

SUPREME COURT OF QUEENSLAND

CITATION: *Matthews v Matthews & Ors* [2004] QSC 086

PARTIES: **JUSTIN MATTHEWS**
(plaintiff/applicant)
v
ANTHONY WAYNE MATTHEWS
(first defendant)
NOMINAL DEFENDANT (QUEENSLAND)
(second defendant/respondent)
**THE CORPORATION OF THE TRUSTEES OF THE
ORDER OF THE SISTERS OF MERCY IN
QUEENSLAND**
(third defendant)
QUEENSLAND X-RAY SERVICE (ARBN BN 3332160)
(fourth defendant)

FILE NO: SC No 4223 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 13 April 2004

DELIVERED AT: Brisbane

HEARING DATE: 1 April 2004

JUDGE: Mackenzie J

ORDER:

The orders are that:

- 1. Pursuant to section 59(1) of the *Public Trustee Act 1978*, Terms of Settlement of this proceeding agreed between the parties on 2 March 2004 and the agreement reached on 31 March 2004 as to the administrative charges payable to the Plaintiff by the Second Defendant be approved and sanctioned, and that all further steps in the proceeding be stayed except for the purpose of carrying the terms of settlement into effect.**
- 2. The issue whether the Public Trustee of Queensland be removed pursuant to section 31 of the *Guardianship and Administration Act 2000* as administrator in relation to all financial matters of the Plaintiff be transferred pursuant to section 241**

- to the Guardianship and Administration Tribunal.
3. That the parties confer with a view to agreeing upon an order implementing the third sentence of paragraph 12 of the reasons
 4. The Registrar forthwith give a copy of this Order to the Guardianship and Administration Tribunal.
 5. The settlement sum of \$2,500,000.00 to be paid by the Second Defendant as follows:-
 - (a) to the Health Insurance Commission, the sum of \$10,555.35, the receipt of the Health Insurance Commission therefore to be a sufficient discharge;
 - (b) to Centrelink, such amount as is the subject of a Notice of Charge, the receipt of Centrelink therefor to be a sufficient discharge;
 - (c) to the trust account of the solicitors for the Plaintiff, on behalf of the Plaintiff's parents, KATHRYN PATRICIA MATTHEWS and ANTHONY WAYNE MATTHEWS, the sum of \$120,000.00 on account of past out-of-pocket expenses (including interest thereon) and past gratuitous care (including interest thereon), the receipt of the said solicitors therefore to be a sufficient discharge;
 - (d) to the Plaintiff's administrator hereof, the balance of the said sum of \$2,500,000.00, whose receipt therefore shall be a sufficient discharge.
 6. The settlement sum shall become payable no later than twenty-one (21) days after the receipt by the Second Defendant of the last notice of statutory charge or clearance.
 7. No interest shall be payable on the settlement sum or any part thereof as remains unpaid until the expiration of twenty-one (21) days after the date of receipt by the Second Defendant of the last notice of statutory charge or clearance.
 8. The joint opinion of Counsel for the Plaintiff tendered in support of this Application and dated 31 March 2004 be lodged with the papers in a sealed envelope marked 'not to be opened without the leave of the Court or a Judge'.
 9. The Plaintiff and his litigation guardian be at liberty to apply for further directions as to the disbursement of the monies to be held in trust as aforesaid.
 10. The Defendants pay the Plaintiff's costs of and incidental to the proceeding, including the costs of and incidental to the application for sanction and order thereupon, as agreed or, failing agreement, to

be assessed on the standard basis in accordance with the Supreme Court scale of fees.

