FINANCIAL MANAGEMENT AND THE RIGHTS OF PEOPLE WITH DISABILITY: A FINE BALANCE

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> There is no room in the legislation for benign paternalism. A person is allowed to make whatever decision [he or] she likes about her property, good or bad, with happy or disastrous effect, so long as [he or] she is capable.[1]

I INTRODUCTION

There is an inherent tension in the State's protective jurisdictions between the need to protect the vulnerable from exploitation and harm, and the desire to maximise a person's autonomy and minimise intrusions on their ability to make their own decisions. The financial management arena is certainly no exception to this rule, and courts and tribunals are consistently called upon to make difficult decisions regarding the amount of autonomy in decision-making that should be allowed to persons with impaired capacity to manage their financial affairs.

The purpose of this article is to examine the financial management regime in New South Wales ('NSW') as regulated by the *Guardianship Act 1987* (NSW) ('*Guardianship Act*'). Financial management orders affect a large number of people in NSW. In 2009–10, the financial affairs of 12 540 people were managed by either a private manager or the independent statutory manager, the NSW Trustee and Guardian ('NSWTG').[2] In 2009–10, 1 741 new financial management appointments were made by the Guardianship Tribunal alone.[3]

Despite the underlying need to ensure protection of the vulnerable, it is the premise of this article that the autonomy of individuals should not be interfered with lightly in the civil arena. As Palmer J said in *FA v Protective Commissioner*:[4]

> the liberty of the subject is not to be interfered with and restricted under guise of the *Guardianship Act 1987* (NSW) or the *Protected Estates Act 1983* (NSW)

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1 *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 (3 May 1999) [17] (Young J) ('*Re C (TH)*').

2 NSW Trustee and Guardian, *Annual Report 2009–2010* (2010) 8.

3 Guardianship Tribunal, *Annual Report 2009/2010* (2010) 41.

4 [2009] NSWSC 415 (18 May 2009).

> unless there is a strong and cogent reason for doing so, directly founded upon the demonstrated mental incapacity of the subject to care, or make appropriate decisions, for himself or herself.[5]

It is the central thesis of this article that despite the judicial pronouncements of Palmer and Young JJ above, the case law and statutes in NSW have not achieved the right balance between protection of the vulnerable and their autonomy of decision-making, and in fact impose excessive restrictions on those individuals who demonstrate an inability to manage aspects of their financial affairs. This paper will juxtapose the work of the NSW Guardianship Tribunal and the *Guardianship Act* in the context of financial management orders with the work of that Tribunal and Act in their other main area, that of adult guardianship, and will seek to highlight the unjustifiable differences between the two approaches. It will be argued that the NSW adult guardianship regime is to be preferred as a less restrictive approach to substitute decision-making, as opposed to the financial management regime, which is inflexible and fails to take account of alternative forms of decision-making support.

It is the further premise of this article that the standard placed upon individuals seeking to revoke financial management orders is unduly high, and the imposition of a reverse onus upon protected persons seeking to remove themselves from the financial management system is unwarranted.

A The International and Domestic Context

This article will examine these contentions within the context of the NSW system, and also by reference to the *Convention on the Rights of People with Disabilities*.[6] The Convention was ratified by Australia on 17 July 2008 and marked the first major international convention recognising the rights of people with disability. The Convention contains eight general principles which are encompassed in the text of the agreement:

a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
b) Non-discrimination;
c) Full and effective participation and inclusion in society;
d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e) Equality of opportunity;
f) Accessibility;
g) Equality between men and women;

5 Ibid [11].

6 *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) ('the Convention').

h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[7]

Importantly for the purpose of this article, article 12 of the Convention on equal recognition before the law has direct relevance to financial management laws. Article 12 provides:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The inclusion of this provision in the Convention marks an important step in recognising disability rights and, in particular, a shift towards supported decision-making in lieu of substitute decision-making. The compliance of the NSW financial management regime with the Convention will be discussed throughout this article.

Following ratification of the Convention, the Council of Australian Governments ('COAG') released the National Disability Strategy for 2010–20,[8] with the aim of creating a 10-year plan committed to 'a unified, national approach to improving the lives of people with disability, their families and carers, and to providing leadership for a community-wide shift in attitudes'.[9] The

7 Ibid art 3.

8 Council of Australian Governments, *2010–2020 National Disability Strategy* (2011) ('National Disability Strategy').

9 Ibid 3.

Strategy aims to establish a policy framework for governments Australia-wide, and to improve services to people with disability.

Importantly, policy directions contained within the National Disability Strategy are aimed towards improving access to justice for individuals with disability, removing societal barriers and maximising opportunities for independence. Of particular relevance to this article are the following policy directions:

- Removal of societal barriers preventing people with disability from participating as equal citizens;
- Access to justice for people with disability; and
- A sustainable disability support system which is person-centred and self-directed, maximising opportunities for independence and participation.[10]

B The Case for Reform

This article will argue that the NSW approach to financial management strays from the principles underlying both the Convention and the National Disability Strategy, by maintaining barriers which prevent people with disability from participating in economic life by managing their own money. The impact of such barriers should not be overlooked, and the stress and anxiety associated with dealing with a statutory body whenever one wishes to spend money should not be underestimated, particularly for those who suffer from mental illnesses and cognitive impairments.

I argue that the financial management system in NSW adopts an approach whereby capacity to manage one's financial affairs is seen as static and unchanging, unless the protected person can prove otherwise. Such an approach runs counter to the accepted wisdom that capacity is fluid, and subject to change over time, depending largely on an individual's life circumstances at any given time.[11]

This article seeks to make the case for reform of the current system. Part II contains a comparison between the financial management and adult guardianship systems in NSW, with the aim of highlighting the unjustifiable inconsistencies between the two approaches. Part III critically assesses the case law in NSW and the standard required when applying to revoke financial management orders.

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10 Ibid 37–8, 48.

11 See for example Ben Fogarty, 'Guardianship and Administration Laws Across Australia' (Intellectual Disability Rights Service, 2009) 11 <http://www.idrs.org.au/_pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf>; Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (2010) 28–30.

