct contact with the person and other significant persons (family, friends, service providers) who such a person is, what they think, desire, wish, expect, their beliefs and where they have been in terms of their life experiences and opportunities.

The views of the person must be given due and full consideration and unless there are clear and unequivocal reasons why their wishes should not be given effect (for example, the wishes of the person are simply not affordable or the person would suffer unreasonable

financial harm by having their decision implemented), such wishes should be implemented.

Each significant (to the concerned person) substitute decision should be documented, along with the reasons or rationale and supporting information (for example, a financial forecasting projection of the immediate and longer-term impact of a particular decision) underpinning the decision. The decision and the reasons such a decision was made must be communicated to the concerned person and his or her significant other persons.

Transparent and documented substitute decision-making is one thing – the opportunity for any person or aggrieved other to request that any decision taken be reviewed or to appeal such a decision, is another. All decisions should be reviewable, by the substitute decision-maker of first instance, and if the complainant is not satisfied with the review determination, by successively higher authorities within the concerned authority and/or appealed to an external authority such as the Administrative Decisions Tribunal or Office of the Ombudsman (these latter bodies have been recommended to assume appellat jurisdiction with respect to decisions taken by the Protective Commissioner).

Substitute decision-makers must not impose their own personal values and beliefs, however strongly held, in making decisions affecting another person, nor make any decision which effectively and unnecessarily and unjustifiably infringes one or more of the basic human rights of the person that they are serving.

In the end, the substitute decision-maker must look past purely financial 'best interests' and make decisions on the basis of each individual person's 'overall best interests'. This is not an easy or often thankful task. **PL**

Footnote:

¹ Creyke, 1995; Richards, 1993.

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