Management of a Resident's Funds in a Supported Accommodation Facility – A Legal Perspective

Anita Smith, President, Guardianship and Administration Board, Tasmania, July 2010

It has historically and currently been a common practice for organisations providing residential support to persons with a disability (including Aged Care providers) to manage their income as part of the support provided. In many cases, those residents may be incapable of managing their own finances because of a disability. This paper examines the sources of authority for management of a resident's funds and suggests the means by which residential care providers might ensure that such funds are managed in the best interests of the residents as well as ensuring that organisations are fully accountable and transparent in their handling of resident's monies.

The paper also warns that where residential service providers manage residents' funds without a clear source of authority, they may be exposing their directors to a personal and uninsurable liability for any losses suffered by residents as a result of that management.

There are two equally important aspects to managing another person's funds:

1. Where does the authority come from to manage that person's funds?
2. What checks and balances are in place to ensure accountability in the management of their funds?

Many organisations have put a great deal of effort into the second question, but not the first. This paper concentrates on the first question.

How did residential service providers become fund managers and does this remain appropriate?

Under the now defunct *Mental Health Services Act 1973* and the *Health (Regional Boards) Act 1991* State Government institutions had authority to manage residents' funds as part of institutional practice. When the Royal Derwent Hospital was de-institutionalised and smaller group homes established, the accounts of residents were transferred to the group home managers. As management devolved to non-Government organisations, the pattern of financial management was continued. The State Mental Health Services continues to manage funds for a significant number of residents and until the 2008 *Living Independently Program* Disability Services also managed a significant fund of residents' moneys.

The authority to manage funds under the *Mental Health Services Act 1973* and the *Health (Regional Boards) Act 1991* was extinguished when those acts were repealed on 19th December 1991 and 1 July 1997 respectively.[1] Once those Acts were repealed, there was no

[1] *Mental Health Services Act 1973* was repealed by the *Statute Law Revision Act 1991*. Section 3 of that Act (which commences the repeals including the *Mental Services Act 1973)* commenced 19 December 1991. *Health (Regional Boards) Act 1991* was repealed by the *Health Act 1997* which commenced on 1 July 1997.

source of legal authority for the management of resident funds unless the resident had capacity or had an appointed attorney or administrator who could agree on their behalf.

However, informal arrangements were historically encouraged in mental health services, disability services and aged care because they were seen as a "less restrictive alternative" to the appointment of an administrator where the resident lacked capacity for financial decision making. The previous President of the Guardianship and Administration Board issued a policy in 2000 stating:

> "2. The practice whereby staff manage the financial affairs of residents is seen as a less restrictive option. In most cases the assets of the resident are minimal and there is pension only income. The risk of exploitation is small because there are usually adequate checks in place to ensure protection including the requirement of joint or dual signatories to bank accounts. Finally such a system encourages and promotes the independence of the person with a disability who may well be able to handle small sums of money in limited circumstances but unable to manage all of his or her financial affairs."[2]

Significant developments in the legal and financial environment have caused the Board to review and ultimately revoke that policy in recent years.

The assumption that residents in receipt of pensions had minimal estates, and therefore the risk was minimal, was later proven to be incorrect. For example, the Department of Health and Human Services implemented the *Living Independently Program* in 2007-2008. In part, this program involved the transfer of the management of individual clients' funds (which had historically been managed by staff of Disability Services) to administrators appointed by the Board. Of 29 applications for the appointment of an administrator, the highest single resident account was $50,000.00 and the lowest was $6000.00. The total amount of resident funds under "informal" management was $694,000.00. None of the residents had ever had an administrator appointed to manage those funds. All of the applications were granted and in the majority of applications the Board appointed the Public Trustee as administrator.

Financial institutions are increasingly refusing to accept informal arrangements for management of funds, such as bank signatories, where the holder of the account is incapacitated for financial transactions. In these circumstances, an appointed decision maker is now required by the financial institutions to oversee the appointment of signatories and other significant decisions such as opening or closing accounts.