II LEGISLATIVE BACKGROUND: A COMPARISON OF THE FINANCIAL MANAGEMENT AND ADULT GUARDIANSHIP REGIMES IN NSW

The focus of this article is on the work of the Guardianship Tribunal and financial management orders which are made outside of the context of involuntary detention, pursuant to the provisions of the *Guardianship Act*.[12] Financial management orders made by the Guardianship Tribunal represent the vast majority of financial management orders made in NSW. In 2009–10, 92.8 per cent of new financial management orders in NSW were made by the Guardianship Tribunal.[13]

Financial management orders may also be made by the Mental Health Review Tribunal ('MHRT') pursuant to the provisions of the *NSW Trustee and Guardian Act 2009* (NSW). Under that system, the MHRT must consider a person's capacity to manage their affairs in the context of a mental health inquiry where a person has been ordered to be involuntarily detained in a mental health facility. In those circumstances, if a person has been involuntarily detained and if the MHRT is satisfied that a person is not capable of managing their affairs, their estate must be subject to management.[14]

In addition, the Supreme Court retains an inherent *parens patriae* jurisdiction with respect to people with incapacity to make financial management orders in its protective jurisdiction.[15] The Supreme Court may make orders on its own motion or on the application of anyone with sufficient interest in the matter, if it is satisfied that a person is incapable of managing his or her affairs.[16]

The purpose of this Part is to juxtapose the work of the Guardianship Tribunal in the financial management arena, and the legislative provisions that govern that work, with the Tribunal's other main area of work, that of adult guardianship.

A The Making of Financial Management Orders

Section 25G of the *Guardianship Act* governs the making of financial management orders by the Guardianship Tribunal. The section lists three criteria that must be satisfied before the Tribunal can make a financial management order:

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12 For a detailed discussion of the operation of financial management orders in the context of the Mental Health Review Tribunal, see Fleur Beaupert et al, 'Property Management Orders in the Mental Health Context: Protection or Empowerment?' (2008) 31 *University of New South Wales Law Journal* 795.

13 NSW Trustee and Guardian, above n 2, 9. Other sources include the MHRT, the Supreme Court and by a Magistrate in the context of a mental health hearing.

14 *NSW Trustee and Guardian Act 2009* (NSW) s 44.

15 For a detailed discussion of the Supreme Court's *parens patriae* jurisdiction, see Timothy Bowen and Andrew Saxton, 'In the Interests of Another: How Far Does Parens Patriae Jurisdiction Extend?'(2006) 14(9) *Australian Health Law Bulletin* 107.

16 *NSW Trustee and Guardian Act 2009* (NSW) s 41.

a) the person is not capable of managing his or her affairs, and
b) there is a need for another person to manage those affairs on the person's behalf, and
c) it is in the person's best interests that the order be made.

If these criteria are satisfied, the Guardianship Tribunal may make financial management orders in respect of the entire or part of the person's estate, and may either appoint a suitable person, such as a close relative, or the independent statutory body, the NSWTG, as manager of the estate.[17]

The scope for making financial management orders of limited duration under the *Guardianship Act* is narrow. Given that the concept of capacity is fluid and a person's capabilities vary over time, it is argued that the inability of the Guardianship Tribunal to make final orders of limited duration is a major shortcoming in the legislation. Section 25H of the *Guardianship Act* enables the Guardianship Tribunal to make interim financial management orders for a period not exceeding six months pending further consideration of the personss capability. However, once a final financial management order is made by the Guardianship Tribunal, there is no scope in the legislation to make that order of limited duration.

The *Guardianship Act* does allow for the Tribunal to make orders that a financial management order be reviewed within a specified time,[18] however it does not appear that this provision is relied upon frequently by the Tribunal. Moreover, the section appears to be directed to reviewing the financial manager, rather than reviewing the making of the orders. Even if the Tribunal invokes section 25N and orders a review of the financial management order itself, a reverse onus applies, and the protected person must establish that he or she has regained capacity. This means that once a financial management order is made, the assumption is that it will continue, until evidence is provided to contradict the original finding that a person falls within the criteria specified in section 25G.

The Guardianship Tribunal does not publish statistics on the number of financial management orders it makes with a requirement for review after a specified period, however the statistics that are published suggest that this is infrequent. In 2009–10, for example, only 88 Tribunal-ordered or own motion reviews of financial management orders were conducted, in contrast to the 1741 financial management orders made by the Tribunal in the same period.[19] This figure would include those reviews the purpose of which is to review the manager rather than the existence of the order itself.

17 *Guardianship Act* s 25M.
18 *Guardianship Act* s 25N(1).
19 Guardianship Tribunal, above n 3, 41, 44. Separate statistics are not available for the number of own motion reviews versus Tribunal ordered reviews for this period.

B Revocation of Financial Management Orders

Other than in situations where the Guardianship Tribunal orders a review of a financial management order within a specified period, there are two ways in which financial management orders may be reviewed:

(1) At the Tribunal's own motion; or

(2) On an application by the protected person, the NSWTG, the manager of the estate or any other person who has a genuine concern for the welfare of the protected person.[20]

The majority of applications to revoke financial management orders fall within the latter category. In the 2009–10 financial year, 88 financial management reviews were undertaken because of Tribunal orders or on the Tribunal's own motion, versus 346 requested reviews.[21] Statistics are not available which show who is making the applications to revoke financial management orders in the 'requested review' category.

The Guardianship Tribunal can revoke financial management orders in one of two situations: first, where the Tribunal is satisfied that the protected person is capable of managing his or her affairs; or second, where, even though the Tribunal is not satisfied that the person is capable of managing his or her affairs, the Tribunal considers that it is in the best interests of the protected person that the order be revoked.[22]

It is important to note that in an application to revoke financial management orders, the onus of proving that the protected person is capable of managing his or her affairs, or of proving that his or her best interests justify revocation of the orders, lies with the applicant in the proceeding, usually the protected person.[23] In an own motion review, despite the proceeding being instituted by the Tribunal, the onus remains with the protected person. This reverse onus differs from the position in adult guardianship matters, which are discussed in more detail below. This legislative requirement has the effect that no continuing evidence is required as to a person's incapacity to manage their affairs in order to maintain a financial management order, so long as the protected person cannot establish on the balance of probabilities the opposite, that he or she *is* capable of managing their affairs.[24]

It is the contention of this article that this reverse onus creates inherent unfairness in the system of financial management orders. As will be discussed in more detail below, the review structure of financial management orders stands in stark contrast to that of guardianship orders, in which continuing orders take effect only for a specified term, with reviews required at the end of that period ('end of term reviews'). Although protected persons can apply separately for a

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20 *Guardianship Act* ss 25N, 25R.

21 Guardianship Tribunal, above n 3, 44. These figures include reviews by the Guardianship Tribunal of the appointed manager.

22 *Guardianship Act* s 25P.

23 *Re GHI (a protected person)* (2005) 221 ALR 589, 594 [22].

24 Ibid 594 [23].

review of guardianship orders within the term, a review will occur even if no application is made and the Guardianship Tribunal will need to be satisfied anew that guardianship orders should be made in the circumstances.

