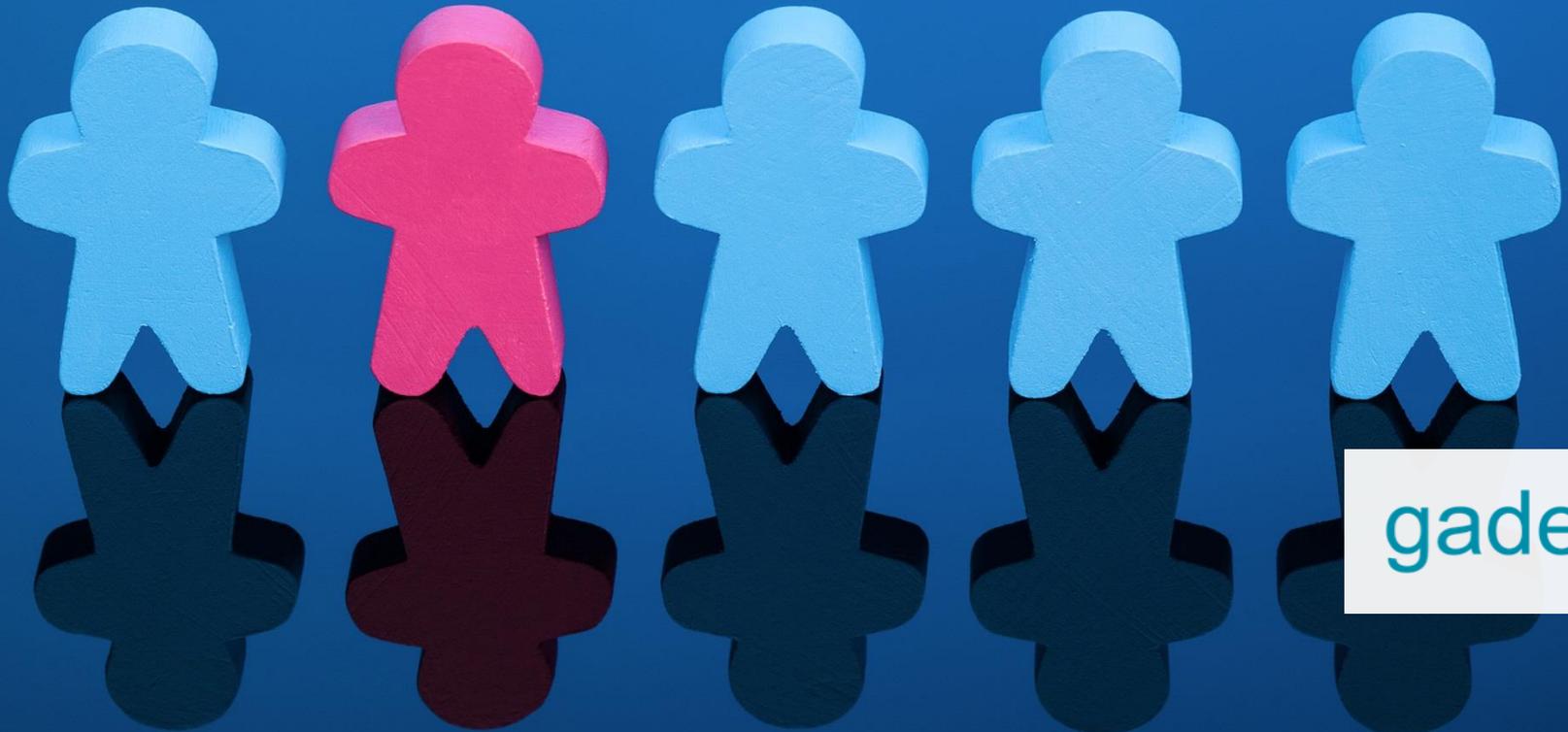


Dealing with difficult families – rights, obligations, strategies

ARTHUR KOUMOUKELIS

AAG & ACS REGIONAL CONFERENCE, DUBBO: 7 APRIL 2016



gadens

Overview

- Case studies
- Overriding principles
- Role of the aged care provider
- Legal structures to ‘protect’ and give powers to act for persons in need.
- What is a ‘loss of capacity’?
- Forming a structure
- Legislative compliance / complaints handling
- Strategies

Case Studies

- Misuse of finances – debts increasing
- ‘Unauthorised’ medications causing side effects
- New Powers of Attorneys and Guardians appear
- Long lost child appears when resident is fading
- Bossy child overpowers resident and other siblings
- Family member harasses staff.
- Other residents are ignored due to the demands of one resident’s family member

The overriding principles

Decisions are made for the benefit of and in the best interests of the individual

Not for the benefit of the state, or others or for the convenience of carers

Implicit in the focus on the person as an individual is respect of their autonomy