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[2] *Management of resident's pension and bank accounts by staff of group homes and nursing homes.* Policy issued by J. Blackwood, President GAB, 14/7/2000.

It is questionable whether many of the "informal" client account management practices in fact "encourage and promote the independence of the person with a disability". Many systems are highly regulated and institutionalised. For instance the current "informal" management system by Mental Health Services[3] is described as follows:

> "Under the current system if a client wishes to make a purchase the request is *faxed by facility staff* to the Mental Health Services South trust officer. The trust officer will act accordingly to make the funds available whilst taking into account the wishes of the client and any relevant restrictions or conditions stipulated by the Administrator or Attorney [if appointed]. The trust officer will complete the necessary paperwork in relation to the deposit, withdrawal and purchase. *The facility staff collect* the purchase order or money from the trust officer *on an agreed set day of the week* and provide the relevant paperwork to the trust officer including receipts after the purchase."[4] (emphases added)

Such an arrangement may have reflected usual business practice in 2000 when the Board's previous policy was issued, however it has neither kept pace with the advent of electronic transactions, nor the popularity of mobile phones amongst residents. It has been confirmed to the President that Mental Health Services residents do not have access to the fax machine and staff have the discretion not to transmit a request that they believe is unreasonable. Compare this with a resident who may have the Public Trustee appointed as administrator. Except in circumstances where a represented person (i.e. a person who is the subject of an administrator order) has threatened Public Trustee staff, a represented person may directly telephone the client account manager who will make a decision to transfer funds or not into the client's account and usually, if granted, that would occur on the same day as the request.

In *MF (Administration)* [2007] TASGAB 1[5] the Board questioned whether so-called "informal" arrangements implemented by the residential service provider, GHA, reflected normative community values:

> "The Board believed that [a] lack of flexibility was based upon an excessively rigid interpretation of organisational values espoused by GHA. One such value was the assumption that financial management in a supported facility must be rigid and

[3] A system which as at 28 July 2009 managed $566,270.00 on behalf of 30 Mental Health Services clients according to a response to a *Freedom of Information Act* request of same date. That figure was later revised as being "too high" but no other figures have been supplied.

[4] *Mental Health Services South – Review of the maintenance of client funds*, Department of Health and Human Services Report, April 2010

[5] A de-identified decision of the Guardianship and Administration Board available at www.austlii.edu.au

uniform between residents to be effective and accountable. This is not consistent with the overall goal of making life in supported accommodation as normal as possible. In homes shared by young adults, residents can have different methods of financial management according to their different needs and income sources. The Board believed that Miss M.F. need not feel 'singled out' for having different financial systems if all parties cooperate towards accepting a diversity of approach."

In *MF* the residential service provider was diligently (but rigidly) adhering to savings plans and budget set for all the residents. Such plans and budgets were developed in consultation with the residents. This is common in supported accommodation. However, it is not necessarily less restrictive or normative compared to an administration order.

We read in every weekend newspaper that the key to personal financial freedom is to write a budget and stick to it. But, how many of the readers of this paper have ever written a budget, how many have stuck to it and how many would take kindly to another adult (e.g. a spouse) imposing a requirement that we stick to a budget when an irresistible 'bargain' crops up that we 'just had to have'? Obviously budgeting is an important part of learning financial literacy and there are good reasons for it to be a part of life in supported accommodation, but how can a budget be imposed when the imposer has *no authority* to manage the funds? How is this 'less restrictive' than when a person *with authority* has approved the budget?

Then there is the darkest side of financial management. Although there are rarely prosecutions or civil actions for recovery, anecdotal evidence suggests that stealing by staff of residential care providers occurs on a too frequent basis. Usually, once detected, such defalcations lead to the quiet dismissal of the employee and the equally quiet repayment of funds by the residential service provider to the resident's account. It is not known whether the level of defalcations by staff of residential services for people with disabilities is higher than the rate of defalcations by employees of other kinds of employment, but the opportunities appear to be greater because of the vulnerability of the client group and the potential difficulties in detection.