In the case of financial management orders, however, even if the Tribunal makes an order for a review after a period of time, the reverse onus applies. This means that unless evidence is presented that satisfies the Tribunal that the protected person is capable of managing their affairs, or it is in their best interests that the order be revoked, the order will continue. It is argued that this system is unfair to people under the financial management system and places undue burdens on them in seeking to revoke financial management orders. Given that both financial management and adult guardianship procedures should be based upon the presumed capacity of a person, there is no justification for the inconsistency between the two systems.

C Making of Adult Guardianship Orders

The Guardianship Tribunal's other main area of work involves that of adult guardianship. The requirements for making guardianship orders differ from those for financial management orders. Section 14 of the *Guardianship Act* provides that the Tribunal may make guardianship orders if it is satisfied that the person is 'a person in need of a guardian'. 'A person in need of a guardian' is defined as a person who, because of a disability, is totally or partially incapable of managing his or her person.[25] In order to determine whether a person is 'a person in need of a guardian', the Guardianship Tribunal must consider two things: (1) whether the person has a disability and (2) whether because of that disability the person is totally or partially incapable of managing his or her person.[26]

The meaning of 'disability' is defined in section 3(2) of the *Guardianship Act*:

> In this Act, a reference to a person who has a disability is a reference to a person:
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> (a) who is intellectually, physically, psychologically or sensorily disabled,
>
> (b) who is of advanced age,
>
> (c) who is a mentally ill person within the meaning of the *Mental Health Act 2007*, or
>
> (d) who is otherwise disabled, and
>
> (e) who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.

25 *Guardianship Act* s 3.

26 *IF v IG* [2004] NSWADTAP 3 (New South Wales Administrative Decisions Tribunal Appeal Panel) (13 February 2004) [24].

This definition encompasses people of advanced age, a growing area of applications to the Tribunal. In the 2009–10 financial year, just under 50 per cent of applications to the Guardianship Tribunal involved people over the age of 75.[27] In the same period, approximately 49 per cent of applications involved people suffering from dementia.[28]

In addition to being satisfied that a person has a disability and is incapable of managing their person, the Guardianship Tribunal retains discretion as to whether or not to make guardianship orders. The Tribunal must consider the views of the person the subject of the application; their spouse, if any, and if the relationship between the person and spouse is close and continuing; and the person, if any, who has care of the person. The Tribunal must also consider the importance of preserving the person's existing family relationships, their particular cultural and linguistic environments, and the practicability of services being provided to the person without the need for the making of a guardianship order.[29]

Although not specified in the legislation, guardianship orders confer one or several functions on the appointed guardian. The different functions allow the guardian to make decisions about the protected person's health care; accommodation; medical and dental treatment; and services.

The structure of the legislation suggests that adult guardianship is seen as a measure of last resort. Only when the Tribunal can be satisfied that a person's disability restricts their major life activities to a significant extent, *and* the provision of services by other means is impracticable, will the Tribunal make guardianship orders committing the control of a person's lifestyle decisions to a guardian. These requirements are more onerous and specific than the requirements contained in the *Guardianship Act* for the making of financial management orders. In determining whether to commit a person's financial estate to management, the Tribunal's focus is on the person's capacity, needs, and best interests. Whilst these may involve the consideration of the person's views, their family relationships, and whether a person's existing support structures are sufficient to meet their needs, the Tribunal is not required to specifically have regard to those factors. This means that the Tribunal would not err by failing to consider those factors, and such a failure would not be a ground for review in an appeal from a decision of the Tribunal.

It is argued that by referring specifically to these factors, the *Guardianship Act*'s approach to adult guardianship is empowering, and engenders a functional approach to a person's care needs. In contrast, the financial management system is restrictive, and encourages a formulaic approach to the making of orders which focuses on whether a person falls within specified criteria indicating their ability to manage their own money. In the case of financial management orders, the Tribunal's focus is on whether a person's capabilities meet a particular standard, an outcomes-based approach which emphasises the route to making the 'best'

27 Guardianship Tribunal, above n 3, 38.
28 Ibid 39.
29 *Guardianship Act* s 14(2).

decision about a person's money. However, in the case of guardianship orders, the focus on meeting a person's needs is considered in the context of their community and support network, and the possibility of achieving functional outcomes without making guardianship orders must be taken into consideration.

D Revocation of Guardianship Orders

Although applications can be made to revoke guardianship orders, guardianship orders are automatically reviewed at the end of their term, often removing the necessity of applying to revoke the orders. Initial guardianship orders must not exceed one year in length and subsequent orders must not exceed three years in length.[30] The *Guardianship Act* contains provisions allowing these terms to be extended in limited circumstances. In the case of initial orders, the Tribunal may extend the length to three years, and in the case of a subsequent order, to five years. However, in order to do so, the Tribunal must be satisfied that the protected person has permanent disabilities, it is unlikely that the person will become capable of managing his or her person, and there is a need for an order of longer duration.[31] The scope for a longer period without review is therefore limited and designed to accommodate the care needs of people with severe disabilities. The Act also contains provisions for temporary orders not exceeding 30 days, which may only be renewed once.[32]

At the end of the term of the guardianship order, the Tribunal must conduct a review. At the review, if the orders are to continue, the Tribunal must satisfy itself anew that the criteria for the making of guardianship orders set out in section 14 are satisfied. Should they not be satisfied, the guardianship orders will come to an end.

E Analysis

It is argued that the disparity in the legislative provisions which govern the making of guardianship and financial management orders are without basis. The provisions are inconsistent on two levels: first, in the factors which must be considered in making orders; and second, in the procedures for maintaining and revoking orders.

1 *The Making of Orders*

Turning first to the making of orders, the Guardianship Tribunal's approach to the making of guardianship orders under the *Guardianship Act* encompasses less restrictive practices than the approach to making financial management orders. The adult guardianship process highlights the importance of the views of the protected person and his or her support network, and the possibility of providing the necessary care and decision-making support without making

30 *Guardianship Act* s 18(1).
31 *Guardianship Act* ss 18(1A), (1B).
32 *Guardianship Act* ss 18(2), (3).

orders. In this sense, guardianship orders appear to be a last resort, to be made when all other mechanisms have failed. Moreover, by giving the Tribunal discretion as to whether or not to make orders, following consideration of, amongst other things, the person's current care arrangements, the legislation allows room for informal mechanisms and supported decision-making practices outside the formal system of substituted decision-making. This approach reflects the guiding principles set out in section 4 of the *Guardianship Act*, which indicate that the freedom of decision and freedom of action of people should be restricted as little as possible, and people should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs.