P v NSW Trustee and Guardian [2015] NSWSC 579

Role of aged care provider

- Legislative obligation under Aged Care Act to provide residential care services
- Residential care services is defined by development of care plan which continues to evolve with assessments over time and Quality of Care Principles.
- Care plan developed by input from variety of sources:
 - Resident's own wishes and needs
 - Resident's assessed needs – clinical, medical etc
 - Prescribed services - drugs

Role of aged care provider

- Contractual obligation under resident agreement to provide services
- Implied terms and residents rights incorporated into resident agreement by operation of User Rights Principles – Charter of resident rights
- Common law obligations – duty of care to exercise care and skill
- Obligation to all residents in facility, not just the subject resident
- Appropriate and qualified staffing

Legal structures and powers

- Protective jurisdiction of the State came from delegation from the Crown to Lord Chancellor
- That power has passed to the Supreme Court
- The State developed the following structures to provide support and structure to the Supreme Court:
 - NSW Civil and Administrative Tribunal Act – Guardianship Division
 - Guardianship Act
 - NSW Trustee and Guardian Act
 - Powers of Attorney Act 2003

Legal structures and powers

- Supreme Court retains overall supervisory power and jurisdiction
- Recent NSW Supreme Court decision – *P v NSW Trustee and Guardian* [2015] NSWSC 579

Who can make the decision?

Enduring Power Of Attorney (EPOA)

- Enduring EPOAs survive loss of capacity but defined by their terms:

*an act done by an attorney **that is within the scope of the power conferred** by an enduring power of attorney and that is of such a nature that it is **beyond the understanding of the principal through mental incapacity at the time of the act** is as effective as it would have been had the principal understood the nature of the act at that time*

Who can make the decision?

- What powers do they confer:
 - in NSW they are limited to financial or contractual matters (not medical or lifestyle)
 - usually not for gifts or other benefits to third parties or the attorney
 - check the wording and seek legal advice if unsure
- An attorney acts in the capacity of a fiduciary for the person conferring the power on them. They cannot prefer their interests over the grantor

Who can make the decision?

In accepting the role, an attorney confirms and agrees to all of the following:

- a) always act in the principal's best interests
- b) keep their own money and property separate from the principal's money and property
- c) keep reasonable accounts and records of the principal's money and property

Who can make the decision?

- d) unless expressly authorised, cannot gain a benefit from being an attorney
- e) must act honestly in all matters concerning the principal's legal and financial affairs
- Failure to do any of the above may incur civil and/or criminal penalties

Who can make the decision?

Enduring Guardianships

Section 6A When appointment has effect

An appointment

- (a) has effect only during such period of time as the appointor is a person in need of a guardian, and
- (b) unless revoked or suspended under this Part, has effect during all such periods.

"person in need of a guardian" means a person who, because of a disability, is totally or partially incapable of *managing his or her person*.

Who can make the decision?

Section 3(2) - A reference to a person who has a disability means a person:

- (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 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.

Who can make the decision?

- **Section 4 – Guardianship Act 1987**

- **General principles**

- It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:
 - a) the welfare and interests of such persons should be given paramount consideration,
 - (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
 - (c) such persons should be encouraged, as far as possible, to live a normal life in the community,

Who can make the decision?

- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

Who can make the decision?

Section 6E - Functions of Enduring Guardianship –

While instrument is effective, the EG can exercise the following functions:

- (a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
- (b) deciding the health care that the appointor is to receive,
- (c) deciding the other kinds of personal services that the appointor is to receive

Who can make the decision?

- (d) giving consent to the carrying out of medical or dental treatment on the appointor,
- (e) any other function relating to the appointor's person that is specified in the instrument.

The instrument of appointment may limit or exclude the authority it confers in relation to any one or more of the functions specified in subsection (1)

Who can make the decision?

- Powers do NOT allow the EG to:
 - make a will
 - vote on their behalf
 - consent to marriage
 - manage their finances
 - override their objections, if any, to medical treatment

Who can make the decision?

Resident representative under Aged Care Act

- Limited roles to:
 - ‘Consult’
 - Execute agreement
- No specific power to make decision under the Act

Loss of Capacity

- What do we mean by loss of capacity?
 - enduring guardianships
a person who, because of a disability, is totally or partially incapable of managing his or her person
 - POAs
is the act being done *beyond the understanding* of the resident due to mental incapacity?
- Supreme Court views it as a holistic issue and not limited to specific capabilities to act independently or be restricted in life activities

Loss of Capacity

- Mental illness is not of itself a basis to declare incapacity.
- The issue is whether by virtue of an element of ‘disability’ (of which advanced age is one), the person is restricted in a major life activity.
- It is a subjective analysis based on the particular person’s own circumstances. It is not an objective test. – *P v NSW Trustee and Guardian*.