The Board has revoked the 2000 policy and now favours circumstances where the source of authority for the management of residents' funds is clear.

What are a resident's rights with regard to his or her funds?

Any Australian adult has the right to manage his or her own funds without interference by a third party except according to law (e.g. insolvency, taxation law, laws regulating financial institutions, laws appointing trustees, administrators and attorneys). These rights, as they pertain to adults with disabilities, have recently been re-stated in the *UN Convention on the*

Rights of Persons with Disabilities. The Convention, ratified by the Australian Government in July 2008, states at Article 12(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."*

There is no law that entitles parents of adults with a disability or residential service providers to manage that person's funds on their behalf without a specific appointment by a lawfully constituted court, tribunal or board.

It is arguable that management of a resident's funds without appropriate authority is an arbitrary deprivation of the person's property and, therefore, a breach of the Convention and of the rights of the person with a disability.

What constitutes appropriate authority to manage the funds of a resident?

There are 5 sources of lawful authority to manage a person's funds on their behalf. These sources of authority and the consequences to a residential care provider are discussed in turn:

(i) A Resident with Capacity

Every adult, whether they have a disability or not, is presumed to have the capacity to manage their own finances unless it has been proven that she or he is incapable of doing so. Where a resident has capacity to make reasonable financial judgments and that resident has appointed the accommodation facility as their agent, it is legal for the agent to act upon that authority. Because of the special relationship between an accommodation provider and a resident, there are possibly additional fiduciary responsibilities that come with being an agent as is discussed later in this paper.

It seems reasonably unlikely that a financially literate person with capacity would appoint their residential provider as an agent to manage their funds.[6] There is a possible conflict of interest for the residential provider (due to accommodation providers frequently charging around 87% of a person's income as board) which most financially literate persons would not consider acceptable.

[6] For example, some Tasmanian university students live in residential colleges such as Jane Franklin Hall, St John Fisher College and Christ College. Students with capacity would be highly unlikely to assign the management of their funds to the managers of the residential colleges, even though the cost of board at residential colleges absorbs a significant part of their student allowances and other income and even though their parents might prefer such an arrangement.

An agent for a resident with capacity may have responsibilities to ensure that the resident is advised to seek independent legal and financial advice. Where the agent invests the resident's funds (for example when skimming excess funds from a cash management account to a term deposit or purchasing a pre-paid funeral), the agent may be acting in a 'financial advisor' capacity which brings a number of onerous responsibilities and requires certain accreditations under federal legislation.

Appointment as an agent for a person with capacity may be limited to certain transactions, it may be informal or formal, such as a standard power of attorney (as opposed to an enduring power of attorney which operates after a person has lost capacity). *Laws of Australia*[7] records an agent's duties as follows:

> "Many agents work under written contracts which contain detailed provisions as to the agents' duties, but in the absence of any, or any relevant, express terms, the mere existence of the agency relationship raises, by implication, certain rights and duties. … Similar principles apply to an oral contract of agency. ... The duties which are imposed on agents as a matter of law include duties to:
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> (1) carry out the principal's instructions;
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> (2) exercise care and skill;
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> (3) act personally;
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> (4) account; and
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> (5) act in good faith:
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> The duty to act in good faith includes a duty to avoid any conflict of interest, and a duty not to receive any bribes or secret commissions." (references omitted)

Laws of Australia[8] records the fiduciary duties of an agent as follows:

> **"**The principal–agent relationship is well recognised as being fiduciary in nature, and parties who occupy a fiduciary position are subject to the general equitable principle to act in good faith. … The most significant restrictions and rules which would apply in the agency situation are:
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> (1) the duty to avoid a conflict of interest; and

[7] Paragraph 8.1.38, *Laws of* Australia, Thomson Reuters, Sydney, last updated 1 January 2003.