In addition to falling in line with section 4 of the *Guardianship Act*, the adult guardianship procedures outlined above comply with Australia's international obligations under the *Convention on the Rights of People with Disabilities.* As indicated in the introduction to this aricle, article 12 of the Convention signifies an important recognition of supported and informal decision-making processes. The article has been interpreted as requiring States to only impose decision-making structures that are proportional and tailored to a person's specific circumstances.[33] In ratifying the Convention, Australia declared that it interprets article 12 as allowing for supported or substitute decision-making processes 'only where such arrangements are necessary, as a last resort and subject to safeguards'.[34]

Supported decision-making encompasses mechanisms which allow an assisted person to maintain a higher level of control of their decision-making than substituted decision-making. Rather than an independent manager stepping in to take over total control of a person's finances, supported decision-making allows the protected person to maintain a continuing involvement in their finances. One option is to authorise the protected person to make decisions, either alone or with a co-decision-maker, in conjunction with other support mechanisms. Thus supported decision-making could include a mechanism whereby a protected person's decisions are ratified by a co-decision-maker, or where a co-decision-maker takes on a greater role in advising and counselling the person as to appropriate choices.

Whilst not enshrined in the legislation, the adult guardianship procedures within the *Guardianship Act* allow for supported decision-making structures by conferring on the Guardianship Tribunal sufficient discretion and scope to take into account the sufficiency of existing measures to assist a person in making important life decisions. In contrast, the financial management provisions of the *Guardianship Act* do not contain the same requirements. Not only does this

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33 See, eg, Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 151, 156–9.

34 United Nations Treaty Collection, Chapter IV: Human Rights, 15; Convention on the Rights of Persons with Disabilities, Australia: Declaration (6 December 2010), 3 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>.

legislative failure create internal inconsistencies within the *Guardianship Act* by contradicting the general principles set out in section 4 of the Act, it also arguably falls short of Australia's obligations under the Convention. In addition to the obligations set out in article 12, article 19 of the Convention emphasises the importance of facilitating independent living and involvement in the community for people with disability, including by providing support services to allow inclusion in the community and prevent segregation. The financial management provisions appear to bypass these steps by failing to require the Tribunal to take into account whether existing mechanisms are sufficient to support a person, and move straight to the appointment of a financial manager when a person's capacity falls short of certain status-based and outcomes-based criteria. Given that the financial manager appointed is in most cases a statutory body, the NSWTG, this approach arguably denies individuals the opportunity to explore other supported decision-making options before the making of an order, thereby removing their ability to live independently in the community.

It is also submitted that the structure of the independent statutory financial manager, the NSWTG, introduces further difficulties within this already restrictive system. Between 55 to 63 per cent of people under financial management orders at any time have as their financial manager the NSWTG.[35] In 2009–10, the NSWTG managed the financial affairs of approximately 9500 people.[36] Difficulties arise in the system implemented by the NSWTG to manage the estates of protected persons, and their ability to respond to persons with impaired capacity.

The NSWTG does not operate on a system of case managers, whereby each protected person is appointed a financial manager. Instead, a protected person is allocated to a 'client service team' which responds to their inquiries. Disability rights lawyers and advocates have highlighted a number of problems with this system and argue that the lack of individualised service results in poor performance and service delivery by the NSWTG. In particular, they argue that the use of client service teams leads to no particular person being responsible for clients; slow responses to clients, or non-responsiveness from officers; an unwillingness to spend time with clients and understand their needs; long delays in paying bills; and lack of consultation with clients and their families.[37]

35 NSW Trustee and Guardian, above n 2, 8

36 Ibid.

37 See Intellectual Disability Rights Service, Submission No 3 to Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 21 August 2009, 7–8; Maria Karras et al, 'On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW' (Research Report, Access to Justice and Legal Needs Series, Law and Justice Foundation of NSW, May 2006) 51–2. See also Public Bodies Review Committee, Parliament of New South Wales, *Personal Effects: A Review of the Offices of the Public Guardian and Protective Commissioner* (October 2001) 48, for a discussion of the NSWTG's predecessor organisation, the Protective Commissioner.

The stress and frustration that these practices can cause should not be underestimated.[38]

Ideally, these shortcomings would be addressed by the organisation and additional funding would be allocated to the NSWTG in order to properly address the needs of persons under financial management orders. However, given that these difficulties continue to occur, it is even more important for the Guardianship Tribunal to take into account additional factors and existing arrangements in determining whether or not to make financial management orders, to ensure that a person's independence is maintained as much as possible. The legislative deficiencies are easily remedied by introducing amendments to the financial management provisions of the *Guardianship Act* which mirror the requirements imposed on the Tribunal in making guardianship orders. Such an approach has been adopted in the Western Australian, Queensland, Victorian and Tasmanian legislation, which require the relevant Tribunal to consider whether a person's needs will not be adequately met by other less restrictive means, or without making an order, before a financial manager ('administrator') is appointed.[39] It is noted that this approach was endorsed and specifically recommended by the NSW Legislative Council Standing Committee on Social Issues in its 2010 report into substitute decision-making but has not been adopted by the legislature.[40]

An amendment to the NSW legislation of such a nature would also bring NSW in line with its obligations under the National Disability Strategy. It is difficult to see how the current financial management regime in NSW, which fails to require the Guardianship Tribunal to take account of a person's own views or existing arrangements before making financial management orders, complies with the Disability Strategy's underlying principles which, like the *Convention on the Rights of People with Disabilities*, indicate the importance of 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.[41] The Disability Strategy also indicates that the views of people with disability are 'central' to policies, programs and services which affect their lives.[42] The NSW financial management regime, by failing to adopt least restrictive practices, is inconsistent with these goals and with key principles within the National Disability Strategy.

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38 See, eg, ABC Radio National, *Protective Commissioner Changes* (9 July 2007) ABC Life Matters <http://www.abc.net.au/rn/lifematters/stories/2007/1971719.htm>.

39 *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Administration Act 1990* (WA) s 4; *Guardianship and Administration Act 1986* (Vic) s 46; *Guardianship and Administration Act 1995* (Tas) s 51.

40 Legislative Council Standing Committee on Social Issues, above n 11, 85 (Recommendations 11 and 12).

41 *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) art 3; Council of Australian Governments, above n 6, 22.

