

# SUPREME COURT OF QUEENSLAND

[2001] QSC 215  
File No 3348 of 2001

BETWEEN:

**THE PUBLIC TRUSTEE OF QUEENSLAND**

Applicant

AND:

**THE PUBLIC ADVOCATE**

Intervenor

## MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 21 June 2001

HEARING DATE/S: 24 April 2001

ORDER: **Application dismissed.**

CATCHWORDS: MENTAL HEALTH – MANAGEMENT AND ADMINISTRATION OF PROPERTY – PROTECTION ORDERS – where Public Trustee appointed by court order as administrator of settlement monies – where Guardianship and Administration Tribunal revoked appointment – whether revocation applied to partial protection order – whether order of court revoked by tribunal

COUNSEL: B Nickel for the Applicant  
J Brasch for the Intervenor

SOLICITORS: Official Solicitor to the Public Trustee for the Applicant  
Public Advocate for the Intervenor

- [1] On 9 February 2001, the Guardianship and Administration Tribunal constituted pursuant to the *Guardian and Administration Act 2000* (*Guardianship Act*) revoked the Public Trustee's appointment as administrator for settlement monies otherwise payable to Daniel Eric Rowe. The Public Trustee had been appointed by an order of this court made on 20 October 1998 pursuant to the *Public Trustee Act 1978*. The Tribunal did so on the basis of a conclusion that Rowe's "functional capacity had improved considerably" and that at the time the Tribunal dealt with the matter he had "a capacity for financial matters". Those conclusions were open to the Tribunal, were not challenged and are of no further concern.

- [2] The Public Trustee, which participated in the proceedings before the Tribunal as a party, applies to this court for directions as to whether:-
1. The term “the estate” in s 146(1)(a) of the *Public Trustee Act* includes those cases where the Public Trustee was the manager of only part of an estate before the commencement of the *Guardianship Act*.
  2. This court’s order of 20 October 1998 had been revoked by the Tribunal’s order of 9 February 2001.
- [3] Rowe was not a party to the Public Trustee’s application which was stated to be made ex parte and endorsed that it was not intended to serve it. When the application came before me the Public Advocate constituted pursuant to s 210 of the *Guardianship Act* sought leave to intervene pursuant to s 210(2) of that Act. This sub-section provides that the Public Advocate may intervene in proceedings before the court “involving protection of the rights or interests of adults with impaired capacity for a matter”; leave to intervene is required, s 210(3). It is relevant to note that s 134(4) of the *Public Trustee Act* provides that a judge, before giving a direction, may require the attendance of “any person interested” but that such a person does not have a right to be heard unless there is a direction to that effect.
- [4] I heard argument from the Public Advocate on the issue of leave to intervene and reserved that question pending argument on the substantive issues. These are essentially issues of statutory construction. I will now deal with the leave issue.
- [5] Section 210(2) of the *Guardianship Act* allows the Public Advocate to intervene in court proceedings involving protection of the rights or interests of adults “with impaired capacity for a matter”. Section 210(3) then imposes a requirement of leave, which may be subject to terms, to intervene. Section 210(2) follows s 209 which confers specific functions on the Public Advocate with respect to “adults with impaired capacity for a matter”.
- [6] It would be appreciated from what I said earlier that the decision which the Public Trustee effectively seeks to have reviewed on this application, arises because the Tribunal found that Rowe did not have an impaired capacity for a matter. Arguably therefore the terms of s 209 and s 210 are not satisfied and Rowe is the proper respondent to the application which ought to have been served on him.
- [7] The question the Public Trustee seeks to canvass nevertheless clearly affects Rowe’s rights and interests although he is not a party to the application. Rowe was apparently content to have the Public Advocate advance his cause. Moreover the outcome of this application will affect others in the same position as Rowe.

- [8] The case is one where it is plainly of assistance for the court to have arguments controverting those advanced on behalf of the Public Trustee and that has occurred. In the circumstances, the terms of s 209 and s 210 of the *Guardianship Act* aside, it is plainly sensible to give leave to the Public Advocate to appear and to dispose of the substantive issues.
- [9] On 23 June 1999 this court sanctioned the settlement of a personal injury action brought by Rowe and ordered that the defendant to that action pay the Public Trustee the balance funds left after specific disbursements. Those funds were to be held in trust for Rowe with the Public Trustee appointed to be the manager of and take possession and control of the fund with the powers and duties defined by the *Public Trustee Act*. That course was dictated by the evidence put before the court as to Rowe's condition in the course of obtaining a sanction of the settlement.
- [10] A protection order of the kind just referred to is commonly referred to as a partial protection order because it applies only to the settlement fund and not to the other assets of the beneficiary.
- [11] It was accepted before me that prior to the *Guardianship Act* becoming law only this court could vary or revoke a protection order and that since that Act became law the power to revoke or vary is vested in the Tribunal. The issue is whether the Tribunal's jurisdiction applies when there is a so called partial protection order.
- [12] Section 146 of the *Public Trustee Act* as amended by the *Guardianship Act* relevantly provides:
- “(1) This section applies if, immediately before its commencement –
- (a) the public trustee managed the estate of a person who is 18 years or more under a protection order under part 6; or
- .....
- (2) On the commencement of this section, the public trustee is taken to be appointed under the *Guardianship and Administration Act 2000* by the tribunal as the person's administrator for all financial matters.”
- [13] Neither the *Public Trustee Act* nor the *Guardianship Act* define the term “estate”. The definition in s 36 of the *Acts Interpretation Act 1954* is of such generality as to be irrelevant for present purposes. Clearly enough however the *Public Trustee Act* contemplates protection of part of an estate.
- [14] Section 64 defines “estate under management” to include a protected estate. A “protected estate” is defined under the same section to mean:

“the real and personal estate of a protected person (or, where the order does not extend to the whole estate, that part of the estate of which the public trustee has been appointed manager by the protection order).”

A “protected person” includes a person whose estate “in whole or part” is the subject of a protection order and the definition of a “protection order” is an order appointing the Public Trustee:-

“manager to take possession of and to control and manage the estate or part of the estate of the person to whom the order relates.”

By s 65(1) a protection order appoints the Public Trustee manager to take possession of and to control and manage “all or such part or parts” as the court directs “of the estate of that [person the subject of the protection order]” and that provision is extended to damages actions by s 67(1).

- [15] Immediately before the commencement of the *Guardianship Act* the Public Trustee managed that portion of Rowe’s estate which was the subject of the order of 20 October 1998. The reference in s 146(2) to appointment by the Tribunal as a disabled person’s “administrator for all financial matters” cannot have the effect of extending the Public Trustee appointment in this case beyond the terms of the 20 October 1998 order.
  
- [16] It follows that in my view s 146 of the *Public Trustee Act* is apt to pick up such of Rowe’s estate as was managed by the Public Trustee under the 20 October 1998 order irrespective of whether it constituted the whole or part of his estate. That being so the application is dismissed.