[8] Paragraph 8.1.43, *Laws of* Australia, Thomson Reuters, Sydney, last updated 1 January 2003.

(2) the duty not to make any secret profit or to take a bribe:." (references omitted)

Where there is a special relationship, such as where the principal (i.e. the person appointing an agent) has a disability or is vulnerable for some other reason (e.g. a language barrier[9] or reliance upon the provision of accommodation and care by the agent) the agent may have additional fiduciary duties such as those discussed below for trustees.

Even where a resident has capacity, the burden that a residential provider takes on in acting as the financial agent for a resident is very high. Residential services providers wishing to provide this kind of agency for residents are advised to seek detailed independent financial advice and legal advice about their responsibilities.

(ii) A Centrelink Nominee

The nature of a Centrelink nominee appointment is different to other kinds of agency. Firstly, there are two kinds, one being the nominee for correspondence, the other being the nominee for payment of benefits. The writer has been advised that very few residential service providers would be nominees for payment of benefits, but many would be nominees for correspondence. Obviously both types of appointment carry a responsibility to look after the interests of the recipient of the benefits, but a nominee who receives the benefits payments has a particularly significant responsibility and may be a 'bare trustee' with the responsibilities discussed later in this paper.

Although in practice the selection of the nominee is made by the recipient of benefits, legally nominees are appointed by the Secretary of the Commonwealth Department of Human Services under Part 3A of the *Social Security (Administration) Act 1999*. This means that the nominee is responsible to the Secretary to account for the disposal of funds. If a person suspected that a nominee was misusing a benefit recipient's funds, they could report it to the Secretary who may ask the nominee to account for the use of the funds and presumably could take action to recover the funds.

Despite the formal legal requirements, anecdotal evidence collected by the Australian Guardianship and Administration Council[10] suggests that appointments of nominees are made by counter staff at Centrelink, are cursory, undertaken with little concern for the capacity of the benefits recipient, and little investigation is undertaken as to the suitability of the nominee for appointment or the prior existence of appointed administrators or attorneys.

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[9] *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14, (1983) 151 CLR 447

[10] As tabled in national meetings in 2004-2005

A Centrelink nomination is a valid appointment, as it is the Secretary's appointment. A residential provider taking on this level of authority still has a duty to be accountable and transparent in their dealings. Such a duty may become complicated where the resident has mixed funds (some of their own funds and some Centrelink benefits) if the nominee has to account to the Secretary some time after such funds have become mixed.

Where a person other than the residential service provider is the Centrelink nominee it is doubtful that person has the authority to assign management of a resident's funds to a residential service provider. He or she would have authority to arrange a direct debit to ensure that the residential service provider's fees were paid, but not to delegate authority unless the Secretary had authorised such an arrangement (which itself appears unlikely).

(iii) An Enduring Power of Attorney

An enduring power of attorney is an instrument that a person with capacity (called a "donor") executes (signs) to prepare for the event when he or she may lose capacity, so that the attorney appointed in that instrument can take over financial management and decision making after the donor's loss of capacity.[11]

An attorney under an enduring power is taken to be a trustee of the property and affairs of the donor according to the tenor of the power and must exercise his or her powers as attorney to protect the interests of the donor.[12] A failure to do so may result in a liability to compensate the donor for any loss occasioned by the failure.

An enduring attorney or an administrator may authorise a residential service provider to manage part of the donor's estate. Generally, an administrator or attorney would only allow minor transactions to be handled directly by a residential provider because they have a significant responsibility to see that funds are appropriately managed and delegation of that responsibility to another exposes the administrator or attorney to financial and legal risks. Attorneys may be required to account to the Guardianship and Administration Board if an application is made to review the power of attorney.

A residential service provider who relies upon the instructions of a competently appointed attorney for the management of a resident's estate has a valid source of authority to act on those instructions. In this case both the residential service provider and the attorney are

[11] Please note, this role bears little resemblance to the Americanism that refers to legal practitioners as 'attorneys.' Mostly non-lawyers are appointed as attorneys.