42 Council of Australian Governments, above n 8, 23.

2 *Maintaining and Revoking Orders*

Turning to the second legislative shortcoming highlighted so far in this article, unlike in the case of guardianship orders, financial management orders in NSW are of unlimited duration and there is no obligation on the Tribunal to undertake a review in the absence of an application. Moreover, the provisions of the *Guardianship Act* unfairly impose a reverse onus on the protected person in seeking to have financial management orders revoked. There is no justification for this practice, and the absence of a presumption of capacity removes a protected person's equality before the law. It is submitted that reform should be undertaken to bring the financial management provisions of the *Guardianship Act* in line with the guardianship provisions, such that financial management orders can only be made for a specified term. If this procedure were adopted, the Guardianship Tribunal would have to undertake a review of the orders at the end of the term, or the orders would lapse. In the review process, the Tribunal would need to be satisfied anew that the making of financial management orders was appropriate. Again, such reform was recommended by the NSW Legislative Council Standing Committee on Social Issues in its 2010 report on substitute decision-making, but this reform not been undertaken.[43]

By imposing a presumption of incapacity on persons under financial management orders, the current system is also inconsistent with Australia's obligations under the *Convention on the Rights of People with Disabilities*[44] and NSW's obligations under the National Disability Strategy.[45] Such discrepancies are also not reflected in the laws of other jurisdictions. In Victoria, there is no distinction in the way that guardianship and financial management orders are treated. Both must be reassessed within 12 months of making the order, unless the Tribunal orders otherwise, in which case a reassessment must occur within three years.[46] In Queensland and Western Australia, guardianship or financial management ('administration') orders must be reviewed at least every five years[47] and in Tasmania, guardianship and administration orders expire at the end of three years.[48]

The distinction between financial management and guardianship in NSW seems to assume that a person is inherently less capable of managing their money than they are of making decisions about lifestyle-related factors. Whilst it is implicit in the guardianship provisions of the Act that a person may regain capacity to make lifestyle decisions or put in place support mechanisms that remove the need for a formal guardian, the lack of review mechanism for

43 Legislative Council Standing Committee on Social Issues, above n 11, 62 (Recommendation 2).

44 See article 12(2): By imposing a different standard on individuals subject to financial management than those who manage their own money, the *Guardianship Act* removes the equality before the law of those people with disability under financial management orders.

45 Policy Direction 2 in the National Disability Strategy aims to 'remove societal barriers preventing people with disability from participating as equal citizens': COAG, above n 8, 37.

46 *Guardianship and Administration Act 1986* (Vic) s 61.

47 *Guardianship and Administration Act 2000* (Qld) s 28; *Guardianship and Administration Act 1990* (WA) s 84.

48 *Guardianship and Administration Act 1995* (Tas) ss 24, 52.

financial management orders presumes that once found to be incapable of managing one's affairs, one is incapable forever. Such an approach also overlooks simple mechanisms which can be put in place to assist people in managing their money without the need for a formal financial manager, such as direct debits and other electronic banking systems, as well as the Centrepay deduction scheme managed by Centrelink to pay for basic needs such as rent and electricity.

On a practical level, disability advocates have also emphasised the unfairness of the reverse onus and the difficulties it causes for a person under financial management orders. They note that there are significant difficulties for a protected person in establishing that he or she has capacity to manage his or her finances without practical evidence of such, however the system leaves no room for supported decision-making or financial independence once financial management orders are made.[49] Once an order is made for the management of a person's affairs, the difficulties highlighted above in dealing with the NSWTG create barriers to a protected person maintaining involvement in decisions about their financial affairs. Moreover, applications to revoke financial management orders are more likely to succeed where a person has expended money on medical reports and/or legal representation. In circumstances where the person is opposing the continued appointment of the NSWTG, there is an inherent conflict in the NSWTG authorising such expenditure.[50]

These difficulties indicate a strong need for reform of the current system of financial management orders. Reform is necessary in order to ensure equality before the law of those whose ability to manage their financial affairs is in some way impaired, and to reflect the well-accepted mantra that capacity is not static and can vary over time. Moreover, absent any change to the current laws, the NSW financial management regime falls short of Australia's international requirements under the *Convention on the Rights of People with Disabilities*.

III CAPACITY AND FINANCIAL MANAGEMENT ORDERS: WHAT STANDARD?

Having examined the differences between the financial management and adult guardianship regimes in NSW, this article will now turn to an analysis of the tests that are applied in making and revoking financial management orders. It is argued that the case law in this area is inconsistent and leads to difficulty in interpretation by the tribunal of fact, the Guardianship Tribunal, and the review tribunal, the Administrative Decisions Tribunal. In addition, the case law imposes a standard upon a person seeking revocation of a financial management order which is unduly high and therefore limits a person's ability to establish

49 Blake Dawson Pro Bono Team, Submission No 25 to Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 18 September 2009, 14.

50 Ibid.

their capacity and re-exercise control over their finances. This approach runs counter to the underlying aims of the Convention and the National Disability Strategy which seek to ensure maximum participation for people with disability in economic life.[51]

A Capability of Managing Affairs

The question of capacity and what one's capability to manage one's affairs entails has been considered in detail by the Supreme Court of NSW. The seminal case is *PY v RJS*,[52] which involved consideration of the issue of capacity under the *Mental Health Act 1958* (NSW) ('*Mental Health Act*'). Under the *Mental Health Act*, a person who sought an order for his or her discharge had to show that he or she was not 'a mentally ill person'. The case law at the time provided that the definition in the Act of 'mentally ill person' required the satisfaction of three criteria, namely:

(a) That the person was suffering from a mental illness; and

(b) That a consequence of that illness was that he or she required care treatment or control for his or her own good or in the public interest; and

(c) That a further consequence of that illness is that he or she is, for the time being, incapable of managing his or her affairs.[53]

In this context, Powell J expounded the following test which has since been used as the benchmark in financial management cases:

> It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:
>
> (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
>
> (b) that, by reason of that lack of competence there is shown to be a real risk that either:
>
> i. he or she may be disadvantaged in the conduct of such affairs; or
>
> ii. that such moneys or property which he or she may possess may be dissipated or lost; it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.[54]

Whilst the test in *PY v RJS* is not a substitute for the statutory test in section 25P of the *Guardianship Act*, the test has been broadly accepted and has been referred to as 'the classic statement of the meaning of the term "incapable of managing his affairs"'.[55]

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51 *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) art 3(c); Council of Australian Governments, above n 8, 48 (Policy Direction 4.1).

52 [1982] 2 NSWLR 700 ('*PY v RJS*').

53 Ibid 701.

54 Ibid 702.

55 *FA v Protective Commissioner* [2008] NSWADTAP 36 (18 June 2008) [9].

At first blush, the test appears reasonable: presumably it is important for a tribunal, in determining whether a person should retain control of their finances, to have regard to their ability to manage their day-to-day affairs and needs, and the risk of their exploitation or disadvantage as a result of their financial vulnerability. However, it is argued that this test has been expanded to an unnecessary degree, such that the tribunal of fact now judges not only a person's ability to deal with 'ordinary routine affairs', but also the more complicated affairs that may come their way. By extending the test to include such affairs, the risk is that the Tribunal will focus on whether a person will make the 'best' decision, and whether they have made or will make mistakes about more complex aspects of their financial affairs, as opposed to judging their capacity or capability to make everyday decisions.