- 11. The Plaintiff's indemnity costs be agreed between the Plaintiff's solicitors and the administrator, or failing agreement, be assessed and paid to the Plaintiff's solicitors by the administrator out of the trust fund to be administered as aforesaid.**
- 12. Costs as between the Public Trustee, National Australia Trustees Limited and the Plaintiff in the proceedings referred to in paragraph 12 be costs in the cause.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE OTHER THAN UNDER FAMILY LAW ACT 1975 AND RELATED ACTS – LEGAL PROCEEDINGS – ACTIONS ON BEHALF OF CHILDREN – APPLICATION OF DAMAGES AND MONEYS RECOVERED – where settlement money sanctioned to parents – where out-of-pocket and gratuitous care expenses – where purpose and intention not self-advantageous

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE OTHER THAN UNDER FAMILY LAW ACT 1975 AND RELATED ACTS – LEGAL PROCEEDINGS – ACTIONS ON BEHALF OF CHILDREN – IN GENERAL – where settlement money – what date interest from

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE OTHER THAN UNDER FAMILY LAW ACT 1975 AND RELATED ACTS – GUARDIANS – REMOVAL OF GUARDIAN – where substitution sought – whether sufficient evidence – whether discretion should be exercised

Guardianship and Administration Act 2000 (Qld), s 29, s31, s 241, s 245

Public Trustee Act 1978 (Qld), s 59

Supreme Court Act 1995 (Qld), s 48

Wills v Bell 715/1995, Mullins J, unrep, 14/12/01

COUNSEL: M Grant-Taylor SC with CC Heyworth-Smith for the plaintiff
MP Kent for the second defendant
RD Cumming (sol) for the Public Trustee

SOLICITORS: Murphy Schmidt Solicitors for the plaintiff
Moray & Agnew Lawyers for the second defendant
Official Solicitor to the Public Trustee

- [1] **MACKENZIE J:** Section 59(1) of the *Public Trustee Act* 1978 requires any settlement or compromise of a damages claim by or on behalf of a person under a legal disability to be sanctioned. No money or damages recovered or awarded is to be paid to any person other than the Public Trustee unless the court otherwise directs. The present application raises both issues.
- [2] There is no dispute that the plaintiff is a person with impaired capacity within the meaning of the *Guardianship and Administration Act* 2000 and that therefore the person is under a legal disability for the purposes of the *Public Trustee Act*. The Public Trustee has already been appointed by the Guardianship and Administration Tribunal for all financial matters by an initial order on 28 February 2001 and reappointment upon review on 1 May 2003. The appointment was for a 5 year term. The financial management required was at a low level during that period although it is asserted that on the occasion of the renewal of the appointment the Tribunal was aware of the damages claim and that it would be substantial. However, it is not suggested that any alternative appointee was proposed. I do not consider the reappointment in those circumstances to be critical to determination of the present application.
- [3] A review of an appointment can be made at any time (s 29 *Guardianship & Administration Act*) Under s 31, if the Tribunal is satisfied that there are appropriate grounds for an appointment to continue, it can continue the order making the appointment or, amongst other things, removing the appointee and making a new appointment (s 31(3)). However, the Tribunal may make an order removing an appointee only if the Tribunal considers either that the appointee is no longer competent or another person is more appropriate for appointment (s 31(4)).
- [4] It is not suggested that the Public Trustee is no longer competent. The issue is whether National Australia Trustees Limited is a more appropriate administrator. Under s 245(2) the Supreme Court may exercise the power of the Tribunal in that regard. Section 241(1) provides that, if the Supreme Court considers it appropriate, it may transfer proceedings within the Tribunal's jurisdiction to the Tribunal.
- [5] With regard to the sanction, I have read the advice of counsel and the terms of settlement and am satisfied that the settlement proposed is beneficial to and in the best interests of the plaintiff. The terms of settlement make provision for payment of \$120,000 to the plaintiff's parents on account of past out-of-pocket expenses and gratuitous care (and interest thereon). Given the conceptual basis of a gratuitous care award, I am satisfied that it is not inappropriate to allow that payment and I will order accordingly. There is an absence of any suggestion of self-advancement by the intended recipients, and the purposes to which the money will be put is indirectly for the benefit of the plaintiff. The settlement will therefore be sanctioned.
- [6] The issue of the date from which interest under s 48 of the *Supreme Court Act* 1995 will apply was agreed in terms of the draft order following an intimation by me that, if it was necessary to do so, without deciding the point, I would exercise my

discretion to allow a reasonable period to the defendant to make payment since certain statutory refunds had not yet been quantified.