[12] Sections 31 and 32 of the *Powers of Attorney Act 2000* establish the powers and duties of an attorney under an enduring power of attorney in Tasmania.

accountable for the management of the funds and both must act in the best interests of the resident, but the ultimate responsibility for the estate lies with the attorney.

A recurrent problem is that many Aged Care providers will not admit an elderly person into care unless they have an enduring power of attorney in place. Many Aged Care providers are advising relatives to go to solicitors to have them drawn up. Given the statistical link between admission to Aged Care and the incidence of dementia, it is most likely that a high proportion of persons at this stage of life are incapable of understanding the nature and effect of the documents that they are signing.[13] Unfortunately many Tasmanian solicitors are not well acquainted with the symptoms of dementia nor the laws about capacity and are happy to oblige the family and the nursing home by providing a document which may later be challenged for invalidity. Residential care providers in this situation would serve their residents better if they were to refer persons with dementia to the Board for the appointment of an administrator.

(iv) An Administration Order

An administrator is appointed for a person when there has been an order made by the Guardianship and Administration Board either after a hearing or in an emergency situation. The Board appoints administrators where it is satisfied that the person has a disability, that his or her disability renders him or her incapable of making reasonable financial judgments and is in need of an administrator. The Board then appoints either a family member or a friend as an administrator after satisfying itself that person is suitable for appointment. If there is no person suitable for appointment, the Board appoints the Public Trustee. An administrator must act at all times in the best interests of the represented person[14]. To do so requires that the administrator acts in such a way as to encourage and assist the represented person to become capable of administering his or her estate; and in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

Where the Board has appointed an administrator with the relevant powers, section 56 enables the administrator to have the general care and management of the estate of the represented person which includes taking possession of the estate and do anything that the represented person would have been able to do if he or she had capacity to manage his or her estate. An administrator who does not meet the standards expected of him or her may be made personally liable for any losses suffered by the estate that arise from a lack of

[13] There is a specific legal test for capacity to execute an enduring power of attorney in section 30 of the *Powers of Attorney Act 2000*

[14] Sections 56-57 *Guardianship and Administration Act 1995*

reasonable care or from bad faith transactions.[15] Administrators are required to provide the Board with annual reports of all transactions.[16]

Like an enduring attorney, where a residential service provider relies upon the instructions of an administrator for the management of a resident's estate, the residential service provider has a valid source of authority to act on those instructions. In this case both the residential service provider and the administrator are accountable for the management of the funds and both must act in the best interests of the resident, but the ultimate responsibility for the estate lies with the administrator.

(v) Formal Trusts (Supreme Court, Wills, Special Disability Trusts, Family Trusts)

Formal trusts are established either by order of the Courts, by a deed (formal agreement) or under a person's Will. Common examples of trusts include:

(a) A person with a severe head injury resulting from a motor vehicle accident is awarded a significant sum of damages. The Supreme Court appoints a trustee to manage the damages as the evidence before the Court shows that the person's head injury affects his or her ability to manage large sums of money.

(b) Elderly parents of a person with an intellectual disability create a *Special Disability Trust* to provide for their son's accommodation and health care. Establishing this trust enables the parents and the son to enjoy certain taxation and Centrelink advantages.

(c) The mother of a woman with severe bi polar affective disorder creates a trust under her Will so that her daughter can inherit from her estate, but the inheritance is protected for purposes that promote her best interests.

Acting as a trustee is one of the most onerous duties that a person can undertake in law. Contravention of a trustee duties are viewed extremely seriously.[17] It is also a powerful role, therefore most trustees would be empowered to authorise a residential service provider to manage part of a person's estate and such authority would have validity at law, although the trustee would retain responsibilities for the actions of the residential service provider.

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[15] Section 63 *Guardianship and Administration Act 1995*

[16] Sections 63 and 66 *Guardianship and Administration Act 1995*

[17] See for example section 260 of the *Criminal Code Act 1925* where offences by trustees are indictable crimes with a maximum penalty of 21 years imprisonment.