An example of the extension of the test of capacity is seen in the decision of Young J in *H v H,*[56] where he stated:

> However, when looking at that test, the ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people's affairs are more complicated than that, and the ordinary affairs of mankind involve at least planning for the future, working out how one will feed oneself and one's family, and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills.[57]

The same point was made by Windeyer J in *OM v MN:*[58]

> The ordinary affairs of man does not just mean going down to the local shop and buying ordinary household goods, it means being able to manage ordinary household funds and ordinary investments and it does involve the ability not only to understand that advice ought to be obtained for the investment of a large amount of money but to be able to properly consider that advice.[59]

On the basis of Justice Young and Justice Windeyer's statements above, it appears that the first limb in Justice Powell's test is not in fact limited to 'the ordinary routine affairs of man', but the affairs of man which enable a person to feed themselves and their family, earn money, look after capital, invest money, and so on. It is hard to see how this was what was envisaged by Powell J when he enunciated the test in *PY v RJS*, yet it is these criteria that are used today to judge whether a person should be allowed to manage their own financial affairs.

1 *Pensioner versus Millionaire: What Test Applies?*

The expanded test becomes particularly problematic when considering its impact on people of different incomes and with different sized estates. Consider the case of a pensioner who receives, on average, a regular $650 allowance each fortnight from Centrelink. He or she may have very little money or assets in their estate, but can rely on a regular income through the pension. As such, the

56 (Unreported, Supreme Court of New South Wales, Young J, 20 March 2000).
57 Ibid 7–8.
58 *OM v MN* [2008] NSWSC 36 (1 February 2008).
59 Ibid [8].

pensioner's everyday, routine affairs generally extend to budgeting, on a fortnightly to monthly basis, for the basic necessities of life – rent, food, transport, electricity, etc. They do not, therefore, extend to dealing with investments, working out how to generate income or looking after capital, as suggested by Young and Windeyer JJ. In judging their capacity to manage their financial affairs, the Tribunal thus has a much narrower frame of reference by virtue of the fact that the person's affairs are inherently less complicated.

In contrast, hypothetical person number two has a more complex estate, owning a house and savings of approximately $300 000. He or she may have limited capacity to work because of their impairment, or may work on and off. Therefore, their ability to preserve their estate may impact upon their future financial wellbeing. Applying the propositions put forward by Young and Windeyer JJ above, a Tribunal should turn their attention to the person's ability to manage the more complex aspects of this estate, including investment, capital return and financial planning over the longer term. Whilst person two may be able to manage their money sufficiently well to be able to pay for the same basic necessities as the pensioner mentioned above, this may be insufficient to ground a finding of financial capacity on the tests suggested by Young and Windeyer JJ. Therefore in *OM v MN*, where MN's estate was significant and MN expressed a desire to invest part of the estate in a real estate business, the Court looked beyond his ability to manage 'ordinary, routine affairs' such as providing for himself and his family. Indeed there was no dispute that MN had been in reasonably regular employment, had been able to provide for his wife and four children, and had saved money responsibly.[60] Instead, however, the Court considered MN's success in his current lawn mowing business, and took into account factors such as the arrangements he had in place for collecting GST in determining whether he was capable of managing his affairs under the first limb of the test.

Is it fair to judge these two types of people so differently because of the differences between their estates? That is, should a tribunal judge a pensioner's capacity to manage their affairs more leniently because they have less complex interests than person two who has much more at stake? Should a more complex estate result in a higher standard being imposed?

It is the contention of this article that it is inherently unfair to impose different standards on different individuals on the basis of the size and complexity of their estate. By doing so, the law creates a moving target and a subjective standard which is both difficult to apply and understand. Moreover, it risks finding a person incapable where they lack the necessary life experience or education to deal with more complex affairs, although they are quite capable of dealing with more simple, day-to-day affairs. It should be emphasised that many people across society lack the ability to deal effectively with complex financial affairs, and may fritter away large sums of money if given the opportunity. In *OM v MN*, the fact that MN did not understand the necessity of registering for

60 *OM v MN* [2008] NSWSC 36 (1 February 2008) [9].

GST could simply be an indicator of his lack of business acumen or education. Such characteristics are not unique to persons with disability and do not necessarily demonstrate a lack of capacity. As such they should not be used to test whether a person should or should not have control of their finances.

In addition, a further ground of criticism of the Supreme Court's current approach, as highlighted by the decisions of Young and Windeyer JJ, is that it runs contrary to previous NSW case law which specifically disavows the subjective approach demonstrated by the contrasting approaches taken to persons one and two. Unlike NSW, Victoria *has* adopted a subjective approach to capacity, whereby a multi-millionaire with complex affairs would be more likely to be declared incapable than a pensioner without any property interests.[61] Pursuant to that approach, a person is judged by whether they are able to manage their affairs as they exist in actuality. The NSW Supreme Court declined to follow this approach in *EMG v Guardianship and Administration Board of Victoria*,[62] yet the decisions of Young and Windeyer JJ come very close to the subjective approach without specifically adopting it or discussing any justification for departing from previous NSW case law.

Similarly, in *Re GHI,*[63] Campbell J appeared to go behind the decision in *EMG*, without specifying as much, by stating that

> once the particular plaintiff shows that he or she wants to engage in a particular type of activity, there is occasion for the court to enquire whether the person has the capacity to deal with the type of routine affairs of man which are likely to arise in that type of activity.[64]

In essence what this means is that once a person with a complex estate expresses a wish to engage some aspect of that estate, he or she will be judged by reference to their ability to succeed in that particular activity. If a millionaire wishes to invest money on the stock exchange, he or she will be judged by virtue of their ability to do so. Yet arguably, such activities do not constitute 'the ordinary affairs of man' and therefore sit squarely within the subjective Victorian test, which has not been adopted in NSW. The broadening of the test represents a curtailment of the rights of persons with limited capacity, by imposing a moving standard which is both difficult to define and to satisfy.

2 *Application of the Test in Proceedings to Revoke Financial Management Orders*

It is argued that the unfairness of the current approach adopted by the courts is compounded when an individual makes an application to revoke financial management orders. The reason for this is that the more complex a person's affairs, the higher the standard by which they will be judged in determining whether they have capacity to manage their affairs.

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61 See *Re MacGregor* [1985] VR 861.
62 [1999] NSWSC 501 (28 May 1999) ('*EMG*').
63 (2005) 221 ALR 589.
64 Ibid 615.