Loss of Capacity

- A person:
 - can show independence but lack insight to their own vulnerability
 - Show judgement but be inconsistent
 - Make decisions but positively harm their own situation

Structure

- Have a process/ policy of dealing with complaints
- Maintain register/record of authorities granted to family members – stick to it
- Keep copies of instruments of appointment
- Seek to understand/assess position at beginning of residence – reference point for change over time
- In relation to medical directives/prescriptions, ensure agreed process:
 - Resident/facility goes to doctor gets prescription
 - Notification of change of medications

Structure

- Keep up to date notifications of care plan – sign off – Aged Care Act
- Keep as best as possible common disagreements
 - Directions as to care
 - Level, cost and location of a resident's care
 - Responsibility for the resident's care costs
 - Who should have control of a resident's finances
 - The best way to manage those finances

Legislative Compliance

- Criminal legislation
 - will depend on the behaviour (seek advice)
 - a matter for police
- Aged care legislation
 - Principles, standards and charters
 - complaints
 - records
- Privacy legislation
 - confidential personal information

Legislative Compliance

The User Rights Principles include:

- the charter of residential care recipients' rights
- the charter of home care recipients' rights

The Quality of Care Principles include:

- the residential care service standards
- the Accreditation Standards and
- the Home Care Standards

Legislative Compliance

Broadly these require that providers:

- maintain the resident's:
 - independence / autonomy / control
 - the participation of their representative in decisions where they do not have capacity
 - privacy and confidentiality of personal information
 - dignity

Legislative Compliance

- provide access to:
 - complaints mechanisms
 - the resident's choice of advocate and other avenues of redress
 - support / community services
 - information
- protect the resident's right to live without:
 - exploitation, abuse, neglect, harassment, discrimination or victimisation
 - an obligation to feel grateful for their care and accommodation

Complaints

s.56-4 of the *Aged Care Act 1997*

The approved provider must:

- (a) establish a complaints resolution mechanism
- (b) use the complaints resolution mechanism to address any complaints
- (c) advise of any other mechanisms that are available to address complaints, and provide such assistance as the resident requires to use those mechanisms
- (d) allow the DSS and other services to investigate and assist in the resolution of complaints
- (e) comply with any requirement made under the Complaints Principles.

The resolution mechanism must be provided in the agreements. 

Complaints Escalation

- The DSS / Aged Care Commissioner can:
 - receive and investigate complaints made by residents, interested parties or anonymously
 - refer complainants and approved providers to mediation or conciliation or other authorities
 - give directions to an approved provider where they are not meeting their obligations under the Act
 - take any other action under the Act (including the sanctions process)
- Where immediate risk to safety is possible, the police may be involved

Records

Division 88 of the Act and Records Principles

- accurate and up to date records can avoid many situations of conflict
- must keep records of:
 - allegations or suspicions of reportable assaults (s.8 of Principles)
 - financial matters regarding residents' care
- should keep records of all threats, complaints, suspected mistreatment and formal requests

How do you deal with complaints effectively?

Dealing with disagreements

1. Acknowledge

- Acknowledge nature of complaint
- Define issue

2. Define roles

- Understand role family member is playing
- Refer to relevant document giving power
- Explain role of provider under Aged Care Act
- Explain role of family member under their instrument

Dealing with disagreements

3. Assess

- Gather evidence and information
- Determine if person is capable of managing own affairs or is a person in need of a guardian
- Determine best interests of resident
- Determine if family member is satisfying role appropriately

4. Respond

- Provide response
- Provide solution and expectation

Strategies

- Be ready – have a policy or process agreed and understood by staff
- Keep records of issues
- Be ready to keep Department informed of emerging issue/complaint
- Change dynamics of who deals with family member – not always DON or senior executives.
- Use friendly/trusted third party
 - Medical opinion

Strategies

- Use unfriendly third party
 - Lawyer letter
 - Conference with unfriendly – give them ‘bad cop’ someone else to hate, bad news messenger
- Follow on
 - Maintain business line and procedures
 - Don’t compromise obligations to other residents
 - Don’t set precedent

Strategies

- Be clear as to rules and obligations of invitees onto premises
- Exercise rights as owner of premises – refuse entry to people who create a nuisance or disrupt your business
 - Visitors to premises including guardians, family members, attorneys, though empowered to act for residents, must abide by your rules.
- Be ready to go to Tribunal

Strategies

- Be ready to inform authorities if abuse or criminal conduct
- Be ready to move the resident to another provider

Questions?

Arthur Koumoukelis

Partner

Gadens

T +61 2 9931 4873

E arthur.koumoukelis@gadens.com