(vi) Conclusion:

In the above scenarios, only the resident with capacity, the administrator, the attorney and the formally appointed trustee has clear lawful authority to enable a residential service provider to manage a resident's funds. If a residential service provider is managing funds without the imprimatur of one of these persons then it is possible that they have failed on the first of the questions posed by this paper: "Where does the authority come from to manage a resident's funds?"

Where persons without capacity have their funds managed informally (i.e. without any formal appointment) by a residential accommodation provider, even with a range of checks and balances in place, this is the highest risk arrangement both from the point of view of the resident and the accommodation provider.

An absence of authority to manage the funds does not absolve the residential service provider of a responsibility to manage the funds in the best interests of the resident. Arguably, it imposes greater responsibilities. The next part of this paper examines those responsibilities.

What are the consequences of managing residents' funds in the absence of a clear source of authority?

It is the view of the writer that where a person or organisation takes over the management of a person's estate (income, funds, property however described) and that person (i) has a disability that renders them incapable of managing their own estate and (ii) is reliant on the person or organisation for accommodation and support, and (c) there is no source of actual authority (enduring power of attorney, administration order, or formal trust) the person or organisation managing the funds has taken on the role of a 'bare trustee'.

(i) What is a 'bare trustee'?

A 'bare trustee' is a person who has taken on a trustee role but is not 'clothed' with any instrument of appointment (i.e. any formal trustee instrument or agreement). Whereas an agent has a duty to carry out the principal's instructions, a bare trustee acting on behalf of a person whose disability makes them incapable of making reasonable financial judgments is acting in the absence of a competent principal's instructions. This is possibly the worst position to be in as there are onerous legal responsibilities but no guidance from the principal as to how to carry them out.

(ii) Why is it a trust arrangement?

At common law, a trust arrangement is found where 4 conditions exist:

(a) A trustee - a person managing the funds of another person, in this case, the residential service provider.

(b) A beneficiary – a person whose funds are being managed by another, in this case, the resident.

(c) Money or property – the resident's property and income.

(d) An equitable obligation to administer trust property for the benefit of another person.

In this case the equitable obligation arises in a number of ways. Firstly because the residential service provider is acting as an agent in managing the resident's funds, so there are natural fiduciary duties flowing from that. However, the equitable obligation also arises because the resident is a person with a disability and therefore vulnerable in the eyes of the law. Thirdly, the resident is vulnerable because he or she is often reliant upon the residential service provider for many of the necessaries of life, such as shelter, nutrition, communication, human interaction, transport, identification of a need for medical treatment, occupation and entertainment, etc. In the writer's view this obligation arises in spite of the fact that there was insufficient authority to establish the trust arrangement.

(iii) What are the responsibilities of a bare trustee?

A bare trustee has the same responsibilities as a formal trustee or agent. These are to:

(1) exercise care and skill;

(2) act personally;

(3) account; and

(4) act in good faith:

(5) the duty to avoid a conflict of interest; and

(6) the duty not to make any secret profit or to take a bribe.

These duties may be described as fiduciary duties. A fiduciary duty also includes a duty to (a) a duty to exercise the powers of a trustee in the best interests of the beneficiary of the

trust; or (b) a duty to take advice; or (c) a duty to invest trust funds in investments that are not speculative or hazardous.

A trustee also has 'prudent person' responsibilities. These are described in the *Trustee Act 1898* as:

> "7(b) if the trustee is not engaged in such a profession, business or employment, must exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of another person.
>
> … [and]
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> (c) … a trustee must, at least once in each year, review the performance, individually and as a whole, of the trust investments."