- [7] The remaining issue was whether National Australia Trustees Limited should be appointed in substitution for the Public Trustee. On the plaintiff's behalf, three matters were raised, the cumulative weight of which was said to make National Australia Trustees Limited more appropriate. The first was that the administration and management fees to be charged by it were almost \$100,000 less over the life of the administration than the Public Trustees would be. The second was that the Public Trustee's reliance on provision by it of a greater level of services than National Australia Trustees Limited was based on a misapprehension. The third was that the plaintiff's mother had, after discussing relevant matters with potential administrators and having some concerns with the Public Trustee's service based on a couple of incidents which are explained by both sides in the material, formed a preference for National Australia Trustees Limited.
- [8] The question of the level of difference in administration and management fees was disputed. On behalf of the Public Trustee it was submitted that some of the assumptions in the affidavit by the investment manager of National Australia Trustees Limited, drawn from his interpretation of parts of a letter in which the basis of calculation of the Public Trustee fees was set out, were in fact misinterpretations. It was submitted that if the same assumptions were used for each calculation, the difference was less than \$25,000. It was also submitted that there were intangible advantages in the service the Public Trustee would provide; it was not clear that those services would be provided by National Australia Trustees Limited. There was also a reference to a Public Trustee rebate of fees in the event that assets reduced to a level where fees were more than 5% of the asset being administered, which may become relevant as the years went by.
- [9] These submissions were countered by a contention in an affidavit by National Australia Trustees Limited's Queensland Manager to the effect that the services it would provide were at least equal to those which would be provided by the Public Trustee. It was submitted that if that was the case, the difference remained of the order of \$100,000.
- [10] There is not nearly as much detail in the evidence relating to this issue as is often available at trial. No oral evidence was given. These factors make it difficult to assess the respective claims with any degree of confidence. In the end the figures quoted seem to be best estimates based on the assumptions made. In addition, the case is not one where an initial appointment is being made. It is one where an order removing an existing trustee on the ground that another is more appropriate for appointment on the ground of significant financial advantage to the person whose affairs are being managed is being sought. It may be accepted that all other things being comparable, demonstrated significant financial advantage would be an important consideration (*cf Wills v Bell*, 715/1995, Mullins J, unrep.) 14/12/DI).
- [11] I am conscious of the undesirability of prolonging the process and causing more cost to the parties if further evidence has to be led. However, I am not able to find,

on the state of the evidence as it stands, that the onus that must be discharged to effect removal has been discharged. The most practicable and probably cost effective way of resolving the issue is to transfer the question whether the Public Trustee should be removed to the Guardianship Tribunal and Administration where any necessary evidence can be heard if the parties wish to pursue the question.

[12] I will make an order in terms of paragraphs 1 and 8 to 14 of the draft. There should also be an order that the issue of the removal of the administrator be transferred to the Guardianship and Administration Tribunal. To ensure that the money earns interest until the identity of the trustee is determined finally, it is desirable for the current administrator to have authority, if it is not already authorised to do so, to invest the money in a way which will earn interest over the expected period until the issue is finally determined without taking any investment steps that cannot be easily unravelled. With regard to that order I am prepared to receive written submissions or preferably a draft form of order, which, if I have no concerns about, I will initial.

[13] The orders are that:

1. Pursuant to section 59(1) of the *Public Trustee Act 1978*, Terms of Settlement of this proceeding agreed between the parties on 2 March 2004 and the agreement reached on 31 March 2004 as to the administrative charges payable to the Plaintiff by the Second Defendant be approved and sanctioned, and that all further steps in the proceeding be stayed except for the purpose of carrying the terms of settlement into effect.
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 - (c) to the trust account of the solicitors for the Plaintiff, on behalf of the Plaintiff's parents, KATHRYN PATRICIA MATTHEWS and ANTHONY WAYNE MATTHEWS, the sum of \$120,000.00 on account of past out-of-pocket expenses (including interest thereon) and past gratuitous care (including interest thereon), the receipt of the said solicitors therefore to be a sufficient discharge;
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receipt by the Second Defendant of the last notice of statutory charge or clearance.

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