In the context of an application *for* financial management orders, this judicial reasoning is somewhat easier to apply; practically, the Tribunal will be able to look at recent past behaviour to determine whether a person can manage his or her estate, whatever its complexity. However, in the context of revocation of orders, the tests expounded by the Supreme Court impose a difficult burden for a person whose money has been managed by an independent manager. As stated above, it is difficult for a person under financial management orders to demonstrate his or her ability to manage more complex affairs when they lack the opportunity to practice those skills. In the NSW jurisdiction, no system of assisted decision-making exists, leaving only a formal process of substitute decision-making once a person is deemed incapable. This means that once financial management orders are made, there is little, if any, opportunity to demonstrate one's abilities to manage financial affairs, particularly those more complex affairs to which the case law refers. In practice, the Tribunal therefore has little choice but to look to historic behaviour to judge present capacity, despite the fact that capacity may well vary over time.

In several cases before the courts, the protected person's estate has included a lump sum which has been obtained through an award of compensation, often in personal injury cases. Financial management orders have often been made following the award of compensation.[65] The concern that is raised is that the protected person risks losing the compensation sum by reason of their incapacity. Again, the difficulty in these cases is that once a protected person seeks to re-establish their capacity, they will have no past experience to point to which demonstrates their ability to deal with the larger sum of money. The individual may well have capacity to manage ordinary day-to-day affairs, such as paying rent, bills and so forth, however this may not satisfy the tribunal of fact when there is also a large sum to consider. The subjective approach adopted by the courts combined with the reverse onus results in a difficult task for a protected person seeking release from financial management orders. In contrast, were an objective approach adopted in which the tribunal of fact focuses on the truly 'day-to-day' affairs of a person, the standard becomes more achievable.

This problem draws on the original tension referred to in this article between the need to protect the vulnerable versus the desire to maximise the independence of people with disability. There is no doubt that there is an important public interest in protecting a vulnerable person's finances from depletion, particularly as it may otherwise fall to the state to support a person financially. However, it is argued that if other evidence such as medical reports suggest that a person has regained the capacity to make his or her own financial decisions, a tribunal or court should not be drawn into the 'benign paternalism' warned against in *Re C (TH)* (discussed below) by judging the adequacy of the decisions they will make if given control of their finances, even if this means that their estate be diminished.

65 See, eg, *Re C (TH)* [1999] NSWSC 456 (3 May 1999); *Re GHI* (2005) 221 ALR 589.

3 *Risk of Loss or Dissipation of Funds*

The second aspect of Justice Powell's test in *PY v RJS* looks at the risk of dissipation or loss of an individual's funds should an order for financial management not be made. How this limb of the test should be applied was considered by Young J in *Re C (TH)*.

In *Re C (TH)*, C had been seriously injured in a motor vehicle accident in 1985. As a result, C had received a substantial amount of compensation in 1990. Following the award of damages, C's estate was committed to management by the Protective Commissioner, the predecessor organisation of the NSWTG.

At the time of C's application to revoke the financial management orders, Young J noted that very little of the compensation money was left after a property had been purchased for C. If an allowance at the current rate continued, C would have sufficient money to cover her until 2003. A preclusion period prevented her from receiving social security benefits before 2001, therefore it was of some consequence if C's money dissipated or was lost. At the time of the application, C expressed a wish to take charge of her money to invest it in a noodle business.[66] There was some concern about C's ability to so invest her money and whether such a venture would be successful.

In deciding to allow the application to revoke the orders, Young J expressed the view that although the case was 'borderline',[67] it was not 'a question of whether the Protective Commissioner or somebody else could manage the affairs of the applicant better, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated'.[68] Justice Young warned against the temptation of benign paternalism in making decisions in a case such as this one. Importantly, Young J stated, '[a] person is allowed to make whatever decision she likes about her property, good or bad, with happy or disastrous effect, so long as she is capable.'[69]

The ratio of *Re C (TH)* suggests that the two limbs of Justice Powell's test in *PY v RJS* are distinct and should be considered sequentially. That is, the tribunal of fact should first consider whether or not a person is capable, on the basis of their capacity to manage the ordinary routine affairs of a person. If the person is found not capable on that basis, the tribunal of fact then turns to the second limb, to determine whether a person, *by reason of their incapacity*, may lose or dissipate their funds. Justice Young made clear that should a person be found to have capacity under the first limb of the test, then the decisions they make, good or bad, must be respected. It is not for the Court to then interfere with the decision-making of a person who has passed the test of capacity on the sole basis that the decisions taken may result in the loss of funds, and are considered subjectively to be 'bad' decisions.

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66 *Re C (TH)* [1999] NSWSC 456 (3 May 1999) [5]–[6].
67 Ibid [7].
68 Ibid [10].
69 Ibid [17].

This approach is to be commended as it is strongly argued that a person should not be judged on the quality of his or her decisions when he or she is able to manage their routine affairs. Again, it must be noted that poor decision-making about money is not a quality unique to persons of impaired capacity. The fact that a tribunal would not make the *same* decision as the protected person is not sufficient reason to warrant a finding of incapacity.[70]

However this approach and the test set out by Young J in *Re C (TH)* has again been circumvented in more recent Supreme Court decisions. In the cases of *Re GHI* and *OM v MN,* outlined above, the Supreme Court has indicated that the test of capacity under the first limb involves a consideration of whether a person is able to manage the 'routine' affairs of investment, budgeting for the future, and generating income. Such an approach necessarily involves a judgment about the quality of decisions that a person makes about those affairs.

If the approach in *Re GHI* had been applied to C in *Re C (TH)*, it is difficult to see how she would have been found capable. Rather than first considering whether C was able to manage day-to-day affairs in order to determine her capacity, as was done by Young J, the Court would have simultaneously considered C's ability to invest her money in a business, C having expressed the intention to do so, while considering her ability to deal with ordinary, routine affairs. Therefore the quality of her decision-making about such a venture and the risk of loss of her funds would have been considered under the first limb of Justice Powell's test of capacity. The result is a circular test: *Re C (TH)* indicates that a person can make any decision, good or bad, so long as they are capable, however *Re GHI* and similar cases dictate that the quality of one's decisions about more complex matters must be examined in determining capability. This approach leaves no room for Young J's approach in *Re C (TH)* and imposes an unduly high standard.