The *Trustee Act 1898*[18] sets out items for consideration by the trustee at the annual performance reviews, including: the desirability of diversifying trust investments; the nature of existing trust investments and other trust property; the need to maintain the real value of the capital or income of the trust; the likely income and the timing of the income return; the length of the term of the proposed investment; the probable duration of the trust; the liquidity and marketability of the proposed investment; the aggregate value of the trust estate; the effect of the proposed investment in relation to the tax liability of the trust; and the likelihood of inflation affecting the value of the proposed investment or other trust property; the costs, including any commission, fee, charge or duty payable, of making the proposed investment. Such matters may be considered with the assistance of independent and impartial advice which can be paid for out of the trust funds.

(iv) The conundrum of a bare trustee:

A bare trustee is exposed to a range of responsibilities outlined in this paper. However there is no basis of authority for the exercise of those responsibilities. Even where the bare trustee has acted to the best of their abilities, they may have overlooked certain responsibilities or made a loss which may be compensable for the beneficiary (the resident).

Typical actions of bare trustees in residential services include skimming excess funds from cash management accounts and investing them in term deposits or purchasing pre-paid funerals. A bare trustee is still obliged to undergo the process of analysis that is set out in sections 7 and 8 of the *Trustee Act 1898* before undertaking such transactions.

[18] Section 8

(v) Who is the trustee?

Where the residential service provider is acting as bare trustee, the identity of the trustee will depend upon the organisation's structure. Where there is a Board of Directors the directors will be the trustees, even where the activities are all undertaken by the CEO of the organisation, because the directors carry the vicarious responsibility for the corporation's or the incorporated association's actions.

Some residential service providers manage residents' funds through a private Tasmanian trustee company. In these cases, however, it appears that the trustee company is acting more like a deposit-taking institution (like a bank) than a trustee as the financial decisions are made by the residential service provider and the trustee company merely acts on instructions from the residential service provider. The mere fact that the funds are invested with a trustee company does not determine that they are the formally appointed trustees. Residential service providers managing funds through a private trustee company ought to enquire of the trustee companies which entity is acting as a trustee and upon what authority? Residential service providers are also advised to seek independent legal advice.

(vi) Is the risk insurable?

Generally, directors of corporations or incorporated associations will have director's insurance. This means that if a resident lost funds because of the actions of the bare trustees the directors may be insured against any personal liability for any losses suffered by that resident. However, it is unclear whether insurers of residential service providers have systematically disclosed to their insurers that the directors carry the responsibility of being 'bare trustees' for residents. If the service provider's insurers have not been informed of that practice, it is possible insurance claims relating to that practice would be refused and the corporation's or the incorporated association's funds will be called upon to pay any damages. The writer imagines that insurance companies would have reason to be very reluctant to insure the risk of unauthorised 'bare trustees' managing funds on behalf of residents with disabilities.

In certain circumstances the directors themselves may bear personal liability for any damages if the funds of the corporation or incorporated association are insufficient to cover damages. If directors have been unaware of the risk posed by being a 'bare trustee' they should be advised to seek legal advice and, if possible, arrange insurance or disclose the risk to insurers as a matter of urgency.

(vii) Do 'bare trustee' arrangements suit the client's needs and rights?

As discussed above, many 'bare trustee' arrangements suit the objectives of the residential service provider much more than they suit the needs or convenience of the resident.

The major problem with the 'bare trustee' arrangement is that it does not easily allow for an independent review. Any trustee, including a bare trustee, may be called upon to account following litigation in the Supreme Court. However it would require a particularly financially literate person to bring and succeed in an action to that Court and such an action would be accompanied by a significant risk of costs, most of which would come out of the person's estate, possibly making this a fruitless action.

Unauthorised bare trustee arrangements do not conform with the obligations imposed by the UN Convention in a number of ways. Firstly they may constitute an arbitrary deprivation of a person's property, because there has not been an open and independent process to establish the trust and there was no lawful authority to establish it. Secondly because bare trusts are not regularly reviewed and reviews are not particularly accessible, they may contravene the Convention because they do not include safeguards that ensure that such measures 'apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.'[19]

How can residential service providers ensure that there is authority to manage residents' funds?