Such circularity leads only to confusion. The result is unfortunate at two levels. First, it is difficult for the Guardianship Tribunal, a tribunal with lay members, to determine the appropriate standard to impose upon an individual, and the test becomes vague and uncertain. Second, the lack of clarity in the case law and the presence of conflicting judicial pronouncements render any appeal of a Guardianship Tribunal decision problematic, as it is difficult to point to any error of law.[71]

It is the contention of this article that the legislation must be reformed to bring clarity to the current uncertainty. It is further argued that the judgment of Young J is *Re C (TH)* is to be preferred, so that the tribunal of fact does not stray

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70 Such an approach was endorsed by the NSW Legislative Council Standing Committee on Social Issues in its 2010 report: see Legislative Council Standing Committee on Social Issues, above n 11, 63. Recommendation 3 states that 'the NSW Government pursue an amendment to NSW legislation in which the issue of capacity in relation to decision-making is raised ... to include a statement to the effect that a person is not to be presumed to lack capacity simply because they make a decision that is, in the opinion of others, unwise.'

71 Appeals from the Guardianship Tribunal to the Administrative Decisions Tribunal ('ADT') are on errors of law only, unless leave is given by the ADT: *Administrative Decisions Tribunal Act 1997* (NSW) s 118B.

into the territory of judging the quality of a person's decisions rather than their capacity to make those decisions. It should not be the role of the Guardianship Tribunal or any branch of the State to judge whether a person's decisions about their money are the 'best' decisions or whether a financial manager can make a 'better' decision.

B Best Interests

The second basis upon which the Guardianship Tribunal can revoke financial management orders is where, even though the Tribunal is not satisfied that the person is capable of managing his or her affairs, the Tribunal considers that it is in the best interests of the protected person that the order be revoked.

In *Re R,*[72] an appeal from a decision of the Guardianship Tribunal making financial management orders, Young J considered the meaning of 'best interests' in section 25G of the *Guardianship Act.* Having noted that it is difficult to find a good definition of this term, Young J went on to state that '"best interests" must include the welfare, health and well-being of the person in a wider sense than is suggested by protection from neglect, abuse or exploitation'.[73]

His Honour ultimately concluded that '[w]hat is in the interests of the incapable person under the general cases has been taken to mean what is for the benefit of the lunatic personally and not for his family or his friends or his estate'.[74] That is, the question of 'best interests' in both sections 25G and 25R of the *Guardianship Act* should be considered as distinct from the consideration of the person's estate and what is in the interests of the estate. Thus, questions of dissipation of funds and so on that are considered under the question of capacity should not arise under the 'best interests' test.

The decisions published by the Guardianship Tribunal are limited and it is therefore difficult to conduct any analysis of the way in which Justice Young's decision in *Re R* has been applied by the Tribunal. The published decisions of the Tribunal do not indicate any consideration of *Re R*, but also do not deal in depth with the question of the protected person's 'best interests' in the context of revocation of financial management orders. It is therefore not proposed to explore this issue in any detail, other than to say that the approach set out by Young J in *Re R* is commendable and should be followed.

C The Need for Another Person to Manage Those Affairs: The Missing Step

As stated above, section 25G of the *Guardianship Act* contains three criteria for the making of a financial management order: capacity; best interests; and the 'need for another person to manage those affairs on the person's behalf'. Section 25R, which governs the revocation of financial management orders, does not

72 [2000] NSWSC 886 (17 August 2000).
73 Ibid [35].
74 Ibid [37].

however contain a requirement that financial management orders be revoked if there is no longer a need for such orders to continue.

It is argued that this gap results in a significant shortcoming in the legislation. By failing to facilitate the revocation of financial management orders on the basis that a need no longer exists, the legislation fails to account for the situation where an individual has set up support mechanisms and supported decision-making structures which obviate the need for a formal financial manager. Again, with the extensive electronic banking, direct debit, and other mechanisms which exist today, it is indeed possible for an individual who lacks capacity to manage their money without a substitute decision-maker. Often, an individual may require some assistance in establishing such a system, in which case there may be an initial need for a financial manager. However once those systems are in place, it may be difficult to justify the continuation of financial management orders, particularly when management by the NSWTG will result in significant fees being imposed on an individual's estate.

It is the contention of this article that there is a strong case for reform of the *Guardianship Act* to amend section 25R to bring it in line with the requirements for the making of financial management under section 25G. As it stands, this omission is unwarranted.

IV CONCLUSION

This article has sought to argue that the current financial management regime in NSW is flawed on several levels and is in need of reform. Such reform is essential not only to guarantee fairness to people with disability, but also to bring the NSW structures in line with our obligations under the *Convention on the Rights of People with Disability* and the National Disability Strategy.

Above all, it is essential that the views of people with disability be considered in any decision-making process which will affect their life. There is no justification for not requiring the Guardianship Tribunal to consider a protected person's views in making and revoking financial management orders and the effect of such orders on their life, and such an approach does not coincide with the adult guardianship provisions under the *Guardianship Act.* Similarly, financial management orders should be a measure of last resort, and should only be imposed where existing support structures do not work. The legislation must be reformed to take account of the new legal paradigm recognised by the Convention, in which supported decision-making and informal arrangements are to be preferred over formal substitute decision-makers.

It is also essential that the legislation be reformed to remove the reverse onus in revoking financial management orders and to place a limited term on new financial management orders. To leave the regime as it stands at present is inherently unfair to people with disability and fails to account for the fluidity of a person's capacity. Such an approach also runs counter to the Convention, which recognises a presumption of capacity for people with disability, and is out of step

with other Australian jurisdictions which place a finite duration on financial management and adult guardianship orders alike.

This article has submitted that the current case law in NSW is confused and circular, and does not provide a clear path for the tribunal of fact in making and revoking financial management orders. The lack of provision allowing the Tribunal to revoke orders where there is no longer a need for such is also a significant lacuna and should be remedied.

In light of current law reform movements in Queensland and Victoria, it is prime time for NSW to undertake a like project. The NSW Parliament's Legislative Council Standing Committee on Social Issues undertook an inquiry in 2010 on 'Substitute Decision-Making for People Lacking Capacity', the result of which was 35 recommendations for reform in the substitute decision-making and mental health arena.[75] The recommendations for change were supported in part by the former NSW government however no reform of the laws has yet to occur, nor have the issues been referred to the NSW Law Reform Commission for consideration.

This article opened upon the premise that the autonomy of a person's decision-making should not be interfered with lightly. Any regime governing a person's ability to control their own economic life should abide by this principle and adopt the least restrictive practices. To fail to do so impacts greatly upon a person's dignity and self-esteem, and their ability to participate fully in society. Whilst society must endeavour to protect the vulnerable from harm and exploitation, it is worthwhile considering whether at times, it is better to allow people to make 'bad' or 'wrong' decisions if by doing so, their independence is maintained.

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75 Legislative Council Standing Committee on Social Issues, above n 11.