As set out above, there are legal substitute decision making arrangements that can provide the necessary authority for a residential service provider to play an agency role in management of client funds.

However, formal trustee arrangements are relatively rare. Enduring powers must be implemented when a person has capacity and for many persons in residential care they may have already lost capacity to make arrangements or may never have had it. Therefore enduring powers may not be accessible for many residents. Centrelink nominations are not entirely clear as to the extent of their authority or whether they may in fact create a 'bare trustee' arrangement which presumably most residential service providers will wish to avoid so as to avoid the onerous trustee duties.

At the end of the day there is only one clear and accessible option for full financial accountability for incapacitated residents of residential care providers and that is to apply for the appointment of an administrator pursuant to Part 7 of the *Guardianship and Administration Act 1995*.

An application for the appointment of an administrator is a free process. In 98.5% of cases the application will be heard by the Guardianship and Administration Board within 45 days of receipt of the application and the Health Care Professional Report. An administrator is

[19] Article 12, United Nations Convention of the Rights of Persons with Disabilities

supervised after appointment by the Board, they are required to submit annual reports which are reconciled by Board staff and approved by a Board member. They are also subject to automatic review hearings every 3 years or more frequent reviews on the applications of interested parties.

Many service providers avoid making applications for the appointment of an administrator because they assume that the outcome of an application for administration will be the appointment of the Public Trustee. This causes concern because the Public Trustee charges a commission and certain fees for work done. The Board may appoint volunteer family members or friends of the represented person where those persons are suitable for appointment. Even in cases of 'last resort' where the Public Trustee is appointed, represented person's estates accumulate significantly under professional management despite the imposition of fees.

In 13 years of operation, the Board has appointed two CEOs of disability service providers in their personal capacity as administrators for less than 10 residents (i.e. we do not appoint the service provider, but the individual). This has been done in unusual situations where a person with a small estate has no other suitable volunteers to take on the role and appointing the Public Trustee with attendant fees and commissions would unduly consume the represented person's funds. The Board has not, to the writer's immediate knowledge, appointed less senior staff members as administrators. In making appointments, the Board must assess whether:

> (i) the person will act in the best interests of the proposed represented person; and
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> (ii) the person is not in a position where his or her interests conflict or may conflict with the interests of the proposed represented person; and
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> (iii) the person is a suitable person to act as the administrator of the estate of the proposed represented person; and
>
> (iv) the person has sufficient expertise to administer the estate[20].

It is better that a senior member of staff is appointed with lawful authority to manage a resident's funds than that the present situation (which is that hundreds of Tasmanians with disabilities have their funds managed under informal arrangements internally monitored by staff with no authority to do so) continues. Once appointed as an administrator, the administrator takes on a duty to report annually or more often to the Board and to respond to questions if those reports should be inadequate or irregular in any way. Where an administrator has been found to misuse funds, the administrator becomes personally liable (i.e. has to pay out of his or her own estate) for any loss to the estate. This is a

[20] Section 54 *Guardianship and Administration Act 1995*

comprehensive system of supervision and remedies for breach which does not exist with the current informal arrangements.

Because an administration order is subject to safeguards that ensure that orders '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[21]', they are compliant with the UN Convention and therefore consistent with resident's rights.

Conclusion:

Discussions about management of residents' funds have been ongoing for some time, but residential service providers have not have a reference point from which to raise such discussions. The purpose of this paper has been to raise some issues of concern and promote discussion amongst residential service providers about whether they have obtained appropriate authority before managing residents' funds. It is also to draw attention to a possible liability that directors of residential service providers have but of which they may not have been aware.

The writer encourages readers to consider alternative views and seek legal advice about whether the conclusions drawn here are correct. It is hoped that one outcome of an exchange of views might be that there is a comprehensive policy developed between Government, service providers, people with disabilities and their advocates that settles the issue of where authority comes from to manage the funds of residents with disabilities.

Anita Smith

PRESIDENT

[21] Article 12, United Nations Convention of the Rights of Persons with Disabilities